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INTRODUCTION TO SYMPOSIUM ON REVISITING ISRAEL'S SETTLEMENTS

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This symposium accompanies Theodor Meron's editorial comment, to be published in the April issue of AJIL, addressing the legal status of the West Bank and the applicable rules of international humanitarian law, particularly the Fourth Geneva Convention's prohibition on settlements on occupied territories in Article 49(6) and the Hague Convention (IV) Respecting the Laws and Customs of War on Land.[1] In that editorial comment, which is being published alongside this symposium on "First View," Meron revisits opinions he first expressed, as a Legal Adviser to the Israel Ministry of Foreign Affairs, immediately after the Six-Day War. Those legal memoranda have been recently unearthed and published.[2] Like Meron, the AJIL Unbound board believes that the fiftieth anniversary of that conflict and other recent events—including the adoption by the Security Council of Resolution 2334 on December 23, 2016 followed by a controversial speech delivered by out-going Secretary of State John Kerry that provoked outrage by then President-elect Donald Trump, Prime Minister Benjamin Netanyahu, some members of Congress, and others[3]—merits revisiting some legal questions regarding Israeli settlements. These evergreen issues, never far from view, are unquestionably again front and center. They are clearly so for a new U.S. President inclined to disrupt seemingly settled verities on the Middle East—and even for contemporary theatre audiences thanks to a critically acclaimed new play, *Oslo*, by J.T. Rogers that reexamines the secret behind-the-scenes negotiations that ultimately led to the Oslo Accords of 1993.

This symposium's six authors address a number of issues to which Meron only alludes. Eyal Benvenisti examines the 1968 legal article that Meron mentions, namely Yehuda Blum's "The Missing Reversioner: Reflections on the Status of Judea and Samaria"; he argues that its subsequent use by Israel's then Military Advocate General Meir Shamgar fundamentally altered Israel's initial settlement policies and changed the course of history.[4] Pnina Sharvit Baruch tackles Meron's core contention that the laws of occupation have a predominately "humanitarian" (or what he calls a "people-oriented") purpose. In her view, those rules also have a "sovereign dimension" that cannot be ignored insofar as they seek to preserve pre-existing claims or rights of the occupier as well as those of the original sovereign of disputed territory.[5] David Kretzmer draws on his recent book on the subject to examine how the Israeli Supreme Court has broached the legality and consequences of settlements, particularly for Israeli citizens themselves, and also to compare that Court's approach with that of the International Court of Justice.[6] The

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[1] Theodor Meron, *The West Bank and International Humanitarian Law on the Eve of the Fiftieth Anniversary of the Six-Day War*, 111 AJIL (forthcoming 2017).

[2] *See* Gershom Gorenberg, *Israel knew all along that settlements, home demolitions were illegal*, HAARETZ (May 19, 2015) (containing links to two of Meron's legal opinions).

[3] *See, e.g.,* Glenn Kessler, *Fact-Checking John Kerry's Speech on the Israeli-Palestinian Conflict*, WASH. POST (Jan. 3, 2017); Eugene Kontorovich, *Five ways the Trump Administration can negate the anti-Israel U.N. Security Council resolution*, WASH. POST (Jan. 2, 2017).

[4] Eyal Benvenisti, *The Missing Argument: The Article that Changed the Course of History?*, 111 AJIL Unbound 31 (2017).

[5] Pnina Sharvit Baruch, *Understanding the Settlements Debate*, 111 AJIL Unbound 36 (2017).

[6] David Kretzmer, *Settlements in the Supreme Court of Israel*, 111 AJIL UNBOUND 41 (2017).

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remaining authors deal with three distinct consequences of settlements in occupied territory. Adam Roberts confronts the fact that settlements, along with occupation itself, provoke resistance and discusses how the *jus in bello* anticipates and regulates such resistance.[7] Omar M. Dajani addresses the possibility that some settlements in occupied territory amount to "de facto annexation" of territory in violation of Article 2(4) of the UN Charter with consequences for other states under the Articles on State Responsibility.[8] Finally, Yaël Ronen raises unresolved questions about the war crime of transfers by an Occupying Power of its own civilian population into occupied territory—a crime that has never been adjudicated. In so doing, she moves beyond the oft-cited debates about whether the International Criminal Court has jurisdiction to address Israeli settlements, considering instead the issues that the Court would have to resolve if it were to consider that offense on the merits.[9]

To be sure, this symposium discusses only a fraction of the legal issues raised by fifty years of Israeli settlements. Guided in large part by the parameters of Meron's AJIL comment, the commentators here do not address sovereignty claims based on religious or biblical grounds. They do not address, as others have, the merits of the Security Council Resolution 2334 or its consequences on the "two-state" solution.[10] Like Meron, they discuss only Israeli settlements and do not engage in comparisons with other contemporary cases that might be seen as comparable—or the oft-stated criticism that the international community's focus on Israeli actions to the exclusion of those by others with respect to their behavior in disputed or occupied territories demonstrates a political bias.[11] Moreover, they raise only some of the Israeli government's legal defenses to its policies and only some of the consequences of those policies. Thus, Meron and at least one of his interlocutors in this symposium (Eyal Benvenisti) focus on arguments that the Fourth Geneva Convention is simply inapplicable to the West Bank first made by Yehuda Blum (and eventually by Meir Shamgar). Contentions that Israeli policies have incorporated certain land as "state lands" for designated "nonsettlement" purposes and that these de facto applications of the Hague Regulations are permitted, raised only tangentially in Kretzmer's contribution, have been highlighted by Israel's military lawyers in recent films such as *The Law in These Parts* by Ra'anan Alexandrowic.[12] Nor is that film's attention to the possible consequences of Israeli settlements on core democratic values the focus of attention here.

We fully expect that, like every effort to revisit this topic, this necessarily selective symposium will draw criticism. It certainly does not purport to cover the waterfront and does not include all shades of opinion even with respect to the matters the commentators chose to address. Not all readers will agree with the substantive conclusions drawn by Meron or his interlocutors. But this effort will achieve its purpose if it inspires continued serious attention to one of the most enduring legal issues of our time.

[7] Adam Roberts, *Resistance to Military Occupation: An Enduring Problem in International Law*, 111 AJIL UNBOUND 45 (2017).

[8] Omar M. Dajani, *Israel's Creeping Annexation*, 111 AJIL UNBOUND 51 (2017).

[9] Yaël Ronen, *Taking the Settlements to the ICC? Substantive Issues*, 111 AJIL UNBOUND 57 (2017).

[10] *See, e.g.,* Andreas Zimmermann, *Security Council Resolution 2334 (2016) and its Legal Repercussions Revisited*, EJIL: *TALK!* (Jan. 20, 2017).

[11] *See, e.g.,* Eugene Kontorovich, *Economic Dealings with Occupied Territories*, 53 COLUM. J. TRANSNAT'L L. 584 (2015); Eugene Kontorovich, *Unsettled: A Global Study of Settlements in Occupied Territories*, NORTHWESTERN UNIVERSITY SCHOOL OF LAW PUBLIC LAW AND LEGAL THEORY SERIES No. 16-20 (2016); Eugene Kontorovich, *International Responses to Territorial Conquest*, 102 ASIL PROC. 437 (2009).

[12] *The Law in These Parts* (2011)

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