LORD DENNING, DONALD TRUMP and the GOLAN HEIGHTS

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Lord Denning has been called "the most celebrated English judge of the 20th century", "the best known and best loved judge of this, or perhaps any, generation. He was a legend in his own lifetime."

What was it that set Lord Denning apart to such a degree? In the well chosen words of former British Prime Minister Tony Blair, *"[Lord Denning] was prepared to use the law for its true purpose in the interests of fairness and justice*." He would seek out the equity and justice in a matter, and then attempt to apply the law to achieve that just end. This is one of my most indelible recollections as I first tread on the 'hallowed' grounds of Cambridge University to learn international law under the greats of that day – Lauterpacht (the younger), Jennings, Bowett, Lipstein, …. all gathered in one 'sacred' place!

In today's society, there is a prevalent counter trend when it comes to "equity and justice", in particular as regards the nation of Israel. There is a widespread predisposition against any act or situation involving Israel, which is invariably portrayed in a negative light and all too readily pre-judged as contrary to international law, often with no supporting evidence set out, or else with prejudicial application.

In contrast to the Lord Denning approach, where the legal means to the most just result are sought out, when it comes to Israel, the pre-judgment that the act or situation is unlawful is first made, and then some international legal grounds sought out to attempt to demonstrate how it constitutes a breach of international law. This is not always evident, with the result that the international law brought to bear in any given set of circumstances is oftentimes distorted, misapplied, and/or misused to condemn Israel's act or situation. I call it "the Cinderella-shoe act." All efforts are made – notably in the halls (and, ultimately, resolutions) of the United Nations, to add a certain *gravitas* – to make the shoe appear to fit, when in reality, no amount of manipulation is able to make the shoe fit. But the pronouncement itself has legs, and it quickly becomes established 'dogma'.

One clear example of this is the application of Article 49 of the Fourth Geneva Convention to the establishment of Israeli communities ("Settlements") in Judea and Samaria ("West Bank"). Article 49 states: "The occupying power shall not deport or transfer parts of its own population into the territories it occupies." The Convention was created to restrict the forced transfer of a belligerent occupier's inhabitants to the foreign territory that it illegally occupied, or the displacement of the local inhabitants of such territories, as Nazi Germany had done across parts of Europe in the Second World War.

This has nothing to do with the situation in Israel, where the sovereign power is not only *not* illegally occupying foreign territory but is neither forcing any of its citizens or inhabitants to relocate. All Israeli civilian relocation is voluntary; and it is in fact onto lands officially attributed to the Jewish People at San Remo, Italy, in 1920. All of Palestine west of the Jordan River was duly established as a Jewish national home under international law at the San Remo Conference, an extension of the Paris Peace Conference of 1919, following the end of the First World War, where the peace terms were determined between the defeated Central Powers and the victorious Allied Powers. The resulting legally binding San Remo Resolution of 1920 was unanimously approved in 1922 by all Member States of the League of Nations at that time and took the form of an international legal instrument as the British Mandate for Palestine.

This international legal instrument was preserved under Article 80 of the UN Charter and has never been abrogated or amended. Moreover, by the customary international law principle of *uti possidetis juris*, "newly-formed sovereign states should retain the internal borders that their preceding dependent area had before their independence." In the case of Israel, this includes *all* former territory of the Palestine Mandate *west* of the Jordan River. This would of course include Judea and Samaria ("West Bank") and *all* of Jerusalem.

This factual historical and legal fact notwithstanding, the less informed are naively oblivious to the truth that the shoe does not fit, confident in the fact that even Advisory Opinions of the International Court of Justice (the principal UN judicial organ) continue to insist (for politically motivated reasons) that it does, despite statements by authoritative analysts and legal scholars and even drafters of the opinions themselves. The 'received' narrative is that the "settlements" are illegal under international law, without citing 'chapter and verse', yet this is generally accepted as legal 'gospel'. The words "international law" and "International Court of Justice" lend credence to this pronouncement. But the shoe does not fit.

