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Why Julie Bishop is wise not to judge Israeli settlements illegal

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Why Julie Bishop is wise not to judge Israeli settlements illegal

Abstract

There was once consensus that the earth is flat. Similarly, the international legal situation of Israeli settlements is flatly said to be criminal. The truth is different and more complex.

Ben Saul's recent article on the "dirty politics of Israel's criminal colonial enterprise" was passionate in its hostility to Israeli settlements but its legal arguments were lacklustre. He declared the existence of 50 years of consensus among the United Nations General Assembly, Security Council and the International Court of Justice concerning the illegality of the settlements, but there has never been such a thing.

Urban construction by Israelis in the area known as the "West Bank" began in the 1970s and now cover about 2% of the territory. Opinion concerning the legality of these Jewish settlements varies across experts and also across particular buildings.

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Foreign minister Julie Bishop, pictured with her Israeli counterpart, Avigdor Liberman, in Jerusalem where she confirmed a change in Australia's position on Jewish settlements. Twitter/AusAmbIsrael

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A history to settlements

Jewish homes there have a firm legal status where the properties were bought under the [Ottoman or the British](#) administrations. In some places, such as in [Hebron](#) and [Jerusalem](#), Jews had lived continuously since ancient times until their residents were killed and Jordan claimed the land in 1949.

In the [1967 war](#), when Israel defended itself from joint attack by Egypt, Jordan and Syria, Jordan lost control over the West Bank. Israel occupied but was not sovereign of the territory. Legal complexity, triggered by international controversy as to the applicability of the Fourth Geneva Convention to the territory, has since surrounded land acquisition and urban construction there by Jews.

In 1920, the League of Nations entrusted Britain with a legal [mandate](#) to establish a Jewish homeland in that area. Britain's growing oil interests caused it to pass on the mandate to the UN after the Second World War. The Jews declared their State of Israel after the British [evacuated in 1948](#).

Sovereignty status in dispute

The Arabs did not declare a state but Jordan's British-led army conquered the area west of the Jordan River. Britain and Pakistan alone recognised Jordan's annexation of the West Bank. All others, including Arab states, regarded its acquisition of territory by aggression as a travesty of international law.

Therefore, the West Bank and Jerusalem remained without any recognised sovereign. Except in [Antarctica](#), this is a most unusual situation, legally exceptional in the inhabited world. The UN mandate was not rescinded. Israel had the strongest legal title to this area at the time.

Some legal arguments against Israeli settlements are premised on Israel occupying a sovereign Palestine that has better title. [In 1988](#) the Palestine Liberation Organisation declared the State of Palestine and [Jordan renounced](#) its prior annexation, albeit there was no de facto government, specified borders etc. Perhaps Israeli occupation formally began then. Yet Palestine was recognised as a state by less than half the world's countries at the time.

In 1993, the PLO and Israel [signed the Oslo Accords](#), which were premised on the West Bank still not being a state. Almost 20 years later, the UN Security Council still [refused it UN membership](#). A quarter of the General Assembly [declined to support it for observer state status](#) (139 to 9 majority vote with 41 abstentions) and negotiations on establishing a state have been renewed.

The meaning of conventions

No state of Palestine was ever party to the Fourth Geneva Convention and [Article 2](#) says that the treaty applies only between the High Contracting Parties. If the convention has become customary law, so what? It applies only to international armed conflict, which requires at least two states.

The Fourth Convention is clearly not customary law for non-international conflicts, as is clear in the International Committee of the Red Cross [study of this subject](#).

[Article 49](#) of the Fourth Geneva Convention provides that an occupying power "shall not deport or transfer parts of its own civilian population into the territory it occupies". Relevant here is that Jews who go to live in Israeli-administered places in the West Bank do so voluntarily. The "deport or transfer" phrase implies a forcible transfer.

Article 49 uses the longer phrase “individual or mass forcible transfers or deportations” a few lines above and the plain reading is that this is also what the later “deport or transfer” phrase means. This is consistent with the original purpose of Article 49 to prohibit a repetition of the Axis Powers' [forcible transfer](#) of their own civilian populations to concentration camps.

[Article 8 \(2\)\(b\)\(vii\)](#) of the 1998 Rome Statute of the International Criminal Court also deals with crimes of an occupying power in an international armed conflict but by moving its own civilian populations “directly or indirectly”. That language is explicitly broader than in Article 49 because Arab states refused to sign the Rome Statute unless new wording was adopted to broaden Article 49 to cover Israeli construction in the West Bank.

When a state of Palestine emerges and if the conflict transforms into an inter-state one, anti-Zionist lawyers would have improved their arsenal with this language. As you would expect, Israel is therefore not party to the Rome Statute.

Minority isn't automatically wrong

Arguments made here for the legality of any Israeli settlements articulate a minority position, it is true. In an international political system where geographic, economic, religious, cultural and petrodollar blocs form immensely powerful alliances against disruption of their interests, you would expect a tiny, anomalous upstart to be unwelcome.

Condemnations of Israel are overwhelmingly abundant and anti-Zionist diplomats and lawyers are legion. That is just how it is usually for the irritant Jewish state within [UN institutions](#), including in the UN Court.



US Secretary of State John Kerry confirmed while in Israel that Washington believes Israeli settlements in disputed territory are “not helpful and are illegitimate”. EPA/Atef Safadi

Even the United States [calls Israeli settlement construction “illegitimate”](#), by which it signifies an obstacle to Palestinian national territorial aspirations. This means Palestinian claims must be fulfilled to achieve peace. However, Israeli defensive strength also must be held to ensure peace, as a century of genocidal attacks by Arabs proves.

The appropriateness of permanent Israeli retention of strategic depth in parts of the West Bank in any conceivable peace deal has been recognised in the form of “land swaps” across the 1949 armistice lines by the [USA](#), [the UN](#), the [Security Council](#) and even by the [Arab League](#).

To prejudge all settlements as illegal is not only legally simplistic and technically incorrect but counterproductive to any durable peace that the parties will negotiate. Australian foreign minister Julie Bishop is aware of this. Be sure she had solid legal advice before pronouncing a position on this fraught topic.

Anyway, arguments should be judged impartially on their merits rather than by political populism. The world is a complicated place and a tumultuous horde of opinions that it is flat does not make it so.