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ISRAEL AND INTERNATIONAL LAW

Eugene Kontorovich

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Israel and International Law
Instructor: Dr. Eugene Kontorovich

Course Description:

Almost every major issue in Israeli politics and the Israeli-Palestinian conflict is routinely discussed in the media using the terminology of international law— "occupation," "illegal settlements," and, most recently, "apartheid." But international law is a specialized field, and most individuals cannot independently evaluate such claims. In this course, we will look behind supposedly uncontested assertions about the legality of Israel's conduct to examine the underlying sources and rules of international law. Moreover, we will do what lawyers typically do (except in regard to Israel)—identify and define the relevant rules by looking at all the relevant precedents, rather than focusing myopically on the world's only Jewish state.

Faculty Biography:

Eugene Kontorovich is a professor at the George Mason University Scalia Law School, and the director of its Center for the Middle East and International Law, as well as the director of the international law department at the Kohelet Policy Forum, a Jerusalem think tank. He previously taught for a decade at Northwestern University and University of Chicago Law Schools. He is one of the world's leading experts in the legal aspects of the Arab-Israeli conflict, and has written dozens of academic articles. His writings also regularly appear in the *Wall Street Journal* and other leading publications.

Israel and International Law

Session II: The Legal Status of Judea & Samaria Communities

1. Applicability of Geneva Convention - textual analysis
2. Meaning of Geneva Convention - comparative analysis
3. ICC precedents
4. Oslo, Ramallah & Gaza: status of Palestinian entities today

Readings:

- Fourth Geneva Convention, Article 2 (1949), Article 49 (1949) & commentary (1958).
- U.S. State Department Legal Advisor Memorandum Regarding Legality of Israeli Settlements (1978).
- Secretary of State Pompeo, Declaration Regarding Legality of Israeli Settlements (2019).
- Eugene Kontorovich, International Law for Just One Nation, *Tel Aviv Review of Books* (2020).
- Oslo Accords (1993), Articles I – IV.
- Patrick Kingsley and Adam Rasgon, Unauthorized Settlement Creates Stress Test for Israel's New Government (2021), *New York Times*.

II

Treaties, States Parties and Commentaries

ARTICLE 2

In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

Treaties, States Parties and Commentaries

Advanced Search (/ihl-search/redirect.xsp?lang=EN&src=IHL)

Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949. (/applic/ihl/ihl.nsf/Treaty.xsp?action=openDocument&documentId=AE2D398352C5B028C12563CD002D6B5C)

DEPORTATIONS, TRANSFERS, EVACUATIONS

ARTICLE 49 [Link]

Individual or mass 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.
Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased.
The Occupying Power undertaking such transfers or evacuations shall ensure, to the greatest practicable extent, that proper accommodation is provided to receive the protected persons, that the removals are effected in satisfactory conditions of hygiene, health, safety and nutrition, and that members of the same family are not separated.
The Protecting Power shall be informed of any transfers and evacuations as soon as they have taken place.
The Occupying Power shall not detain protected persons in an area particularly exposed to the dangers of war unless the security of the population or imperative military reasons so demand.
The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.

Commentaries

Commentary of 1958 (/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=523BA38706C71588C12

<< Previous (/applic/ihl/ihl.nsf/ART/380-600055?OpenDocument) Up (/applic/ihl/ihl.nsf/Treaty.xsp?action=openDocument&documentId=AE2D398352C5B028C12563CD002D6B5C) Next >> (/applic/ihl/ihl.nsf/ART/380-600057?OpenDocument)

Treaties, States Parties and Commentaries

SEPTEMBER 30, 1946

ARTICLE 49 -- DEPORTATIONS, TRANSFERS, EVACUATIONS (1)

[p.278] Article 49 is derived from the Tokyo Draft which prohibited the deportation of the inhabitants of an occupied country (2). As a result of the experience of the Second World War, the International Committee of the Red Cross submitted this important question to the government experts who met in 1947. On the basis of the text prepared by the experts the Committee drafted detailed provisions which were adopted in all their essentials by the Diplomatic Conference of 1949.

PARAGRAPH 1. -- FORCIBLE TRANSFERS AND DEPORTATIONS

The first of the six paragraphs in Article 49 is by far the most important, in that it prohibits the forcible transfer or deportation from occupied territory

of protected persons.

There is doubtless no need to give an account here of the painful recollections called forth by the "deportations" of the Second World War, for they are still present in everyone's memory. It will suffice to mention that millions of human beings were torn from their homes, separated from their families and deported from their country, usually under inhumane conditions. These mass transfers took place for the greatest possible variety of reasons, mainly as a consequence of the formation of a forced labour service. The thought of the physical and mental suffering endured by these "displaced [p.279] persons", among whom there were a great many women, children, old people and sick, can only lead to thankfulness for the prohibition embodied in this paragraph, which is intended to forbid such hateful practices for all time.

The authors of the Convention voted unanimously in favour of this prohibition, but there was some discussion on the wording. The draft submitted by the International Committee of the Red Cross reads: "Deportations or transfers of protected persons out of occupied territory are prohibited..." (3); the Diplomatic Conference preferred not to place an absolute prohibition on transfers of all kinds, as some might up to a certain point have the consent of those being transferred. The Conference had particularly in mind the case of protected persons belonging to ethnic or political minorities who might have suffered discrimination or persecution on that account and might therefore wish to leave the country. In order to make due allowances for that legitimate desire the Conference decided to authorize voluntary transfers by implication, and only to prohibit "forcible" transfers (4).

The prohibition is absolute and allows of no exceptions, apart from those stipulated in paragraph 2. It is, moreover, strengthened by other Articles in

the cases in which its observance appeared to be least certain: in this connection mention may be made of Article 51, paragraph 2 , dealing with compulsory labour, Article 76, paragraph 1 , concerning the treatment of protected persons accused of offences or serving sentences and also under certain circumstances Article 70, paragraph 2 , which deals with refugees. The Hague Regulations do not refer to the question of deportation; this was probably because the practice of deporting persons was regarded at the beginning of this century as having fallen into abeyance. The events of the last few years have, however, made it necessary to make more detailed provisions on this point which may be regarded to-day as having been embodied in international law (5). Consequently, [p.280] "unlawful deportation or transfer" was introduced among the grave breaches, defined in Article 147 of the Convention as calling for the most severe penal sanctions.

PARAGRAPH 2. -- EVACUATION

As an exception to the rule contained in paragraph 1, paragraph 2 authorizes the Occupying Power to evacuate an occupied territory wholly or partly. Unlike deportation and forcible transfers, evacuation is a provisional measure entirely negative in character, and is, moreover, often taken in the interests of the protected persons themselves. The clause may be compared with other provisions already commented upon, where the aim in view is similar, such as Articles 14 , 15 and 17 , which deal with hospital and safety zones, neutralized zones, and the evacuation of besieged or encircled areas. These provisions which apply to the whole population of countries engaged in a conflict are, of course, fully valid in occupied territory.
In order to protect the interests of the populations concerned, a number of

safeguards are laid down with regard to evacuation, some of them in this paragraph and some in the next.

