

Elizabeth Warren's "Yes, Yes" To Ending Israel's "Occupation"

by Hugh Fitzgerald



"Warren supports anti-Israel group call to pressure Israel 'to end the occupation,'" [JNS](#), July 9, 2019:

Sen. Elizabeth Warren (D-Mass.), who is running for president in 2020, responded on July 8 to the anti-Israel group IfNotNow calling on her to pressure "the Israeli government to end occupation," which that group has defined as "stealing Palestinian land."

Two IfNotNow activists approached Warren, who was campaigning in New Hampshire, with one of them, University of Michigan student Becca Lubow, telling her, "We really love the way you're fighting corruption. We'd really love it if you also pushed the Israeli government to end occupation."

"Yes, yes. So I'm there," responded Warren swiftly, followed by taking a picture with the activists.

"Our members in New Hampshire just asked @ewarren if she would commit to pressuring the Israel to stop their 52 year military Occupation over the Palestinian people," tweeted IfNotNow. "She said YES."

"In the past, Warren has regularly spoken of Israel as a strong ally in a tough neighborhood and has appeared at [American Israel Public Affairs Committee] events and used right-wing talking points," continued the press release. "But as her career has gone on, her views on the issue have grown to be farther in line with her progressive values," citing the senator's support for the 2015 Iran deal and criticizing the US embassy in Israel moving to Jerusalem as examples.

Many consider all of Israel to be occupied, while Israel's defenders note that the West Bank is disputed territory, and that the Palestinian areas are under the authority of the Palestinian Authority, known for corruption.

No doubt these anti-Israel activists were delighted to have Senator Warren reply to their request that she would "push the Israeli government to end occupation" with an ill-considered "Yes, yes. So I'm there." She's with them, apparently, all the way, and doesn't need any further convincing. But what does she know about this soi-disant "occupation" by Israel of land to which it has, many believe, such a strong claim?

What is this "occupation" by the Israelis that must be ended? Let's start with Gaza. There is no Israeli presence in Gaza; every single Israeli left Gaza in 2005. There is no occupation. And the Gazan Arabs have for nearly 15 years been subject to those lords of misrule in Hamas, two of whose top officials – Mousa Abu Marzouk and Khaled Meshal – have each managed to appropriate the colossal sums of 2.5 billion dollars, stolen from the foreign aid meant for the people of

Gaza. Would Senator Warren agree that Gaza is not “occupied” by the Israelis? And would she care to comment on how, under Hamas, people in Gaza have fared since Israel pulled out?

Now let us examine the status of the West Bank, that is, the territory that had been part of the Mandate for Palestine from 1922 until 1948, when the British withdrew and the Mandate ended. During the 1948-49 war, that territory was seized by the Jordanians, who held it from 1948 to 1967, when Israel came into possession of that territory through its victory in the Six-Day War. From her latest comments, Senator Warren apparently thinks that the West Bank (or, to use the toponyms that had been in use in the Christian world since the time of Jesus, “Judea and Samaria”) is “occupied” territory. Certainly the U.N., in its many anti-Israel resolutions, likes to refer to Israel’s “occupied territories.” But are they “occupied”?

The word “occupied” is ordinarily applied when, following a war, the victor retains temporary possession of territory to which it has no other claim except that of military occupant. That occupation is to ensure the enactment of military, political, economic and social reforms, after which the military occupier will return the territory to its original owners. A few examples will help. After World War II, American troops were stationed in what, from 1945 to 1952, was called Occupied Japan. The only American claim was as a military occupant; there was no intention to hold onto Japanese territory. By 1952, after widespread reforms had been accomplished, the U.S. occupying forces, led by General Douglas MacArthur, withdrew.

Occupied Germany was a bit more complicated, because there were four military occupiers: the U.S., the U.K., France, and the Soviet Union, each of which was assigned its own zone, where different political, economic, and social reforms, including denazification, were instituted. The city of Berlin, deep in the Russian zone, was subject to a quadripartite

occupation. The three western zones were merged to form the Federal Republic of Germany in May 1949, and the Soviets followed suit in October 1949 with the establishment of the German Democratic Republic (GDR). However, troops of the occupying powers remained for some years, even after the two Germanies were established. But political power had been returned to the Germans. The "occupying powers" had completed their missions of reforming German politics and society, especially the process of denazification, and there was never any intention to remain, as "occupying powers," in possession of formerly German territory.

