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International Law, Settlements and the Two-State Solution

James Friedberg

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A substantial majority of scholars and international lawyers who have addressed the legality of post-1967 Israel settlements on the West Bank have found them to be illegal.¹ Diplomatic practice of states and pronouncements of international organizations reflect a similar near-consensus. Yet the fact remains that the settlements exist and do not appear likely to disappear soon. As settlements expand and as transportation and security infrastructures expand to support them, further land is rendered inaccessible to Palestinians, making an independent contiguous Palestine impossible and a two-state solution hard to imagine.

What Law Applies?

The international law that most directly affects the legality of West Bank settlements includes international conventions, the customary international law that might flow from these treaties², applicable United Nations Security Council resolutions, and the jurisprudence of the International Court of Justice (ICJ or World Court).

Treaty law traditionally only obligates and benefits state parties to a treaty. It is an explicit written agreement between two or more states. If a state is not a party, it cannot assert rights under it. Nor can it be bound by its provisions. Generally, only a state can be a party to a treaty. Such analysis mirrors the logic of contract law found in most legal systems. Thus, Palestine could only complain *under treaty law* about Israeli settlement activity, if

¹ This essay addresses an interdisciplinary audience of politicians, Mideast experts, human rights activists, journalists, etc. It does not attempt to repeat the very thorough doctrinal analysis found in law journals and comprehensive texts by Theodor Meron, Gershom Gorenberg, and others. I draw on and acknowledge their scholarship in enabling me to create this overview intended for a mixed, non-law audience. Of course, any conclusions or opinions herein are mine, not theirs.

² For purposes of this article, the terms "treaty" and "convention" are synonymous. Generally, a convention refers to an important multilateral treaty, often with a quasi-legislative effect.

Palestine and Israel were both state parties to the treaty purportedly being violated.

However, in the last 75 years, with the growth of international human rights law, numerous multilateral international conventions have departed under the *ergo omnes* doctrine from this contract model. Such treaties operate not merely for the reciprocal benefit of state parties, but for the benefit of all humanity. Thus, for example, becoming a state party to a convention prohibiting torture not only obligates that state to other parties but also obligates it to all persons. It may not torture nationals of other state parties, but such a treaty also prohibits it from torturing its own nationals, or nationals of a non-party state, or stateless persons. Many human rights conventions today operate *ergo omnes*, and some are relevant to the question of the settlements. Again, however, if Israel is not party to a particular treaty, how could it be bound by its provisions? The question engages the interplay between treaty law and international customary law.

The United Nations Charter, the 1907 Convention (No. IV) Respecting the Laws and Customs of War on Land (Hague IV), the 1949 Convention (No. IV) Relative to the Protection of Civilian Persons in Time of War (Geneva IV) and the International Covenant on Civil and Political Rights (ICCPR)³ are the conventions that appear most relevant to issues surrounding the settlements.⁴

International *customary law* binds all states. Lawyers find custom by identifying uniform practice among states, as well as a consensus (*opinio*

³ A state may limit its treaty obligations by reservations and derogations. In Israel's case, it has joined the International Convention on Civil and Political with a reservation that preserved its right to have religious law control in family and spiritual matters. More to our point, Israel has derogated from a number of the ICCPR's protections of civil rights, by declaring an ongoing state of emergency under ICCPR Article 4 which allows limited derogations from civil rights obligations in times of existential emergency.

⁴ The UN Charter probably ranks first in importance among treaties, given its scope and its universal acceptance by states. Article 2(4) of the Charter outlaws the use of force in international relations. The illegality of permanent territorial conquest by war flows from that prohibition. Thus, Israel's *annexation* of the Golan Heights after the 1967 war with Syria broke the very fundamental mandate of Article 2(4). Netanyahu's claim that the annexation was justified by the doctrine of conquest-by-defensive-war fails on one or possibly two grounds. First, by 1967 Israel had long been a party to the UN Charter and bound by Article 2(4), a provision that "occupies the field" in matters of the international use of force by states. Exceptions to its near-absolute prohibition may not be assumed. Exceptions are limited to immediate *self-defense* under Article 51 (which offers no additional allowance for permanent conquest), participation in Security Council police actions, and perhaps (according to some authorities) humanitarian intervention. Second, it is a matter of profound debate whether Israel's 1967 War with Syria was one of self-defense. Trump's recent proclamation regarding the Golan did not change the illegality of the annexation, but perhaps made him an accomplice after-the-fact in it. While these issues do not directly speak to the two-state solution regarding Palestine, they do reflect on the Netanyahu and Trump administrations' reliability as negotiating partners.

juris) that such practice is legally required. Often people disagree regarding the existence of a custom, since it is an unwritten norm.

