

LAW OF THE LAND



Israel's governance and development of the West Bank (also called PA-controlled Palestine, or Judea and Samaria) is perfectly legal under international law. This, despite popular misconception, proclamations of European parliaments, and the thousand-fold repetition in the *New York Times* that "most of the world views Israel's settlements as illegal." Here is why Israel's control and development of the West Bank is lawful, and here is why this legal point is important.

The sovereignty of the Jewish Agency (later, the State of Israel) over the territory defined in the Mandate for Palestine was established in international law by the post-World War One treaties and agreements that disposed of the Ottoman Empire's territories (1920). This disposition was given preeminent status in international law by the Mandate's incorporation into the Covenant of the League of Nations (see [article 22](#)), detailed in the text of the [Mandate](#), and then directly built into the [charter \(chapter XII\)](#) of its successor, the United Nations.

Although the British Government's Balfour Declaration (1917) is said to have "led to the creation of the State of Israel," there was no particular legal significance to that British declaration, though it was politically important. Later, some of the language of the Balfour Declaration was incorporated into the Mandate for Palestine, and for that reason the declaration was a key to understanding the Mandate's language, in the way that legislative history can be a source for legal interpretation.

The United Nations General Assembly [Resolution 181](#), the "Partition Vote" (1947), contrary to popular misconception, also had no particular legal import. It is no more than a "recommendation," as it states in its preamble. The UN Charter itself gives the General Assembly only the power to "recommend" and not "legislate"

international law, and numerous cases over the years have been decided by courts accordingly. Further, the partition recommendation was explicitly rejected by the pertinent parties (except for the Jewish Agency, which would have accepted it), so as a matter of international law the resolution was dead on arrival. The resolution held great political import, by most accounts, and whether it was (or would have been, or still is) a good idea is a matter of opinion.

The 1949 Armistice Agreements explicitly (at the demand of the Arab governments) stated that the armistice lines ("Green Line") do not represent permanent or recognized borders. The Egyptian-Israeli agreement stipulates, "The Armistice Demarcation Line is not to be construed in any sense as a political or territorial boundary, and is delineated without prejudice to rights, claims and positions of either Party to the Armistice as regards ultimate settlement of the Palestine question;" the agreement with Jordan has similar language. Only many decades later, Israel signed treaties with Jordan and Egypt that established boundaries – and the [boundary agreed upon with Jordan](#) is the Jordan River, "without prejudice to the status of any territories that came under Israeli military government control in 1967." Jordan's occupation of the West Bank from 1948 – 1967 was not legal at the outset and was not recognized by other nations; Jordan later renounced its claim, and later formalized that stance in its treaty with Israel.

There is a widespread misconception about Israel's Supreme Court landmark Elon Moreh decision (1979). In that case, the Court ruled that these territories are treated *under Israeli law* according to the set of rules of International law that would apply to belligerently occupied territories, not because that is the Court's view of

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the territories' *status* under *international* law, but because Israel's *own laws* of incorporating territory into the State require a formal annexation for Israeli civil law to be extended there. Absent annexation, Israeli law follows the rules of the Geneva Conventions and other international rules. The decision characterizes its scope in brief by saying:

מבלי להתייחס לשאלה המשפטית בדבר
עצם תחולת כללי המשפט הבינלאומי באזור
המוחזק על-ידי צה"ל מאז שנת 1967.

This is without reference to the legal question of the fundamental applicability of the Principles of International Law to the territories controlled by the IDF since 1967.

It is a distinction that makes a difference.

A domestic analog would be the case of property *owned* by a municipality that is not *incorporated* into the municipality itself. Say the town of Cannonball, ND, purchases a plot of land outside of, but contiguous to, city limits, on which it builds a fire station. The town owns the land free, clear and legally, but its municipal ordinances such as parking rules and building codes do not apply. Instead, under Cannonball law, the parking regulations and building codes that apply to the fire station are the rules described in the State of North Dakota's statutes for unincorporated areas. Meanwhile, the State of North Dakota may have assigned that acreage and more to Cannonball, seeing that there is no other town nearby that could want it. So under State Law, the territory is subject to Cannonball rules, but Cannonball chooses to subsume the State rules for unincorporated territories into its municipal code and govern the fire station accordingly, "as if" State Law applied. If the Cannonball city council passes an ordinance incorporating the plot, it would then become subject to the law of Cannonball.

In our case, the Israeli courts have ruled that until the Knesset applies the rules for acquired territories to these areas (i.e., formally annexation), *Israeli law* provides that

the rules of international law govern this plot. For a variety of political, military and practical considerations, the Knesset has not extended Israeli law to these areas except for municipal Jerusalem. At the same time, following the rules of the Geneva Convention hedges Israel's position, keeps "options" open, limits the rights in Israeli law of the area's residents, and may protect its leaders from charges of war crimes or other exposure in international and other nations' courts.

Another point of confusion is that some West Bank construction is indeed illegal *under Israeli law*. Constructing buildings and entire developments without proper permits and clear title is a violation of Israeli law (and this is done by Israelis as well as Palestinian Arab residents), and so some settlements and structures are indeed illegal. This is a distinct issue from the larger question of the legality of Israel's control and development.