The "West Bank" is very different. Israel may have come into possession of it through force of arms, but its claim to the territory is very different from that of a military occupier. The West Bank formed part of the territory originally assigned to the Mandate for Palestine in 1922. That Mandate was one of a series of mandates established by the League of Nations to deal with territories and peoples that were formerly part of the Ottoman Empire, by assigning a Western power as the mandatory authority responsible for fulfilling certain tasks in a given territory, introducing political reforms, with the ultimate goal of guiding the local population to statehood.

There were several mandates for the Arabs. The Mandate in Iraq, held by Great Britain, was established in 1921, and ended with the British withdrawal in 1932. The Mandate for Syria and Lebanon was held by the French from 1923 until 1946, when both Syria and Lebanon became independent and the French withdrew.

The Mandate for Palestine, held by Great Britain, was created in order to further the establishment of the Jewish National Home. That was its only purpose, its reason for being. Originally the territory assigned to the Mandate included land east of the Jordan River. But the British decided, for reasons of realpolitik, to create an Arab entity, the Emirate of Transjordan, out of the territory east of the Jordan, in order

to provide the consolation prize of an emirate to Abdullah, the Hashemite brother of Feisal, whom the British had placed on the throne of Iraq. By ending Jewish immigration into the territory east of the Jordan, the British effectively decreased the land open to Jewish settlement (and ultimate statehood) by 78%. There was nothing the Zionists could do about this betrayal by the British of the promises made in the Mandate as originally conceived, though there were those, under the leadership of Vladiimir Jabotinsky, who furiously protested.

In the territory west of the Jordan, however, the Mandate for Palestine's provisions clearly applied. Has Professor Warren ever studied the Mandate for Palestine? One has reason to doubt. The most important part of the Mandate document was the preamble:

Whereas the Principal Allied Powers have also agreed that the Mandatory should be responsible for putting into effect the declaration originally made on November 2nd, 1917, by the Government of His Britannic Majesty, and adopted by the said Powers, in favour 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.

The declaration of November 2, 1917, which is referred to in the preamble, is the Balfour Declaration, which declared British support for the establishment of the Jewish National Home.

Note the phrase, too, about how "nothing should be done which might prejudice the civil and religious rights of existing non-Jewish communities in Palestine." The drafters quite deliberately left out any mention of "political rights"

because, of course, a Jewish National Home, leading to the establishment of a Jewish state, would necessarily impinge on the political rights of local Arabs.

Article 4 of the Mandate makes clear that it is to lead to the creation of a single Jewish National Home, and not to the creation of two states, Jewish and Arab, in the territory west of the Jordan that was ultimately assigned to the Mandate.

An appropriate Jewish agency shall be recognised as a public body for the purpose of advising and co-operating with the Administration of Palestine in such economic, social and other matters as may affect the establishment of the Jewish national home and the interests of the Jewish population in Palestine, and, subject always to the control of the Administration to assist and take part in the development of the country.

The Zionist organization, so long as its organization and constitution are in the opinion of the Mandatory appropriate, shall be recognised as such agency. It shall take steps in consultation with His Britannic Majesty's Government to secure the co-operation of all Jews who are willing to assist in the establishment of the Jewish national home.

Article 6 of the Mandate calls on the mandatory authority to “facilitate Jewish immigration” and “encourage...close settlement by Jews on the land, including State lands and waste lands”:

The Administration of Palestine, while ensuring that the rights and position of other sections of the population are not prejudiced, shall facilitate Jewish immigration under suitable conditions and shall encourage, in co-operation with the Jewish agency referred to in Article 4, close settlement by Jews on the land, including State lands and waste lands not required for public purposes.

So what, in international law, is the West Bank? It was always part of the territory assigned to the Mandate for Palestine. Thus it was intended by the Mandates Commission (headed by the Swiss law professor William Rappard, who was distressed when the British ended Jewish immigration in eastern Palestine) to form part of the Jewish National Home. Had the Jews managed to hold onto the West Bank in the 1948-49 war, it would have become, as the Mandate always intended, part of Israel. When the Jordanian army seized and held territory west of the Jordan in the 1948-49 war, Jordan emulated the Romans, who had renamed "Judea" as "Syria Palaestina" or "Palestine" to efface the Jewish connection to the land. The Jordanians renamed the parts of Judea and Samaria it now controlled as "the West Bank."