The first stipulation is that evacuation may only be ordered in two cases which are defined in great detail, namely when the safety of the population or imperative military reasons so demand. If therefore an area is in danger as a result of military operations or is liable to be subjected to intense bombing, the Occupying Power has the right and, subject to the provisions of Article 5 , the duty of evacuating it partially or wholly, by placing the inhabitants in places of refuge. The same applies when the presence of protected persons in an area hampers military operations. Evacuation is only permitted in such cases, however, when overriding military considerations make it imperative; if it is not imperative, evacuation ceases to be legitimate.

It is stipulated that evacuation must not involve the movement of protected persons to places outside the occupied territory, unless it is physically impossible to do otherwise (6). Thus, as a rule evacuation must be to reception centres inside the territory.

The last sentence of the paragraph was added by the Diplomatic Conference (7); it stipulates that protected persons who have been evacuated are to be brought back to their homes as soon as the [p.281] hostilities in the area have ended. This clause naturally applies both to evacuation inside the territory and to cases where circumstances have made it necessary to evacuate the protected persons to a place outside the occupied territory.

PARAGRAPH 3. -- PRACTICAL ARRANGEMENTS

Evacuation with all it implies -- leaving home, moving into an unknown environment, etc. -- represents a radical change in the position of those concerned. The unfortunate consequences of evacuation should therefore be

mitigated as far as possible by adding to the measure a minimum of humanitarian safeguards.

That is what this paragraph is intended to do. It represents a very strong recommendation to the Occupying Power. In the corresponding provision of the draft text put forward by the International Committee of the Red Cross the safeguards were expressed in the form of an absolute obligation (8); but the Diplomatic Conference made the clause rather less rigid by inserting the words "to the greatest practicable extent" (9).

It must not be forgotten, however, that this wording is intended to cover the contingency of an improvised evacuation of a temporary character when urgent action is absolutely necessary in order to protect the population effectively against an imminent and unforeseen danger. If the evacuation has to be prolonged as a result of military operations and it is not possible to return the evacuated persons to their homes within a comparatively short period, it will be the duty of the Occupying Power to provide them with suitable accommodation and make proper feeding and sanitary arrangements.

Attention should finally be drawn to the last clause in the paragraph which stipulates that members of the same family are not to be separated from one another. This provision represents a very appropriate addition to those of Article 27 under which the Parties to the conflict are in general obliged to respect family rights. Like Articles 25 , 26 and 82 it is essentially intended to keep the family united or to re-unite it if it becomes separated.

PARAGRAPH 4. -- NOTIFICATION OF THE PROTECTING POWER

The importance attached in the Convention to evacuation taking place under the conditions defined above is underlined by the fact [p.282] that

the Protecting Power is given the right to be informed of them.
The text proposed by the International Committee of the Red Cross read: "The Protecting Power shall be informed of any proposed transfers and evacuations. It may supervise the preparations and the conditions in which such operations are carried out." (10)
The Diplomatic Conference did not wish to make the prior notification of evacuation compulsory, as that would have made it more difficult to keep military operations secret. It therefore confined itself to providing that the information was to be given a posteriori (11).
The Protecting Power cannot therefore exercise its right of supervision during the preparations or when the moves themselves are taking place; it can, however, verify whether the Occupying Power fulfils the conditions which the Convention lays down with regard to the accommodation and other arrangements for the evacuees. The Protecting Power will take action to ensure that they are treated as humanely as possible and will help to improve their lot by co-operating with the competent authorities. The rights of supervision and check of the Protecting Power in regard to evacuation will, of course, apply not only inside the occupied territory but also outside it, in particular if the transfer is to a place within the territory of the Occupying Power.

PARAGRAPH 5. -- RIGHT OF PROTECTED PERSONS TO MOVE FROM PLACE TO PLACE

This paragraph is based on a clause proposed by the International Committee of the Red Cross. The Conference decided to include it in each of the first 4 sections of Part III (Articles 28 , 38 (4) , 49, paragraph 5 , and 83, paragraph 1).

It was pointed out in the commentary on Article 27 that the rule whereby individuals are free to move from place to place is subject to certain restrictions in wartime. Two such restrictions are mentioned here: the Occupying Power is entitled to prevent protected persons from moving, even if they are in an area particularly exposed to the dangers of war, if the security of the population or imperative military reasons so demand.
This clause is the result of the lessons drawn from the Second World War. [p.283] It will be enough to remember the disastrous consequences of the exodus of the civilian population during the invasion of Belgium and Northern France. Thousands of people died a ghastly death on the roads and these mass flights seriously impeded military operations by blocking lines of communication and disorganizing transport (12). Thus, two considerations -- the security of the population and "imperative military reasons" -- may, according to the circumstances, justify either the evacuation of protected persons (paragraph 2) or their retention (paragraph 5). In each case real necessity must exist; the measures taken must not be merely an arbitrary infliction or intended simply to serve in some way the interests of the Occupying Power.

PARAGRAPH 6. -- DEPORTATION AND TRANSFER OF PERSONS INTO
OCCUPIED TERRITORY

This clause was adopted after some hesitation, by the XVIIth International Red Cross Conference (13). It is intended to prevent a practice adopted during the Second World War by certain Powers, which transferred portions of their own population to occupied territory for political and racial reasons or in order, as they claimed, to colonize those territories. Such transfers

worsened the economic situation of the native population and endangered their separate existence as a race.

The paragraph provides protected persons with a valuable safeguard. It should be noted, however, that in this paragraph the meaning of the words "transfer" and "deport" is rather different from that in which they are used in the other paragraphs of Article 49, since they do not refer to the movement of protected persons but to that of nationals of the occupying Power.

It would therefore appear to have been more logical -- and this was pointed out at the Diplomatic Conference (14) -- to have made the clause in question into a separate provision distinct from Article 49, so that the concepts of "deportations" and "transfers" in that Article could have kept throughout the meaning given them in paragraph 1, i.e. the compulsory movement of protected persons from occupied territory.

Notes: (1) [(4) p.277] For the discussions concerning this Article, see ' Final Record, ' Vol. II-A, pp. 664, 759, 809; Vol. II-B, p. 415;

(2) [(1) p.278] See p. 4 above;

(3) [(1) p.279] See ' XVIIth International Red Cross Conference, Draft Revised or New Conventions for the protection of War Victims, ' Document 4a, p.173;

(4) [(2) p.279] See ' Final Record of the Diplomatic Conference of Geneva of 1949, ' Vol. II-A, pp. 759-760;

(5) [(3) p.279] This view is not expressed in the Convention alone. The Charter of the Nuremberg International Military Tribunal laid down in its Article 6 (b) that "deportation to slave-labour or for any other purpose" was a "war crime"; sub-paragraph (c) of the same Article includes "deportations and other inhuman acts done against any civilian population" among "the crimes against humanity".

