
Determining the International Boundary Between Israel and Jordan and the Case of the Two Special Regimes*

Elyakim Rubinstein

The issue of the boundary between states and nations is founded in the history of mankind. In the past, nations have attributed enormous significance to their borders and they continue to do so today, to the point of sanctifying them. The Lavan-Ya'akov agreement in *Genesis* 31, 44-53 is a type of model in this regard: the two parties entered into a treaty that set a statue as a boundary mark, and committed to avoid transgressing the boundary for evil purposes (although the biblical commentator Rashi says "but you can cross for trade"). This is true the world over, including the Middle East region. Peaceful, secure and recognized borders are the ideal in international law. Security Council Resolution 242 of November 22, 1967, concerning attempts to establish peace between Israel and its neighbors, refers in paragraph 1 (ii) to the right of all states in the region to "live in peace within secure and recognized boundaries free from threats or acts of force."

I was privileged to participate in the negotiations on the peace treaties with Egypt (1977-1979) as a member of the Israeli delegation, and in the negotiations with Jordan (1991-1994) as head of the delegation. In my view, the most significant achievement in the peace negotiations with Jordan was the determination of the border between the two countries.¹ I think that the Jordanians too had attached great importance to this, since when it was decided in June 1994 to transfer the negotiations from Washington to our region, the Jordanians insisted on conducting them, at least initially, in the border area of the Arava. The objective was to make it clear that the border was to be determined, because there were those in Jordan who feared that Israel was not giving Jordan its full political weight. Indeed, negotiations on this issue accelerated in July 1994 in talks conducted in a tent in the Arava.

Let us go back to the beginning. After the Madrid Conference in 1991, the momentum moved toward the determination of the Israeli-Jordanian border. The talks

began with the negotiations on the "Agreed Common Agenda" between Israel and Jordan, that was formulated in Washington in 1992 and concluded in November of that year, but was signed only on September 14, 1993. This agreement provided that the agenda for negotiations (Article 5) would include:

settlement of territorial matters and agreed definitive delimitation and demarcation of the international boundary between Israel and Jordan with reference to the boundary definition under the Mandate, without prejudice to the status of any territories that came under Israeli Military Government control in 1967. Both parties will respect and comply with the above international boundary.

* Partially based on the article: Elyakim Rubinstein, On the Boundary and the Israel-Jordan Border, *PARASHAT HASHAVUA* (Hebrew) 170 (A. Hacoheh and M. Vigoda eds. 2004). It was dedicated – inter alia – to the blessed memory of David Ben-Rafael (Goldman), a diplomat of peace and law who served as Israel's Minister in Argentina, and was assassinated in the terrorist attack on the Embassy of Israel in 1992.

1. There has been extensive writing on the Israel-Jordan boundary by Prof. Moshe Brawer, Dr. Haim Srebro, and Prof. Gideon Biger; see, inter alia: Moshe Brawer, The Israeli-Jordanian Peace Boundary, in *BORDERLANDS UNDER STRESS* (Martin Pratt and Janet Allison-Brown eds., 2000); Haim Srebro, *THE BOUNDARIES OF ISRAEL TODAY* (Hebrew, 2012); Elyakim Rubinstein, On the Boundary and the Israel-Jordan Border, *PARASHAT HASHAVUA*, 170 (Hebrew); The Peace Between Israel and Jordan: Anatomy of a Negotiation, *ibid.* (1996); Moshe Yegar, Yosef Govrin and Arye Oded, *MINISTRY OF FOREIGN AFFAIRS – THE FIRST 50 YEARS*, pp. 194-204 (2002).

The wording is careful and meticulous: “with reference to the boundary definition under the Mandate.” This is also reflected in Article 3 of the 1994 Israel-Jordan Peace Treaty, which deals with the international boundary.

The practical delimitation of the border was perhaps the most complex issue because there was no known marked border between the two countries. The Armistice Line of 1949 did not have the status of a political border. On the contrary, that line was denied by the Arab negotiators. The Armistice Agreements were effectively canceled because of the actions of the Arab States in the 1967 Six-Day War, and Israel officially declared the agreements null. In September 1970, following the period of Fatah activity within and from Jordan after the Six-Day War, Jordan expelled the Palestinian Liberation Organization from its territory, indirectly assisted by Israeli deterrence, thus preventing the Syrians from interfering. The de facto security line was then moved eastwards, and the Arava villages were permitted by the Israeli government to cultivate lands east of the Armistice Line. Those lands had been barren and had never been cultivated. During the course of the peace negotiations, the representatives of the Arava villages tried to preserve the lands cultivated by them east of the Armistice Line, which comprised about half of the cultivated land and water of these communities. The State of Israel had a moral-agricultural interest that the Arava villages in this important region would not be harmed.