But it was Jordan that was the illegal "occupier" of the West Bank from 1948 to 1967. The Jordanians had no legal claim to the 'West Bank'; their only claim was as military occupier. With Israel, the juridical situation was quite different. Israel's claim to that territory was based on the Mandate for Palestine itself, which always included that territory. But, someone might object, hadn't the Mandates system expired when the League of Nations, which had created the system of mandates, ceased to operate in 1946 and was replaced by the United Nations? No, because by its own charter, the United Nations recognized the continued relevance of the Mandates system. International law, the UN Charter, and specifically Article 80 of the UN Charter implicitly recognize the "Mandate for Palestine" of the League of Nations. This Mandate granted Jews the irrevocable right to settle in the area of Palestine, anywhere between the Jordan River and the Mediterranean Sea. Professor Eugene Rostow, then Dean of Yale Law School, has explained:

This right [of settlement] is protected by Article 80 of the United Nations Charter. The Mandates of the League of Nations have a special status in international law, considered to be

trusts, indeed 'sacred trusts.'

Under international law, neither Jordan nor the Palestinian Arab 'people' of the West Bank and the Gaza Strip have a substantial claim to the sovereign possession of the occupied territories.

To sum up: the Jewish claim to the "West Bank" is based clearly on the Palestine Mandate of the League of Nations, which gave Jews the right to settle anywhere between the Jordan and the Mediterranean. That right was not extinguished when the League of Nations came to an end. Article 80 of the U.N. Charter recognized the continuing relevance of the Mandate's provisions. That land always formed part of the territory assigned to the Jewish National Home.

The only "occupying" power in the West Bank has been Jordan itself, from 1948 to 1967. It had no legal claim to territory that was intended for the Jewish National Home. When Israel won back the West Bank by force of arms, this did not establish its legal claim – that Israeli claim already existed. What Israel's victory, and possession of the West Bank, did do, is allow the Israelis to exercise their pre-existing legal claim to the West Bank. Some Israelis think that even though Israel has a perfect right to retain, by the Mandate and Article 80 of the U.N. Charter, the entire West Bank, it might wish to yield some parts to the Arabs, perhaps in an area that would be permanently demilitarized, if such a sacrifice could lead to a lasting peace. Others, who have studied Islam and come to believe that the only way to ensure a lasting peace with a Muslim enemy is through deterrence, insist that Israel has to hold onto the entire West Bank for its own survival. In any case, it is up to Israel alone to decide what are the conditions required for its own security.

What cannot be accepted, what does violence to the legal status of the West Bank, is the claim that Israel is an

“occupier” of the very territory that the League of Nations’ Mandates Commission assigned to a future Jewish state.

There is an entirely separate claim to the West Bank, one not based on the Mandate, that Israel might also invoke: that is the right of a victim of aggression to hold onto territory from which that aggression was launched, and which it wins in a war of self-defense. The reason for such a rule is that if a defeated aggressor did not have to forfeit territory, there would be few constraints on such aggression. In June 1967 Jordan, in concert with Egypt and Syria, attacked Israel. The Israelis won on all fronts. Jordan lost the West Bank, the territory from which it had attacked Israel. When the U.N. finally passed Resolution 242 in November 1967, which set out the terms for any territorial adjustments, it was made clear by the main drafter of the resolution, the British Ambassador to the U.N. Lord Caradon, that Israel would not be required to withdraw to the pre-1967 borders (that is, the 1949 armistice lines), but was entitled to “secure and defensible borders.” Lord Caradon said: “I know the 1967 border very well. It is not a satisfactory border, it is where troops had to stop in 1947, just where they happened to be that night, that is not a permanent boundary... ” A good case can be made that Israel must continue to control the entire West Bank, which includes the heights of Judea and the historic invasion route from the east. And that case only reinforces the legal claim based on the express terms of the Mandate itself.

Elizabeth Warren was a professor of law for decades before entering politics. Even though bankruptcy law was her specialty, she certainly knows her way around statutes, and codes, and mandates, and conventions. She can refresh her knowledge of the League of Nations’ system of mandates, study the precise provisions of the Mandate for Palestine, and the continuing relevance of that Mandate in determining the legal status of the West Bank. She might read – it would daunt many, but not Elizabeth Warren – Professor Julius Stone’s definitive

study of Israel's legal claim to the West Bank, Israel and Palestine: *An Assault on the Legal Order*. She will discover that Israel is not an "occupier" of the West Bank in the legal sense, and that its claim to sovereignty over that territory is superior to that of any other claimant. She would then be prepared, the next time that anti-Israel activists let her know that "We'd really love it if you also pushed the Israeli government to end occupation," to reply not with that enthusiastic "Yes, yes. So I'm there," but with a sober "It's a complicated business, but I must say, now that I've had a chance to study the matter, that Israel has a very strong legal claim to the West Bank, and talk of 'occupation' is simply wrong."

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