Tribunal agreed that deportation was illegal. A great many other decisions by other courts which have had to deal with this question have also stated that the deportation of inhabitants of occupied territory is contrary to the laws and customs of war;

(6) [(1) p.280] See in this connection ' Final Record of the Diplomatic Conference of Geneva of 1949, ' Vol. II-A, pp. 664, 759-760;

(7) [(2) p.280] See ibid., Vol. II-A, pp. 759-760;

(8) [(1) p.281] See ' Final Record of the Diplomatic Conference of Geneva of 1949, ' Vol. I, pp. 120-121;

(9) [(2) p.281] See ibid., Vol. II-A, pp. 759-760; Vol. II-B, p. 415;

(10) [(1) p.282] See ' Final Record of the Diplomatic Conference of Geneva of 1949, ' Vol. I, p. 120;

(11) [(2) p.282] See ibid., Vol. II-A, pp. 759-760;

(12) [(1) p.283] See ' Final Record of the Diplomatic Conference of Geneva of 1949, ' Vol. II-A, pp. 759-760;

(13) [(2) p.283] See ' XVIIth International Red Cross Conference, Legal Commission, Summary of the Debates of the Sub-Commissions, ' pp. 61-62 and 77-78;

(14) [(3) p.283] See ' Final Record of the Diplomatic Conference of Geneva of 1949, ' Vol. II-A, p. 664;

Letter of the State Department Legal Advisor, Mr. Herbert J. Hansell, Concerning the Legality of Israeli Settlements in the Occupied Territories of 21 April, 1978[1]:

Dear Chairmen Fraser and Hamilton:

Secretary Vance has asked me to reply to your request for a statement of legal considerations underlying the United States view that the establishment of the Israeli civilian settlements in the territories occupied by Israel is inconsistent with international law. Accordingly, I am approving the following in response to that request:

The Territories Involved

The Sinai Peninsula, Gaza, the West Bank and the Golan Heights were ruled by the Ottoman Empire before World War I. Following World War I, Sinai was part of Egypt; the Gaza strip and the West Bank (as well as the area east of the Jordan) were part of the British Mandate for Palestine; and the Golan Heights were part of the French Mandate for Syria. Syria and Jordan later became independent. The West Bank and Gaza continued under British Mandate until May 1948.

In 1947, the United Nations recommended a plan of partition, never effectuated, that allocated some territory to a Jewish state and other territory (including the West Bank and Gaza) to an Arab state. On 14 May 1948, immediately prior to British termination of the Mandate, a provisional government of Israel proclaimed the establishment of a Jewish state in the areas allocated to it under the Jewish plan. The Arab League rejected partition and commenced hostilities. When the hostilities ceased, Egypt occupied Gaza, and Jordan occupied the West Bank. These territorial lines of demarcation were incorporated, with minor changes, in the armistice agreements concluded in 1949. The armistice agreements expressly denied political significance to the new lines, but they were de facto boundaries until June 1967.

During the June 1967 war, Israeli forces occupied Gaza, the Sinai Peninsula, the West Bank and the Golan Heights. Egypt regained some territory in Sinai during the October 1973 war and in subsequent disengagement agreements, but Israeli control of the other occupied territories was not affected, except for minor changes on the Golan Heights through a disengagement agreement with Syria.

The Settlements

Some seventy-five Israeli settlements have been established in the above territories (excluding military camps on the West Bank into which small groups of civilians have recently moved). Israel established its first settlements in the occupied territories in 1967 as para-military 'nahals'. A number of 'nahals' have become civilian settlements as they have become economically viable.

Israel began establishing civilian settlements in 1968. Civilian settlements are supported by the government, and also by non-governmental settlement movements affiliated in most cases with political parties. Most are reportedly built on public lands outside the boundaries of any municipality, but some are built on private or municipal lands expropriated for the purpose.

Legal Considerations

1. As noted above, the Israeli armed forces entered Gaza, the West Bank, Sinai and the Golan Heights in June 1967, in the course of an armed conflict. Those areas had not previously been part of Israel's sovereign territory nor otherwise under its administration. By reason of such entry of its armed forces, Israel established control and began to exercise authority over these territories; and under international law, Israel became a belligerent occupant of these territories.

Territory coming under the control of a belligerent occupant does not thereby become its sovereign territory. International law confers upon the occupying State authority to undertake interim military administration over the territory and its inhabitants; that authority is not unlimited. The governing rules are designed to permit pursuit of its military needs by the occupying power, to protect the security of the occupying forces, to provide for orderly government, to protect the rights and interests of the inhabitants, and to reserve questions of territorial change and sovereignty to a later stage when the war is ended. See L. Oppenheim, 2 International Law 432-438 (7th ed., H. Lauterpacht ed., 1952); E. Feilchenfield, The International Economic Law of Belligerent Occupation 4-5, 11-12, 15-17, 87 (1942); M. McDougal & F. Feliciano, Law and Minimum World Public Order 734-46, 751-7 (1961); Regulations annexed to the 1907 Hague Convention on the Laws and Customs of War on Land, Articles 42-56, 1 Bevans 643; Department of the Army, The Law of Land Warfare, Chapter 6 (1956) (FM-27-10).

'In positive terms, and broadly stated, the Occupant's powers are (1) to continue orderly government, (2) to exercise control over and utilize the resources of the country so far as necessary for that purpose and to meet his own military needs. He may thus, under the latter head, apply its resources to his own military objects, claim services from the inhabitants, use, requisition, seize or destroy their property, within the limits of what is required for the army of occupation and the needs of the local population.

But beyond the limits of quality, quantum and duration thus implied, the Occupant's acts will not have legal effect, although they may in fact be unchallengeable until the territory is liberated. He is not entitled to treat the country as his own territory or its inhabitants as his own subjects..., and over a wide range of public property, he can confer rights only as against himself, and within his own limited period of de facto rule. J. Stone, Legal Controls of International Conflict, 697 (1959).'

On the basis of the available information, the civilian settlements in the territories occupied by Israel do not appear to be consistent with these limits on Israel's authority as belligerent occupant in that they do not seem intended to be of limited duration or established to provide orderly government of the territories and, though some may serve incidental security purposes, they do not appear to be required to meet military needs during the occupation.

2. Article 49 of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 6 UST 3516, provides, in paragraph 6:

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

Paragraph 6 appears to apply by its terms to any transfer by an occupying power of parts of its civilian population, whatever the objective and whether involuntary or voluntary.[2] It seems clearly to reach such involvements of the occupying power as determining the location of the settlements, making land available and financing of settlements, as well as other kinds of assistance and participation in their

creation. And the paragraph appears applicable whether or not harm is done by a particular transfer. The language and history of the provision lead to the conclusion that transfers of a belligerent occupant's civilian population into occupied territory are broadly proscribed as beyond the scope of interim military administration.

The view has been advanced that a transfer is prohibited under paragraph 6 only to the extent that it involves the displacement of the local population. Although one respected authority, Lauterpacht, evidently took this view, it is otherwise unsupported in the literature, in the rules of international law or in the language and negotiating history of the Convention, and it seems clearly not correct. Displacement of protected persons is dealt with separately in the Convention and paragraph 6 would seem redundant if limited to cases of displacement. Another view of paragraph 6 is that it is directed against mass population transfers such as occurred in World War II for political, racial or colonization ends; but there is no apparent support or reason for limiting its application to such cases.