Unlike Egypt, where the border between the Ottoman Empire and British-controlled Egypt had been delimited in 1906 and was even fully marked (although due to some disputes on specific points they were settled later in the Taba Arbitration), there was no delimited and demarcated border between Israel and Jordan. The border was defined verbally in 1922 by the British, as described below, but not marked on the ground, except for the marking of four kilometers north of Aqaba in 1946. The Mandate definition of the border in September 1922, with the separation of Transjordan from the application of the King’s Order-in-Council of 1922 – i.e. from the obligation towards the Jewish National Home in Palestine promised in the Balfour Declaration of November 2, 1917 and the League of Nations Mandate for Palestine of July 24, 1922 (Preamble, and see also Article 25 of the Mandate) – was established in the Transjordan Memorandum as approved by the League of Nations on September 16, 1922. The Mandate definition of the border was described as the:

line drawn from a point two miles west of the town of Akaba on the Gulf of that name

up the centre of the Wadi Araba, Dead Sea and River Jordan to its junction with the River Yarmuk; thence up the centre of that river to the Syrian Frontier.

The question was how to translate this line into legal and practical language. Moreover, at a later stage during the Mandate period, reference was made to the “low points line,” although this too was impossible to identify precisely.

In 1994, the year when the Peace Treaty was concluded, it was difficult to determine where the border was. Although the terms “centre of the Wadi Araba, Dead Sea and River Jordan” were accepted in international parlance, it was still not clear what “Wadi Araba” was and what was “the centre of Wadi Araba,” as there is no single water carrier, either dependable or transitory, between the Red Sea and the Dead Sea that could be identified. The boundary posed another problem regarding the relations with the Palestinian Authority, and it was dealt with in the Treaty (Article 3(2)), which states that “The boundary, as set out in Annex 1a, is the permanent, secure and recognized international boundary between Israel and Jordan, without prejudice to the status of any territories that came under Israeli military government control in 1967.”

The problem with the term “the centre of Wadi Araba” stemmed from the fact that there does not exist one Wadi (dry river) that could be identified as running from Eilat-Aqaba to the Dead Sea. We developed, with our experts, the thesis that “the centre” meant “the Arava Valley,” namely, the two sides of the hilly chains known as the Syrian-African Rift. This is how we described the situation during the negotiations, whereas Jordan relied on the Armistice Line. Our thesis implied that the boundary would be situated significantly eastward. Obviously, the Jordanians did not like this and insisted on the Armistice Line as the boundary.

In the course of the discussions between Israel and Jordan, the idea of an exchange of territories arose, with each side having clear interests: Jordan would be able to tell the Jordanian public that it had not relinquished any of the territories of 1949; Israeli farmers would continue to cultivate lands throughout the Arava villages under Israeli sovereignty.

The idea of an exchange of territory indeed followed a precedent in our region, when Jordan received from Saudi Arabia an area east of the Gulf of Aqaba in exchange for a larger desert area. Therefore, an exchange of territory was agreed upon: the areas cultivated by the Arava

communities would remain under Israeli sovereignty, and in return, Jordan would receive wasteland in Israeli territory in the western part of the Arava. In this way, about 40 square kilometers were exchanged – one for one – and essentially the remaining territory was made consistent with the Armistice Line. Thus, Jordan was able to state that it had received 300 of the 380 square kilometers that it had demanded, and the Arava communities received the cultivated areas under Israeli sovereignty. As one of their leaders pointed out to me: “The border was set in the place reached by the Hebrew plow.”

Special regimes were established in Naharayim/Baqura in the north and, later, in Zofar/Al-Ghamar in the Arava. Regarding Naharayim, Jordanian sovereignty was recognized, but special circumstances justified the establishment of a special regime for 25 years, during which Israel would retain the right to engage in cultivation and tourism under special legal arrangements, with the possibility of an extension, to be later discussed. With regard to Zofar, as its cultivated land was east of the line established, a similar special regime under Jordanian sovereignty was agreed upon in order to enable further agricultural cultivation, again, with a possibility of extension. I shall come back to this below.

The matter of the exchange of territory is not mentioned in the Peace Treaty, but the latter contains a reference to the aerial photographs that were attached to it. The result was that in the Arab world some criticism was raised and directed at the two special regimes – media referred to these as “leases” — but not at the border itself.