When treaty provisions are so widely accepted by the international community that they reflect general state practice, as well as the consensus opinion of policymakers and legal scholars, such treaty law is deemed custom binding all nations. So, when the overwhelming majority of nations adhere to treaties like the Geneva Conventions, when they are widely incorporated into domestic law, when their norms are frequently cited as rules for proper behavior, judges and experts may consider such treaty rules to be customary rules, binding all states — not just state parties. Furthermore, such customary rules may apply to situations outside the procedural requirements of the convention from which they spring.

A *UN Security Council resolution* is a legally binding order issued by the Council based on the authority granted to it by the UN Charter⁵, itself a treaty agreed to by virtually every state in the world. Citing international law generally and Geneva IV in particular, on December 23, 2016 the Security Council demanded in Resolution 2334 “that Israel immediately and completely cease all settlement activities in the occupied Palestinian territories.”

Jurisprudence of the *International Court of Justice* includes 1) *decisions* in contentious cases between states which usually contain legal orders binding on parties to that case, and 2) *advisory opinions* requested by the UN Security Council or General Assembly, which carry significant interpretive authority but are not legally binding orders to any state or individual. There has been no case before the World Court to which Israel and Palestine have been parties. However, the court did address the legality of the West Bank settlements in the Palestine Wall Advisory Opinion.⁶ It found them to violate international law. However, since this was not the specific question asked of the court by the General Assembly, it was not analyzed in detail but only addressed in conclusory terms. While this was not a legally binding order to abandon the settlements, it was a conclusion

⁵ By contrast, UN *General Assembly resolutions* do not create binding law. The General Assembly is not an international legislature. It does not proportionally represent humanity. Tiny San Marino has the same single vote as India with its billion people. However, when it acts with consensus, representing all segments of the world's population, GA resolutions, while not law *per se*, constitute evidence of state practice and legal opinion, thus of custom. This is particularly true where authoritative international bodies, such as the Security Council and the World Court (as well as most states) reaffirm the position of the General Assembly in word and deed. At its birth, Israel benefitted from such a process, where the 1947 Partition Plan authorized Jewish and Arab states in previously British Palestine, and where subsequent Security Council affirmation and state practice confirmed Israel's existence.

⁶ International Court of Justice (ICJ): Legal Consequences of a Wall in the Occupied Palestinian Territory 43 I.L.M. 1009 Advisory Opinion ¶ 162 (July 9, 2004)

of illegality from a highly respected tribunal.

While a number of sources of law mentioned above affect the legality of Israeli settlements on the West Bank, this essay's ten pages do not permit detailed consideration of them all — the UN Charter, the Human Rights Covenants, Security Council resolutions, court opinions, etc. *The language of the Hague and Geneva Conventions, whether applied directly as treaty obligations or derivatively as customary law, most directly controls the analysis here.* It is codified international law that specifically speaks to the case of an occupying power settling its own nationals in occupied territory.

Applying the Law

Hague IV contains the following provisions that pertain here:

Article 46 (¶ 2):

Private property cannot be confiscated.

Article 55:

The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.

Article 56 (¶ 1):

The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property.

All seizure of, destruction or willful damage done to institutions of this character, historic monuments, works of art and science, is forbidden.

Palestine is a party to Hague IV, but Israel is not. Therefore, the convention does not bind Israel directly as a matter of treaty law. However, as discussed above, provisions of a treaty may reflect international customary law, when they are widely accepted as such by legal authorities. The world has so accepted Hague IV. The Nuremberg Tribunals⁷ and the Israeli Supreme Court have joined in that consensus. Furthermore, the Israeli Supreme Court has said in the *Beit Sourik* case, “the Regulations Concerning the Laws and Customs of War on Land, The Hague, 18 October 1907 ... reflect customary international law.”⁸ Thus, where West Bank settlements have been built on private Arab land, they violate Article 46. Where built on public land, they violate Article 55. Where built on municipal, religious or educational property, they violate Article 56.

⁷ Nuremberg Tribunals, September 30 & October 1, 1946.

⁸ See *Ajuri v. I.D.F Commander HCJ 7015/02*, Judgment of President A. Barak, ¶ 13 (Sept 3, 2002) concluding that the Fourth Geneva and Hague Conventions are customary law.

Geneva IV contains the following provisions that control here:

Article 49 (¶ 1)

... forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.

Article 49 (¶ 6)

The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.

Israel has both displaced Palestinians from their homes and transferred Israelis to settlements.

Israel and Palestine are both parties to Geneva IV. However, some Israeli lawyers and politicians have propounded the “disputed territory” theory to avoid the designation of the lands conquered in 1967 as “occupied” and thereby subject to Geneva. Were this logic correct, Israel would not be an occupier under Geneva IV and thus not bound by its rules. So, the argument goes, since Jordan occupied the West Bank in 1948 (after Britain had surrendered its mandate over Palestine) and because it was not authorized to so occupy that land, the territory continued to be in a non-sovereign limbo, and Israel’s conquest was not illegal or even an occupation.