The Israeli civilian settlements thus appear to constitute a 'transfer of parts of its own civilian population into the territory it occupies' within the scope of paragraph 6.

3. Under Art. 6 of the Fourth Geneva Convention, paragraph 6 of Article 49 would cease to be applicable to Israel in the territories occupied by it if and when it discontinues the exercise of governmental functions in those territories. The laws of belligerent occupation generally would continue to apply with respect to particular occupied territory until Israel leaves it or the war ends between Israel and its neighbours concerned with the particular territory. The war can end in many ways, including by express agreement or by de facto acceptance of the status quo by the belligerent.

4. It has been suggested that the principles of belligerent occupation, including Article 49, paragraph 6, of the Fourth Geneva Convention, may not apply in the West Bank and Gaza because Jordan and Egypt were not the respective legitimate sovereigns of these territories. However, those principles appear applicable whether or not Jordan and Egypt possessed legitimate sovereign rights in respect of those territories. Protecting the reversionary interest of an ousted sovereign is not their sole or essential purpose; the paramount purposes are protecting the civilian population of an occupied territory and reserving permanent territorial changes, if any, until settlement of the conflict. The Fourth Geneva Convention, to which Israel, Egypt and Jordan are parties, binds signatories with respect to their territories and the territories of other contracting parties, and "in all circumstances" (Article 1), and in 'all cases' of armed conflict among them (Article 2) and with respect to all persons who 'in any manner whatsoever' find themselves under the control of a party of which they are not nationals (Article 4).

Conclusion

While Israel may undertake, in the occupied territories, actions necessary to meet its military needs and to provide for orderly government during the occupation, for reasons indicated above the establishment of the civilian settlements in those territories is inconsistent with international law."

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[1] *International Law Materials* (1978), pp.777–79; Matt Skarzynski, Jonathan H. van Melle, Foundation for Middle East Peace, and Holly Byker, Churches for Middle East Peace, Statements on American Policy toward Settlements by U.S. Government Officials – 1968–2009, June 8, 2009. Also cited in cited in Progress report – The human rights dimensions of population transfer including the implantation of settler prepared by Mr. Awn Shawhat Al-Khasawneh. at: https://unispal.un.org/DPA/DPR/unispal.nsf/9a798adbf322aff38525617b006d88d7/2dfed17dc7dfae2a852563a9004c4055?OpenDocument&Highlight=0,al-khasawneh and http://www.hlrn.org/img/documents/E_CN.4__Sub.2_1994_18_EN.pdf.

THE TIMES OF ISRAEL ›

Annotations

Full text of Pompeo's statement on settlements

NOVEMBER 19, 2019

Full text of US Secretary of State Mike Pompeo's announcement at the State Department regarding Washington's shift in policy toward Israeli settlements, which declared them not "inconsistent with international law," November 18, 2019:

"Turning now to Israel, the Trump administration is reversing the Obama administration's approach towards Israeli settlements.

US public statements on settlement activities in the West Bank have been inconsistent over decades. In 1978, the Carter administration categorically concluded that Israel's establishment of civilian settlements was inconsistent with international law. However, in 1981, President Reagan disagreed with that conclusion and stated that he didn't believe that the settlements were inherently illegal.

Subsequent administrations recognized that unrestrained settlement activity could be an obstacle to peace, but they wisely and prudently recognized that dwelling on legal positions didn't advance peace. However, in December 2016, at the very end of the previous administration, Secretary Kerry changed decades of this careful, bipartisan approach by publicly reaffirming the supposed illegality of settlements.

After carefully studying all sides of the legal debate, this administration agrees with President Reagan. The establishment of Israeli civilian settlements in the West Bank is not per se inconsistent with international law.

I want to emphasize several important considerations.

First, look, we recognize that, as Israeli courts have, the legal conclusions relating to individual settlements must depend on an assessment of specific facts and circumstances on the ground. Therefore, the United States Government is expressing no view on the legal status of any individual settlement.

The Israeli legal system affords an opportunity to challenge settlement activity and assess humanitarian considerations connected to it. Israeli courts

have confirmed the legality of certain settlement activities and has concluded that others cannot be legally sustained.

Second, we are not addressing or prejudging the ultimate status of the West Bank. This is for the Israelis and the Palestinians to negotiate. International law does not compel a particular outcome, nor create any legal obstacle to a negotiated resolution.

Third, the conclusion that we will no longer recognize Israeli settlements as per se inconsistent with international law is based on the unique facts, history, and circumstances presented by the establishment of civilian settlements in the West Bank. Our decision today does not prejudice or decide legal conclusions regarding situations in any other parts of the world.

And finally, finally, calling the establishment of civilian settlements inconsistent with international law hasn't worked. It hasn't advanced the

cause of peace.

The hard truth is there will never be a judicial resolution to the conflict, and arguments about who is right and wrong as a matter of international law will not bring peace. This is a complex political problem that can only be solved by negotiations between the Israelis and the Palestinians.

The United States remains deeply committed to helping facilitate peace, and I will do everything I can to help this cause. The United States encourages the Israelis and the Palestinians to resolve the status of Israeli settlements in the West Bank in any final status negotiations.

And further, we encourage both sides to find a solution that promotes, protects the security and welfare of Palestinians and Israelis alike.”

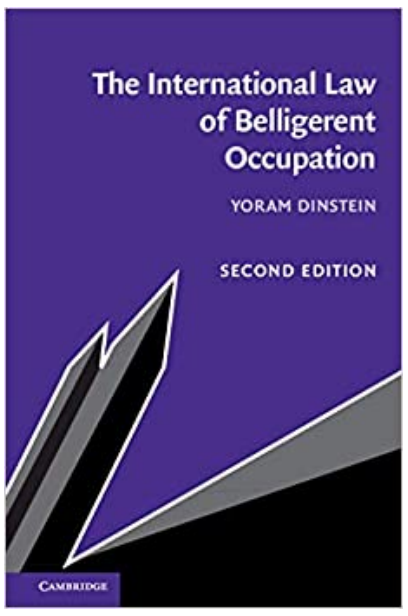
THE TEL AVIV REVIEW OF BOOKS

Autumn 2020

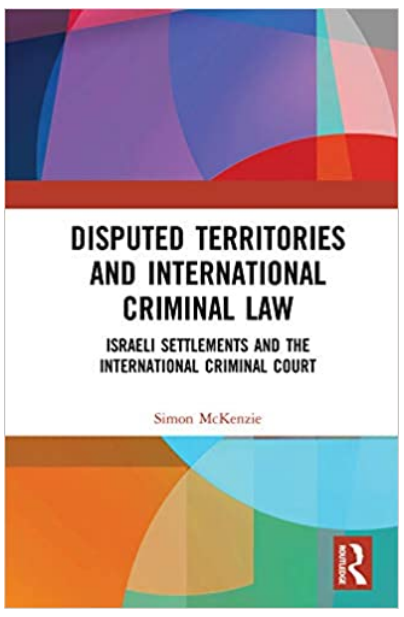
International Law for Just One Nation

Eugene Kontorovich

Two books examine the details behind arguments about the legality of settlements.