It is the same with United Nations resolutions, which repeatedly condemn the Israeli "occupation" of the "Palestinian Territories" (Judea and Samaria) and "East" Jerusalem – Israel's own sovereign territory under international law, which it administers for the necessary purposes of maintaining national security and the public order – as if it were *illegal* occupation of *another* state's sovereign territory, which it patently is not.

Now, what does all this have to do with Israel's occupation of the Golan Heights, Lord Denning, and President Trump?

Let's start with the distinction between the so-called Israeli "occupation" (in reality, Israeli "administration") of the "West Bank" and "East" Jerusalem on the one hand and the Israeli occupation of the Golan Heights on the other.

First, the term "occupation" (in the sense of "belligerent occupation") is a misuse of the international legal term in the case of the "West Bank" and "East" Jerusalem, since, legally speaking, a government does not "occupy" its own sovereign territory, as discussed above. In the case of the Golan Heights, on the other hand, the term "occupation" is legally correct, because the territory, by international treaty law, is under the sovereignty of Syria by the terms of the Franco-British Agreement on Mandatory Borders of 1920, setting the boundaries between the two Powers' respective mandatory territories.

This treaty was amended in 1923, pursuant to a joint British-French boundary commission which turned all of the Golan over to France, without particular regard for ancient culture or historical tradition. Noteworthy is that the original bilateral Agreement *followed* the setting up of the Mandates at the San Remo Conference but *preceded* the actual approval of the Mandates on 24 July 1922. In San Remo, the Golan Heights were considered to be a part of the territory determined for the Jewish national home, in accordance with the Zionist delegation claim in Paris that essentially included all of ancient Eretz Israel, both sides of the Jordan, of which the Golan was a part. But both the San Remo Resolution and the final approved League of Nations Mandate for Palestine left to the Principal Allied Powers the task of determining the respective mandatory borders. Consequently, with the March 1923 amendment of the treaty, the change in borders took place prior to the official coming into force of the Mandates on 29 September 1923 and, in any case, was within the terms of the Mandate. Accordingly, the Golan Heights became the sovereign territory of Syria when it gained independence in 1946 and has remained so ever since, strictly legally speaking.

Some consideration might well be given – in addition to those already enumerated – to the fact that there are now two sovereign states, Syria and Israel, that are subject to a treaty directly affecting their borders that precedes their own existence as independent states and leaves them vulnerable to decisions previously imposed on them by third party states, with unanticipated consequences. While the treaty was legitimate, the two future states, being only mandates at the time, had no voice in their future destiny as independent states.

Here is where Lord Denning and Donald Trump come in. Looking at the age-old historic, ancestral and cultural ties of Israel with the Golan, and considering that the Heights are a strategic necessity for the national defense of Israel, given the unilateral Syrian armed aggression against Israel in 1967, together with the persistent aggression and incessant unprovoked Syrian attacks against Israel during the 50-plus years since (all acts of aggression; acts of war, without proportional retaliation on the part of Israel), plus the more recent inroads of Iran into Syria, strategically positioning itself in the border areas (aided and abetted by Syria) for its express objective of targeting Israel, *justice would require that the Golan be returned to its pre-Franco-British treaty status of 1920 and that Israel's ancient territory of the Golan be reconstituted under Israeli sovereignty.*

The two possible means under international law to accomplish this are (1) *annexation* (it is still arguable – albeit with considerable opposition – that annexation is legal under international law, under certain circumstances; see forthcoming article by this author), which has wisely been purposefully avoided by the Israeli Government, to date; and (2) *bilateral treaty* (between Syria and Israel), which is unfortunately improbable under the current circumstance that Syria still does not recognize the State of Israel.

President Trump is fully aware that his "recognition" of Israeli sovereignty over the Golan Heights, even on behalf of a nation as powerful as the United States, does not change the international legal status of that territory. But it does one thing, in the spirit of Lord Denning, and that is to openly declare to the political world what he sees as the *just and rightful* end-solution, in historic, cultural, and self-defense terms; and he raises international awareness of this fact. This might indeed provide the initial catalyst in ultimately arriving at Lord Denning's penchant for "*us[ing] the law for its true purpose in the interests of fairness and justice*." President Trump's bold declaration is a step in the right direction.

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