The Border Clause in the Peace Treaty

Article 3 of the Peace Treaty with Jordan deals with the international boundary, and paragraph (1) states that the boundary “is delimited with reference to the boundary definition under the Mandate as is shown in Annex 1 (a) ...,” and in paragraph (5) it is agreed that “in the event of natural changes in the course of the flow of the river as described in Annex 1 (a), the boundary shall follow the new course of the flow. In the event of any other changes, the boundary shall not be affected unless otherwise agreed.”

Annex 1 (a) discusses in detail the Jordan and the Yarmouk:

(1) The boundary line shall follow the middle of the main course of the flow of the Jordan and Yarmouk Rivers. (2) The boundary line shall follow natural changes (accretion or erosion) in the course of the rivers unless otherwise agreed.... No artificial

changes [in or of the course of the rivers] may be made except by agreement between both Parties. (3) In the event of a future sudden natural change in or of the course of the rivers (avulsion or cutting of new bed), the Joint Boundary Commission [...] shall meet as soon as possible, to decide on necessary measures, which may include physical restoration of the prior location of the river course. [...] (5) Adjustments to the boundary line in any of the rivers due to natural changes (accretion or erosion) shall be carried out whenever it is deemed necessary by the Joint Boundary Commission or once every five years.

On Changes in the Jordan River

Without entering into a meticulous interpretation of these articles, it is clear that with regard to changes in the course of the Jordan River, the basic approach in international law is that natural changes modify the boundary and the boundary is delimited by the new course. This approach is compatible with the view of the Jewish sages, as cited in *Talmud Yerushalmi* (the Talmud version written in *Eretz Israel*, or the Land of Israel, in the third and fourth centuries)²: “The Jordan, which took from one and gave to the other, whatever it took it took and what it gave it gave” (Tractate *Hallah* 4:8). In other words,

The Jordan River, if it changed its course and expanded the boundaries of Eretz Israel and detracted from [the land of] the other side or the converse, whatever it took it took and whatever it gave it gave, the border of the Land of Israel is always the Jordan River and changes with the course of the Jordan River.³

As Gideon Biger noted, “the principle commonly accepted today in most international agreements relating to river borders” was implemented in the Israel-Jordan Peace Treaty.⁴

-
2. TALMUD YERUSHALMI, The Academy of the Hebrew Language edition, Jerusalem, 1961.
 3. TALMUDIC ENCYCLOPEDIA, *Eretz Israel*, Vol. 2, p. 207 (Hebrew).
 4. Gideon Biger, *Boundaries in Rivers and Lakes – General and Particular in the Boundaries of Israel STATE, GOVERNMENT AND INTERNATIONAL RELATIONS*, vol. 41-42, pp. 207-216 (Hebrew).

On the Two Special Regimes

As mentioned earlier, Naharayim/Baqura in the north of the Jordan valley, and Zofar/Al-Ghamr in the south, posed special questions regarding the boundary issues. This bore two additions to the Treaty – annexes that perhaps because of their detailed character raised some criticism in the Arab world. As stated above, they are lands under Jordanian sovereignty used by Israelis for 25 years, with the possibility of automatic renewal, subject to a one-year notice of termination.

Naharayim/Baqura first: The electricity station in Naharayim, established in 1932 by Pinhas Rutenberg, the founder of the Palestine (now Israel) Electric Corporation in 1923, was based east of the Jordanian river. A part of its area, adjacent to the lands of Ashdot Yaakov (Ihud and Meuhad) and Gesher Kibbutz villages, remained after 1949 in the possession of the State of Israel. This was based on the Armistice Line at the time. These lands were by and large registered in the Jordanian Land Registration (Irbid) in the name of the Palestine Electric Company (PEC) as being a part of the Rutenberg Lands. While dealing with the drafting of the Treaty, and within the good atmosphere that prevailed in the negotiations, we argued that since many problems – including important water issues – were being resolved, why should we not give expression to the fact that the Israeli villages have been working the lands – registered in the name of the PEC – for 46 years?

Indeed, an agreement was reached between King Hussein and Prime Minister Rabin. While the area is under Jordanian sovereignty, based on the 1922 definition, Article 2 of Annex 1(b) of the Treaty stipulates that:

(2)(1) Recognising that in the area which is under Jordan's sovereignty with Israeli private land ownership rights and property interests ("land owners") [...], Jordan undertakes: [inter alia], (1) to grant without charge unimpeded freedom of entry to, exit from land usage and movement... to the land-owners and to their invitees or employees....