International law, and particularly the law of belligerent occupation, is a central aspect of the political discourse around Israel's presence in the West Bank, or Judea and Samaria. Conventional wisdom on this matter, at least amongst Western diplomats and legal academics, is fairly well settled: Israel is an occupying power, and the presence of Israeli civilians living in the areas formerly occupied by Jordan is a war crime. This conclusion is well known, but even educated observers typically lack the background knowledge of international law, and the fairly specific subfield of occupation law, that would be necessary to determine whether the conclusion is valid, disputable, or wrong. For most it is enough to rely on conventional wisdom, relying on authority and expertise. But as we shall see, the experts have not analyzed this question in the way one would typically approach a legal problem. Indeed, they themselves often typically appeal to a purported *political* consensus, embodied in the resolutions and decisions of various U.N. bodies.



The books under review seek in various ways to unpack, through technical legal analysis, the relevant legal provisions. Yoram Dinstein's *The International Law of Belligerent Occupation* is widely regarded as one of the leading academic treatises on occupation law in all of its aspects, authored by one of most eminent academic authorities in the field (the other is a similarly-titled volume by Dinstein's colleague at Tel Aviv University, Eyal Benvenisti). Originally published in 2009, it was issued in a second edition last year. Simon McKenzie's *Disputed Territories and International Criminal Law: Israeli Settlements and the International Criminal Court* examines in detail the legal arguments about Israeli settlements as they could play out in the ICC's slow and ongoing inquiry into what it calls "the Situation in Palestine."

Dinstein says that his second edition has been updated to take into account "quite a few contemporary occupations have cropped up in far-flung quarters of the world," such as Nagorno-Karabakh (where Armenia has occupied Azerbaijani territory since 1991) and Northern Cyprus (occupied by Turkey since 1974), but ultimately learns close to nothing from those situations. McKenzie explicitly frames his work as a "case study" into the ICC, based on Israel, but offers no

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Ari Blaff

Three publications show different approaches to teaching the Arab-Israeli Conflict on campus.

Stone Men

Alex Stein

The story of the role played by Palestinian stonemasons and construction workers in the building of Israel.

'Duel Review': The Conflict over the Right of Return

concrete suggestions on how the legal lessons of this case apply to—or are contradicted by—the Court's treatment of other cases. In short, both books, to the extent they concern settlements (Dinstein's has a far broader scope), are books about Israel more than they are about international law.

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The entire case against Israeli settlements depends on the application and interpretation of one sentence, found in Article 49(6) of the Fourth Geneva Convention Relative to the Protection of Civilians in Time of War. That provision comes at the end of a paragraph whose first five clauses are devoted to ethnic cleansing—the expulsion of a population from occupied territory. Par. 6, however, provides that "The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies." As both authors recognize, the application of this provision to Israel raises many legal questions that are neither straightforward nor determined by precedent.

Did Israel become an "occupying power" in 1967? Assuming it did, did the occupation end upon the signing of the peace treaty with Jordan in 1994, or the Oslo Accords the year before?—the Fourth Geneva convention has no application outside of an international armed conflict. But assuming that an Israeli occupation uniquely survived into peace time, have Israelis who live in the West Bank been "deported" by Israel? Have they been "transferred," and if so, what was the means of their transfer, given that at least on face value, most moved of their own volition, through the services of moving companies?

And what about the majority of the Israeli population now living in the territories, who neither moved there, nor were "transferred," but were born there, often in the third or fourth generation? The authors agree that the Convention's occupation provisions did not envision prolonged occupation—should Art.49(6), which unlike the rest of the convention governs not just governmental action but also private civilians, be applied to cover downstream demographic consequences, forever? To the extent that these measures are said to be designed to prevent a "colonization" of occupied territory, does Israel's repeated attempts to rid itself of the territories through offers of full statehood to the Palestinians (something not seen in Western Sahara or Crimea, for example) put it outside of the provisions intended application?

Each of these questions is genuinely debatable. But crucially, *all of them* must be answered against Israel for settlement activity to be deemed illegal, while resolving any one of them in favor of Israel's interpretation would undo the project of casting the settlements as illegal. The authors dutifully tackle most of these issues, one by one – and resolve each in favor of illegality.

What is important for the non-specialist reader to understand is the methodology employed in these efforts, and how it differs from standard legal interpretation. Here is how law typically works. There is a question about the meaning of a rule, in this case, Art. 49(6). Typically, lawyers would resolve the application of a rule to a case by looking at precedent—that is, the application of the rule to other analogous cases. Indeed, Friedrich von Hayek has said that the essence of law is that it is a system of general rules, made in *advance of the cases to which it would apply,* that is then applied prospectively to like cases. This is what gives law its integrity, and prevents it from being just ad hoc, politicized, or intuitive judgments about particular cases, colored inevitably by the interpreter's prejudices about the parties.

Emmanuel Navon Tamer Masalha

Two reviews, separately written, about recent books about the Palestinian "right of return."

But the question of Art. 49(6)'s meaning is different from most legal questions because in practice, it has neither prior precedent not future application outside of the Israeli context. Indeed, the esoteric world of belligerent occupation law has become a de facto language for talking about the Jewish State.

When the Fourth Geneva Convention was adopted in 1949, Art. 49(6) was "adopted after some hesitation," according to the International Committee for the Red Cross's semi-canonical 1957 commentary on the treaty, and with some considerable confusion about the meaning of "deport and transfer." The provision was apparently never invoked or studied before 1967, when it was dusted off and used to justify as a requirement of *international* law what had previously been accomplished by Jordanian law—the complete exclusion of Jews from eastern Jerusalem, Judea and Samaria. Indeed, Art. 49 has become one of the most invoked provisions of the Convention, cited thousands of times by the United Nations. Yet every time it is mentioned, it is in the context of Israel, and Israeli Jews in particular.

These volumes are themselves a good example of this phenomenon. Dinstein's book is a studious, systematic study of the law of occupation, covering a wide range of issues. But it has an acknowledged "special focus" on Israel, and in its discussion of legal issues around settlements, an exclusive emphasis. Dinstein notes that "never" has an occupation "drawn so much international attention." Indeed, for legal questions involving settlements, no occupation has ever drawn any attention, and thus Dinstein is pleased to have the "raw material for the law of belligerent occupation."

Similarly, McKenzie's book focuses entirely on the question of Israeli settlements, though he observes in passing that "it could be used by those assessing whether crimes are occurring in other occupations, such as those in Cyprus, Georgia, and Crimea" (all places where the ICC has jurisdiction). Do not hold your breath. Many activists and commentators have graciously suggested that they hope the "rules" they seek to apply to Israel will be generalized, but after more than fifty years, it is quite clear that they never will be.