Ironically, no country was established in international law in a more legal or legitimate way than was Israel, and this specifically included the territory of the West Bank.

Israel's legal status is important for several reasons.

Claim of illegality undermines Israel's standing in the world, and most importantly in the eyes of the Jewish world. As a critic, I would have to say that the Government of Israel, like the US Government and that of every other country, has taken actions and policies that I believe are unwise, unjust and dangerous. But that is different than the complaint that its existence on its own territory is fundamentally illegal, which is to define Israel as an outlaw

state. We need to understand that in this matter the State of Israel is operating on solid grounds within international law, for our own sense of pride and honor, and as a matter of Israel's standing in the world.

The right wingers are correct in stating that Israel's sovereignty over Tel Aviv is based on precisely the same international laws as Israel's occupation of the West Bank. If you believe that Israel's control of the West Bank is illegal, then you must conclude that the Government of Israel is illegal altogether.

I believe that respect for international law holds great promise for the future of humanity. The campaign to treat Israel's occupation as illegal undermines that, because it either so egregiously misrepresents international law as it has evolved, or proposes an alternative theory of law

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that is tantamount to the rejection of all law. Each time the *New York Times* repeats its report that “most of the world” considers Israel’s West Bank settlements “illegal,” it debases international law and undermines its credibility. Beyond the political consequences, this exposes Israeli government officials and employees to prosecution in other countries, and subjects Israel to sanction, including the most recent European Union product-labeling regulations (though these should eventually be overturned by the trade courts).

The question of legality affects our sense of honor, which is important in Jewish culture as well as in that of Israel’s Arab residents and neighbors. By consistently staying within the boundary of law in the question of territory, Israel helps create one condition of trust. Given the absence of trust in so many other realms, this point should be elevated, not mocked. Acting consistently within the law, and with an identifiable set of principles, can contribute to trust between nations. Adherence to this legal framework may have contributed to Israel’s “good” relationship with the Kingdom of Jordan.

This correct understanding of the legal status of the territories enhances Israel’s claim of “entitlement” to these territories, which in the political realm may be a barrier to compromise on Israel’s part. But that does not justify misrepresenting or deprecating the law. It is not clear to what degree a notion of entitlement based on legality really is or would be a barrier to adopting “The Two State Solution” or some other rubric that cedes control or sovereignty. Discourse in Israel usually focuses on military, political and economic considerations, and less on questions of legal rights. But this right is something that should not be traded away or taken lightly.

At the same time, the calumny of illegality buttresses a sense of entitlement among advocates for Palestinian Arab independence. Some commentators have observed that the Palestinian Arab claim of right to control of all of Palestine is itself a barrier to progress toward peaceful coexistence. It seems, though, that the Palestinian Arab claim of entitlement is based more on Arab nationalist chauvinism and ideas of Islamic conquest than on a thoughtful view of international law. In the unfortunate dynamic of current relations, this consideration may be a zero-sum equation,

or worse, as it contributes to an unwarranted sense of entitlement by both parties.

A consistent and correct view of law has to be incorporated in any plan to establish in fact and law a Palestinian Arab State (or some variation of autonomous control), or in a partial or complete Israeli annexation, or in whatever other governance rubric is implemented. Israel’s peace treaty with the Hashemite Kingdom of Jordan (formerly Transjordan, and formerly the eastern three-quarters of Palestine) created a legally irreversible condition in which Israel ceded claim to that portion of Mandatory Palestine, or as the [Hashemite Kingdom puts it](#), “the treaty defined Jordan’s western borders clearly and conclusively for the first time, putting an end to the dangerous and false Zionist claim that ‘Jordan is Palestine.’” So too a treaty with a sovereign and recognized State of Palestine in the West Bank and Gaza would create a new legal reality. That would mean that were Israel to send military or police units to apprehend or interdict terrorists, it could constitute an act of war, or otherwise be a violation of international law. This could greatly limit Israel’s options, absent a Palestinian government that welcomes Israeli troops.

A foundational principle of the Jewish People is that law has the potential to bring peace among individuals and nations. Promoting this theory and making it a reality is central to our mission. Thus establishing and defending Israel’s sovereign rights can only be good for the Jewish People and the world if those rights exist in a larger context of compassion and justice, or, in a classic formulation, “Justice and Mercy.” That potential can be realized when we build institutions, select leaders, speak and act with respect for law in a way that promotes the larger set of values that we hold dear.

The Fine Print

“Legal” does not mean wise, fair, practical or safe; those are different issues. You have the right to cut off your arm and stuff it up your chimney, but having the right does not make it a smart thing to do. This discussion excludes the Golan Heights, which has a different legal history and status, and Greater Jerusalem, which has additional considerations. Also excluded are individual cases of unlawful actions by the State of Israel, by other government agencies, and by private bodies. This discussion does not deal with the rights of people, specifically the non-Israeli-citizen residents of the West Bank, who have or should have certain legal rights.