However, Article 31 (1) of the *Vienna Convention on the Law of*



The International Court of Justice, which has its seat in The Hague, is the principal judicial organ of the United Nations

*Treaties*⁹ reads: “A treaty shall be interpreted in good faith in accordance with the *ordinary meaning* to be given to the terms of the treaty in their context and in light of its *object and purpose*” (emphasis added). The “ordinary meaning” of both Hague and Geneva, quoted above, outlaw settlement activity and its ancillary acts. The very apparent “object and purpose” of the quoted provisions — to protect civilians in a conflict zone — can only be met by prohibiting such activity. Arguments over technical sovereignty do not trump the basic purpose of protecting the civilian residents of the territory.

Law eschews an interpretation of a treaty that leaves a gap in addressing a principal purpose of that treaty. Thus, in another Geneva Convention case, *Hamdan v. Rumsfeld* (2006), the U.S. Supreme Court ruled that *habeas* petitioner Hamdan was entitled to Geneva Common Article 3 protection, rejecting the Bush administration’s argument that he was not a protected enemy soldier under the general provisions of the Convention, but neither was he covered by safety-net Article 3, since it referred to conflicts “not of an international character.” The Court rightly refused to find such a gap that would allow torture and other denial of rights, in a provision that clearly was meant to cover all those armed conflicts that the major interstate provisions of the treaty did not. Analogously, Geneva IV is intended to cover the rights of civilians (here Palestinians) when their land is conquered in modern conflict. An interpretation that so narrowed the word “occupation” as to strip the intended protection of the law runs contrary to the purpose of the treaty.

Hague IV and Geneva IV codify customary law. Furthermore, they have the status of *ergo omnes* treaties — creating rights not just for parties, but for all humanity. They bind and protect the world community, as a national statute binds and protects all persons within a state. These particular provisions regulate the precise situation at hand — the rights of civilians whose territory has been occupied by a foreign military. Pronouncements of the Security Council¹⁰, the World Court¹¹ and other bodies finding the settlements illegal flow essentially from these Hague and Geneva rules.

Is the Jewish Quarter an Illegal Settlement?

As to the West Bank and as to the overwhelmingly Arab neighborhoods of East Jerusalem, the rules of treaty construction and the *ergo omnes* character of the Hague and Geneva Conventions mandate that those territories are “occupied” and that Israeli settlements within them violate

⁹ 1155 U.N.T.S. 331. The Vienna Convention is taken by most experts to codify customary law of treaty interpretation.

¹⁰ Security Council Resolution 2334 (2016)

¹¹ See footnote 5

international law. The Jewish Quarter of the Old City presents a different situation.

For centuries, Jews resided in the southeast quarter of the old walled city. For less than two decades, after the Jordan Legion conquered and largely demolished that quarter in the 1948-49 war, the neighborhood was largely abandoned, save a small number of poor Arabs that Jordan settled among the ruins. Thus, the question, "Whom does Hague IV and Geneva IV aim to protect?" prompts a different answer here than with regard to East Jerusalem outside the walled city. While the latter neighborhoods were historically Arab for hundreds of years prior to 1967 (and therefore under the logic of this article are *occupied* and not legally open to Israeli settlement), the Jewish Quarter is a different matter.

The resettlement of the Jewish Quarter by Jews was a reclamation of a traditionally Jewish neighborhood semi-abandoned since the Jews' expulsion less than two decades earlier; it was not occupation of and settlement within historically and predominately Arab territory, as has been the case in the West Bank and the rest of East Jerusalem. Thus, in this very limited situation (compared to the Occupation as a whole) neither Hague IV or Geneva IV are implicated.

Why Does Law Matter?

Law affects the bargaining positions of the parties. Violations of these laws are precisely what make a territorially viable Palestinian state impossible. Law impacts third-party mediating leverage, for example, U.S. and European pressure on the Israelis. Important constituencies within such countries care about upholding the rule of law. Law might also bolster the positions of groups within Israel, particularly pro-peace factions and the weight their arguments carry with the Israeli public. All this might affect the political chances for a two-state solution.

Finally, once the parties conclude a peace agreement, its fidelity to international norms of justice will make more likely the buy-in of as many stakeholders as possible.

So, it matters whether the settlements are legal or illegal under international law. Generally, they are illegal. Negotiations should proceed accordingly.¹²

¹² This is not to say that the burden of negotiating "give" is totally on Israeli shoulders. On issues that include Hamas targeting civilians, institutionalized anti-Semitism and incitement, and acknowledgment of the finality of 1948, Palestinian "give" is also required. But one suspects that reversal of Israeli settlement policy would shake loose the psycho-political logjam on some of these other issues.

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