Indeed, McKenzie's book, focusing on how settlements should be treated at the ICC, was published before the shocking announcement by the The Hague-based court's Prosecutor. Since Moscow's occupation of Crimea in 2014, close to 200,000 Russian settlers have moved to the territory, a fairly extraordinary number. If. as these authors maintain, the policy behind Art.49(6) is a kind of Trumpian vision of preserving a local population in demographic amber, free from the tensions of migration even over the course of decades, then Russia's settlement policy should clearly be of the greatest interest to the international community and the Court. Russian settlers are a bigger part of Crimea's population after six years than Israeli settlers are of the West Bank and Gaza after 53.

While the ICC prosecutor has without comment simply declined to even consider war crimes prosecutions regarding settlements in North Cyprus and Georgia, she was compelled to consider the settlement issue within a broader inquiry regarding Russian crimes in Crimea. Yet last November, and despite the vast "raw material" about international law that authors like Dinstein and McKenzie had mined from Israel, she quietly concluded that the mass movement of Russians into occupied territory does not constitute a potential crime.

The problem with developing a complete account of Art. 49(6) and testing it solely against Israel is that it is not falsifiable—one can draw an infinite number of lines through a point. Yet the ICC Prosecutor's Crimea decision is as explicit a

repudiation of these theories as it gets, or rather, further evidence that they are not "law" in the sense of being rules of general applicability. Typically, when law professors suggest interpretations of law and courts and other official actors adopt contrary ones, it is the professors who are thought to be wrong; the law runs with reality. Yet the authors' deep focus on Israel misses a larger point: every single occupation has involved population movement into the occupied territory. Yet not a single one of them has ever been said, by the U.N. or any international court, to violate these prohibitions.

To say that Israel is the test case rather than all these other examples is the analytic mistake known in social science as selecting on the dependent variable. This criticism of the authors' methodology is not a claim about double standards, or international hypocrisy. A double standard is when there is a preexisting standard, that is then applied differently to like cases. Thus, one might argue that just because many other countries violate the settlements rule does not mean Israel should; indeed, perhaps Israel should be pleased at the coercive assistance it gets from the international community in keeping to the law. But both books are refreshingly honest about the lack of a clear pre-existing rule—that is to say, the meaning of Art. 49(6) involved "ambiguity," as McKenzie concedes. He goes on to admit that the kind of government action necessary to constitute transfer is a "difficult question" on which the text "do[es] not offer any guidance" and on which "there are no cases." Thus, distilling a standard from the international treatment of Israel, which then becomes reflected onto the "general" rule, becomes a legal infinite regression mirror. The objection here is not about double standards, but rather the non-application of the actual standard to the case at hand.

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Let us examine how the authors analyze a few of the particular legal issues mentioned above. One set of questions deals with whether the Fourth Geneva Convention even applies to the territories. The treaty is not, like human rights agreements, a list of universal rules to be observed at all times. Rather, it applies to wars, and only a subset of them: "international armed conflicts" between countries that have signed the treaty. In other conflicts (such as between a country and a guerilla group), the treaty does not apply. This is why, despite Iran settling large numbers of foreign Shiites in ethnically cleansed areas of Syria, this does not implicate Art. 49(6), because the Syrian civil war is technically categorized as a "*non*-international armed conflict."

Israel and Jordan were certainly engaged in an international armed conflict in 1967. However, the West Bank was not part of Jordan. This point has been a staple of arguments against considering the territory occupied. Both authors offer the fairly conventional retort, based on a broad reading of the "purposes" of the convention. Arguments about purpose are fair game, but slippery, because anything can be said to be consistent with particular purposes at a high enough level of abstraction. The argument about the effect of Jordan's lack of sovereignty is an old one, and genuinely debatable. But both offers fail to deal with newer arguments.

For example, there is a strong basis for arguing that under international law, not only did Jordan *not* have sovereignty over the territory in 1967, but that Israel did. This would be decisive, as even if one can occupy "non-sovereign" territory, both authors would agree that one cannot occupy *one's own* territory. The argument for Israeli sovereignty involves a straightforward application of a universal principle of international law that provides that when a new country is created, it inherits the borders of the last top-level administrative unit in the territory; this rule applies

even if—as is usually the case—those prior borders were colonial, arbitrary, or otherwise did not hew closely to ethnic lines. This is why the international boundaries of Syria, Lebanon, and Jordan all lump in discontented ethnic or religious minorities—all those states stepped into the borders of previous League of Nations Mandatory territories. In Israel's case, the last prior borders were those of the Mandate for Palestine. Jordan's invasion of the territory in 1948 would, both authors surely agree, not lawfully change sovereignty. Yet neither even deal with the possibility of prior Israeli sovereignty.

Then, there is the question of the effect of the 1994 peace treaty with Jordan. As mentioned above, occupation depends on the existence of an international armed conflict. When that conflict ends, there is no more occupation. That is why the presence of large numbers of U.S. troops in post-war Germany or Afghanistan was not considered an occupation. The authors, like most who have written on the topic, conclude that Israel's war with Jordan—who occupied, but was not sovereign over, the West Bank—was good enough to trigger Art. 49(6). By the same token, then, a peace treaty should end its application. A U.S. State Department memo in 1978 concluded that Israel occupied the West Bank, on much the same analysis as the authors—and McKenzie cites its analysis as compelling authority. Yet, the same memo made clear that if Israel made peace with Jordan, the occupation and any question about settlements would end.

Perhaps that was easier to say in 1977, when such legal ruminations seemed unlikely to be tested by reality. Still, both writers struggle unsuccessfully (and briefly) to explain why the 1994 peace treaty did not end occupation that might have existed hitherto. They rely on the provision of the treaty stating that it is "without prejudice" to the status of the West Bank. But that simply means that the treaty did not determine the future sovereign status of the West Bank as between the competing Palestinian and Israeli claimants. It does not change the fact that an unconditional peace was established, ending all belligerency and thus belligerent occupation. The treaty may not extinguish (or affect) Palestinian territorial claims, but not all territorial disputes are occupations. The authors essentially paper over the inconvenient point that, even in their analysis, it is hard to argue that a de jure occupation continues to exist.

Like a drunk looking for his keys under the lamppost, the authors invariably attach great weight to every scrap of evidence in favor of their arguments, while discounting or entirely ignoring contrary evidence. Both authors, for example, give almost conclusive weight to the International Court of Justice's Advisory 2004 opinion in the *Wall* case, where the Court opined that territory can be deemed "occupied" even if it had no prior sovereign. But the ICJ opinion was, as the authors are aware, "advisory," and thus not legally binding. As a formal matter, the ICJ's opinion deserves no more legal weight than the quality of its legal arguments. On this point, it made none, but rather cited the numerous U.N. resolutions that had said the same thing, all solely in the context of Israel.