Israel undertakes, inter alia, (3)(1) "not to carry out or allow to be carried out in the area activities prejudicial to the peace or security of Jordan." Subject to the Annex, Jordanian law applies in the area, but Israeli law applies to Israelis and their activities. The same language appears in the Zofar Annex 1(c), to which I will later refer.

Indeed, whoever now visits Naharayim can see Jordanian sovereignty represented by the presence of Jordanian soldiers and Jordanian flags, while the agricultural work and enterprises on the land are carried out by Israelis. Naharayim was planned to be, per Agreed Minute C to the Treaty, a joint tourism area. This Agreed Minute (Article 2(3)) states that:

In the spirit of peace, the two Parties attach high priority to the planned recreation joint venture project in the Naharayim/Baqura area, they favourably consider the partnership in peace to be created there, and will endeavor together to promote its implementation as soon as possible.

Some moves toward this end and initial plans had indeed been in the works, but they were sadly affected in 1997 when a group of Israeli school girls who were touring the area were cruelly murdered by a Jordanian soldier.

As for **Zofar/Al-Ghamr**, the problem was that the lands cultivated by the village were five kilometers east of the Armistice Line. This differed from the other Arava villages. Fitting the boundary within this "belly" towards the east was deemed difficult. In the last leg of the negotiations, King Hussein and Prime Minister Rabin applied the Naharayim solution to Zofar. The language in Annex 1(c) relates to "Jordan's sovereignty with Israeli private land use rights."

The two special regimes in Naharayim and Zofar required the enactment of a special law by the Knesset, "The Implementation of the Peace Treaty Between the State of Israel and the Hashemite Kingdom of Jordan Law, 5755-1995." This law contained detailed provisions and regulations, and stated (in Section 2) that "The Peace Treaty is regarded as valid for all intents and purposes." In this way, a legal solution was found for the issue of territorial exchange.

With regard to the duration of the special regime areas, both annexes stipulate in Article 6 that:

Without prejudice to private rights of ownership [Naharayim] – of use [Zofar] – of land within the area, this Annex will remain in force for 25 years, and shall be renewed automatically for the same periods, unless one year prior notice for termination is given by either Party, in which case, at the request of either Party, consultations shall be entered into.

The language is clear: the intention of both parties was that the renewal would be automatic, as explicitly stipulated. Indeed, a formal right to termination was duly incorporated but personally, I would expect that based on the overall consideration of the peaceful relations between the two countries, including on the matters of security and water, the automatic renewal will prevail, without in any way derogating from Jordanian sovereignty. It is my understanding that consultations between the two states are being conducted. I am hopeful that appropriate understandings, in the spirit of peace, will be achieved. One should remember, without going into detail, that on the basis of mutual good will, various rights and interests between the two states have to be taken into consideration.

Conclusion

The Israel-Jordan boundary has reached its 25th year, and except for the sad and abhorrent murder of the seven innocent girls in Naharayim in 1997, it is indeed a boundary of peace. It should be noted that the late King Hussein, acknowledging the crime, himself came to console the families of the victims, and the families were later compensated by the Jordanian government. A border of peace also means that the IDF and the Jordanian army maintain control on security matters without the mediation

of a third party, whether it be the United Nations or any other international body. This in itself is an important achievement. We must pray for God's help in the future, as well as pray that "He makes your border one of peace" (Psalms 147:14).

The Israel-Jordan peace is vital for both countries. As the head of Israel's delegation to the peace negotiations a quarter of a century ago, I believe we all should be proud of the way the boundary has been shaped. I would like to conclude by expressing my appreciation, respect, and gratitude to all my colleagues on both sides who took part in this mission.

Elyakim Rubinstein served as Government Secretary for four different Israeli governments, 1986-1994, and as Attorney General of Israel, 1997-2003. He was appointed Justice of the Supreme Court of Israel in 2004, and later Deputy President of the Supreme Court of Israel, 2015-2017. He now serves as an Associate Professor of Public Policy and Political Science at the Hebrew University of Jerusalem.



Elyakim Rubinstein, head of the Israeli delegation to the Jordan-Israel peace talks (then Government Secretary), and Fayez Tarawneh, head of the Jordanian delegation, sign the Israel-Jordan Common Agenda at the State Department in Washington D.C., September 14, 1993 (photo credit: AP/Charles Tasnadi).

(right to left): Eitan Bentsur, Elyakim Rubinstein, Fayez Tarawneh, Dr. Marwan Muashar, Warren Christopher, Victor Posevaliuk.