In any case, the ICJ opinion was only issued in 2004, further discounting its value, for both legal and sociological reasons. Under basic principles of international law, the law that would govern Israel's presence in the West Bank is the law as it was understood in 1967, not subsequent interpretations. Moreover, by 2004, and indeed, much earlier, the question of occupation of non-sovereign territory had become entirely synonymous with the question of Israel and the territories; it could hardly be treated as an abstract legal question. On the other hand, both authors entirely ignore the *Cession of Vessels and Tugs for Navigation on the Danube* case, which was decided before 1967, and would thus state the law as it

was when Israel took control of the territories. That case held that the territory that was not under the sovereignty of any state could not become occupied. That means that the West Bank, which was not under any sovereignty when Israel ended Jordanian control, could not be deemed occupied. Dinstein's failure to acknowledge this precedent, which goes contrary to his conclusions, is a particularly odd lapse given that he cites *Danube Tugs* as authority for other propositions of occupation law.

Yet even these authors, who largely track the conventional U.N. consensus on these matters, try to take seriously the fact that they are dealing with legal texts. Many readers will be surprised that both authors agree that the broad and undifferentiated treatment of Israeli settlers as "illegal" lacks any basis. In the commonplace understanding, any Jewish presence across the Green Line is ipso facto illegal. This is the view that animates groups such as Peace Now and Btselem, who condemn every individual Jewish-inhabited housing unit. But the authors note there is simply no colorable basis in Art. 49 for such a comprehensive ban: it does not prohibit the nationals of an occupying power from moving to or living in the territory. Rather, it regulates certain actions by occupying powers to move its population there. In particular, it requires acts of "transfer" by the occupying power, a term which the authors interpret sweepingly, but still excluding clearly private actions.

Thus, both authors agree that Israelis who purchase land in private transactions, or move to land they had prior title to, cannot conceivably fall within these prohibitions. Dinstein also points out that "so called 'outposts'"–settlements established in the face of *opposition* by the Israeli government–would have to be considered legal under international law, precisely because they are illegal under Israeli law.

Yet neither book takes these points to their logical conclusion. They agree that "transfer" must refer to movements of people caused by official government action, but in practice they interpret causation in a "but for" way, rather than a more direct causation of the kind typically required by criminal prohibitions. That is, to say that "transfer" occurs when Israel makes it possible for its citizens to move to the West Bank, or does not discourage residence there relative to other places, is to interpret a ban on transfer as a requirement of discouragement, which appears nowhere in the convention.

Nonetheless, it is important to note the gap between the somewhat more limited version of the rule conceded by these authors and the absolute ban assumed by the international community and pro-Palestinian NGOs. It is an odd coincidence that the legal interpretation of the obscure Art. 49(6) adopted by so many happens to be entirely congruent with Palestinian political demands and negotiating positions.

*Yoram Dinstein, *The International Law of Belligerent Occupation,* Cambridge University Press, pp. 336

*Simon McKenzie, *Disputed Territories and International Criminal Law: Israeli Settlements and the International Criminal Court,* Routledge, pp. 257

Israel Ministry of Foreign Affairs

Declaration of Principles

13 Sep 1993

Declaration of Principles on Interim Self-Government Arrangements
September 13, 1993

The Government of the State of Israel and the P.L.O. team (in the Jordanian-Palestinian delegation to the Middle East Peace Conference) (the "Palestinian Delegation"), representing the Palestinian people, agree that it is time to put an end to decades of confrontation and conflict, recognize their mutual legitimate and political rights, and strive to live in peaceful coexistence and mutual dignity and security and achieve a just, lasting and comprehensive peace settlement and historic reconciliation through the agreed political process. Accordingly, the, two sides agree to the following principles:

ARTICLE I

AIM OF THE NEGOTIATIONS

The aim of the Israeli-Palestinian negotiations within the current Middle East peace process is, among other things, to establish a Palestinian Interim Self-Government Authority, the elected Council (the "Council"), for the Palestinian people in the West Bank and the Gaza Strip, for a transitional period not exceeding five years, leading to a permanent settlement based on Security Council Resolutions 242 and 338.

It is understood that the interim arrangements are an integral part of the whole peace process and that the negotiations on the permanent status will lead to the implementation of Security Council Resolutions 242 and 338.

ARTICLE II

FRAMEWORK FOR THE INTERIM PERIOD

The agreed framework for the interim period is set forth in this Declaration of Principles.

ARTICLE III

ELECTIONS

1. In order that the Palestinian people in the West Bank and Gaza Strip may govern themselves according to democratic principles, direct, free and general political elections will be held for the Council under agreed supervision and international observation, while the Palestinian police will ensure public order.

2. An agreement will be concluded on the exact mode and conditions of the elections in accordance with the protocol attached as Annex I, with the goal of holding the elections not later than nine months after the entry into force of this Declaration of Principles.

3. These elections will constitute a significant interim preparatory step toward the realization of the legitimate rights of the Palestinian people and their just requirements.

ARTICLE IV

JURISDICTION

Jurisdiction of the Council will cover West Bank and Gaza Strip territory, except for issues that will be negotiated in the permanent status negotiations. The two sides view the West Bank and the Gaza Strip as a single territorial unit, whose integrity will be preserved during the interim period.

ARTICLE V

TRANSITIONAL PERIOD AND PERMANENT STATUS NEGOTIATIONS

1. The five-year transitional period will begin upon the withdrawal from the Gaza Strip and Jericho area.

2. Permanent status negotiations will commence as soon as possible, but not later than the beginning of the third year of the interim period, between the Government of Israel and the Palestinian people representatives.

3. It is understood that these negotiations shall cover remaining issues, including: Jerusalem, refugees, settlements, security arrangements, borders, relations and cooperation with other neighbors, and other issues of common interest.

4. The two parties agree that the outcome of the permanent status negotiations should not be prejudiced or preempted by agreements reached for the interim period.

ARTICLE VI

PREPARATORY TRANSFER OF POWERS AND RESPONSIBILITIES

The New York Times https://www.nytimes.com/2021/06/24/world/middleeast/israel-settlement-bennett-netanyahu.html

Unauthorized Settlement Creates Stress Test for Israel's New Government

The outpost of Evyatar is illegal under Israeli law. Prime Minister Naftali Bennett will anger one wing of his coalition if he evicts the settlers, and another if he lets them stay.

By Patrick Kingsley and Adam Rasgon

June 24, 2021

JABAL SUBEIH, West Bank — When Israeli settlers took over a windswept hilltop in the West Bank last month, it became the latest of about 140 unauthorized settler outposts built there in recent decades. Aside from the Palestinian villagers who could no longer reach olive groves there, the encampment initially attracted little attention.

Since then, the rapidly expanding settlement, Evyatar, and the huge protests it has begun to attract, have become an early stress test for the fragile new Israeli government.

The settlement is illegal under Israeli law, and the Israeli Army has ordered it razed, subject to the approval of the government.

If the new right-wing prime minister, Naftali Bennett, backs the settlers, he will alienate the leftist and Arab members of his coalition. If he permits them to be evicted, he will allow the Israeli right to paint him as a turncoat. An eviction could come as soon as Sunday, but could be delayed by legal proceedings.

"This is the test of Naftali Bennett," said Yoav Kisch, a lawmaker in the opposition Likud party, as he toured the settlement on Tuesday.

"If you are truly the prime minister and you actually have right-wing ideology in you, stop this wrong, twisted and fraudulent evacuation of Evyatar," he added. "This is in your hands."

Settlers planting a tree at Evyatar, an outpost that sprung up last month. They could be evicted as soon as Sunday. Amit Elkayam for The New York Times

Mr. Bennett's dilemma embodies the tightrope his government is treading during its earliest days in office.

To win a parliamentary majority large enough to push his predecessor, Benjamin Netanyahu, from power, Mr. Bennett and his centrist partner, Yair Lapid, assembled an ideologically incoherent alliance that ranges from leftists who oppose settlement expansion to hard-right politicians like Mr. Bennett who support building settlements across the occupied West Bank.

By The New York Times

The bloc came together on a single issue — the need to remove Mr. Netanyahu — but governing has quickly proved harder work.

Before entering office, the leaders of the eight-party coalition promised to focus on policies that united them, such as infrastructure and the economy, and avoid third-rail issues like the Israeli-Palestinian conflict.

To some extent, the government has followed through on this pledge: Mr. Bennett and other government ministers presented a united front this week in their response to a sudden rise in coronavirus cases. They have moved quickly to strengthen ties with the Biden administration, filled dozens of vacant senior Civil Service positions and agreed to begin an inquiry into a disaster at a religious site that killed 45 people in April.

But the Palestinian question, and the 54-year occupation of the West Bank, have already proved impossible to sever from the day-to-day business of running an Israeli government.

Evyatar started with a few tents and has rapidly expanded to about 50 one-story homes. Amit Elkayam for The New York Times

Mr. Bennett's government is struggling to find a majority to extend a 2003 law that effectively bars granting citizenship to Palestinians who marry Israeli citizens. Under previous governments, the law has been extended each year without drama, but this year its extension is at risk because Arab and leftist members of the coalition oppose it.

That split has given Mr. Netanyahu's party, Likud, an opportunity: Likud has withdrawn its support for the bill, despite having always supported it. By allowing it to fail, Likud hopes to embarrass Mr. Bennett by highlighting how his government is reliant on Arabs and leftists.

Mr. Netanyahu had previously laid another trap for the Bennett government, deciding in his last week in office to allow far-right activists to schedule a provocative march on the second day of Mr. Bennett's tenure. Mr. Bennett's government allowed the march to take place, setting off a furious response from leftist members of his coalition and testing the government's unity.

Disagreements also loom over the question of improving housing rights for Palestinian citizens of Israel. And a discussion about allegations of apartheid in Israel, co-hosted by a leftist coalition member at the Israeli Parliament on Tuesday, highlighted the vast gulf in ideologies within the government bloc.

Israel's new government has already shown cracks over the question of Evyatar, which is illegal under Israeli law. Amit Elkayam for The New York Times

"The opposition is sniffing around to find the issues that will embarrass the government and create cleavages within it," said Tamar Hermann, a professor of political science at the Open University of Israel. "They are incessantly looking for a spoke to stick into its wheel."

One of the most pressing quandaries for the coalition is the settlement on Jabal Subeih, a hill near Nablus in the northern West Bank. Mr. Lapid, the foreign minister, wants to proceed with the eviction, while a member of Mr. Bennett's party, Nir Orbach, visited the site on Thursday to show solidarity with its residents.

Settlers pitched several tents there on May 3, naming the new hamlet for Evyatar Borovski, a settler killed by a Palestinian in 2013.

The settlement expanded unusually fast, and now includes about 50 one-story homes, several tarmac streets, each with its own street sign, as well a Wi-Fi network, a synagogue, an electricity generator and a water storage system.

Prime Minister Naftali Bennett, center, in Jerusalem this week, has previously said that he would not evict any settlers from the West Bank. Ronen Zvulun/Reuters

The settlement leaders say they are acting only on their own initiative and received only crowdsourced funding. But the site was quickly instrumentalized by Likud, which sent representatives to Evyatar to raise its profile and sought to turn it into a wedge issue for the new government.

The West Bank was occupied by Israel in 1967, and much of the world considers all Jewish settlements there illegal under international law. Most settlers, however, live in settlements permitted under Israeli law.

But Evyatar, built without permission from the Israeli state, is illegal according to Israeli law.

Mr. Bennett said in 2012 that he would consider it unconscionable to evict any settlers in the West Bank, and that he would refuse a military order to do so. The issue could ultimately be decided by the High Court.

Government approval of the eviction would outrage Mr. Bennett's supporters, who believe that settlements in the West Bank are essential to Israel's security and, for many, that the territory was among the lands promised to Jews by God.

Some of Mr. Bennett's supporters believe that West Bank settlements are vital for Israel's security, others that the territory was promised to Jews by God. Amit Elkayam for The New York Times

"It's forbidden for him to touch this memorial site," said Mr. Borovski's widow, Sofia, who now lives part of the week at the settlement. "If they remove the community," she added, "it would be like killing my husband all over again."

Mr. Bennett's office declined to comment.

The view from the other side of the valley, in the Palestinian village of Beita, was very different. Pointing at an olive grove descending from the new settlement, a retired farmer said he helped his father plant its trees in the 1960s, before Israel captured the land from Jordan.

"I can't forget my father, digging the land, sweat pouring down his face," said the farmer, Mohammed Khabeisa, 68. "That memory raises a fire inside me when I see those dogs up on that hill."

Mr. Khabeisa's family is one of 17 that say they have owned land on the site of the settlement for generations. Twenty-two other families claim adjacent land that is blocked off by soldiers protecting the settlers. None of them have the deeds to prove ownership, and Israeli military officials have said it is not clear who owns the land.

Mohammed Khabeisa, a retired farmer from a nearby Palestinian village, said he helped his father plant olive trees on land now occupied by the settlement of Evyatar. Amit Elkayam for The New York Times

The government department that oversees civil aspects of the occupation has acknowledged that at least five families, including Mr. Khabeisa's, paid land tax on plots in the area of the hill during the 1930s, before Jordan seized control of the territory, though the exact whereabouts of those plots was unclear.

Fury over the settler takeover has led to daily protests and marches by Palestinian villagers, farmers and their supporters. They have thrown stones at the soldiers blocking access to the hill, burned tires in the surrounding valleys and pointed laser pens at the settlement at night, in an effort to harry the settlers into leaving.

Palestinian officials say that at least four Palestinians have been killed by Israeli soldiers firing live rounds during these protests, and hundreds injured. Mr. Khabeisa has a fresh scar above his left knee, after an Israeli soldier fired a tear-gas canister at him during a protest in early June, he said, hitting him at short range.

For Palestinians like Mr. Khabeisa, the question of whether Mr. Bennett will or won't support the settlement's destruction means little in the long term. They see the settlers, the soldiers, Mr. Bennett and Mr. Netanyahu as ultimately part of the same system that has gradually taken control of more and more land in the West Bank since 1967.

"Every government has the same goal," said Mr. Khabeisa. "The seizure of land."

Palestinians from the village of Beita have protested the settlement and thrown stones at Israeli soldiers. Amit Elkayam for The New York Times

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