

## **Edited Eugene Kontorovich Transcript**

The following is the edited transcript from the talk by Eugene Kontorovich, presented on Zoom from Jerusalem, sponsored and arranged by Santa Fe Middle East Watch (SFMEW) on Sunday, May 21, 2023, as part of the greater Santa Fe Jewish Community's Israel@75 celebration of the Independent State of Israel's 75<sup>th</sup> anniversary.

### **Introduction**

#### **Halley Faust:**

Welcome everyone, and thanks for joining us.

I'm Halley Faust, chairman of Santa Fe Middle East Watch. I may be referring to that as SFMEW, which is also where you can get more information on our organization.

First a shout out to David Shulman, who organized Santa Fe's Israel@75 events among the various organizations. This is the last event in Santa Fe for Israel@75, a Santa Fe Middle East Watch production with Professor Eugene Kontorovitch, on international law and the Arab Israel conflict. He's speaking from Jerusalem today.

### **What is the organization Santa Fe Middle East Watch?**

We were founded in 2015 to counter the anti-Zionism from speakers and stunts that the Lannan Foundation, Santa Feans for Justice in Palestine, Jewish Voice for Peace and others bring into town. We are unapologetically Zionist. Hence ...

We monitor and respond to anti-Israel events, media, and politicians, and we provide our own educational programs, like the one today. We worked with Stand With Us, the Jewish Federations of North America policy arm, and the Governor's office to get the Governor to proclaim the definition of antisemitism that is used by the state government based on the IHRA acceptance. We have held Israel advocacy workshops in collaboration with ADL, the Federation, AJC, CAMERA., and AIPAC.

If you are not on our email list, go to [sfmew.org](http://sfmew.org) and sign up on the right side of the page.

Thanks to a number of people today who've helped with the production of this event, and particularly Israel and Nancy Sushman, Ron Duncan-Hart, and the various Santa Fe Jewish institutions which have publicized the event.

Also a big thanks to Linda Goff and the New Mexico Jewish Historical Society, which now has agreed to be our ongoing administrative fiscal sponsor. It's an administrative function only - we operate independently. As a standard disclaimer, the NM Jewish Historical Society doesn't sponsor or endorse any of the programs that we do; the opinions expressed in our work or by our speakers is our own.

## Speaker introduction:

In Santa Fe we have had a number of speakers who come through and have proclaimed that “this” or “that” action of the Israeli government or armed forces is “illegal” according to international law. Usually these speakers are opposed to the *action* and are making political statements, disguised as legal ones.

The two can often be confused, and, as our speaker stated in the Tel Aviv Review of Books (Autumn, 2020), “even educated observers typically lack the background knowledge of international law, and the fairly specific subfield of occupation law”.

Many of the Lannan Foundation-sponsored speakers like Noura Erekat in 2019 were like this. If you are interested, SFMEW has a list of the anti-Zionist, and I would argue antisemitic speakers Lannan brought in over the years. Today’s talk is an opportunity for Santa Feans and others to hear from a scholar who specializes in these questions. If you're interested. We have a list at <https://www.sfmew.org/lannan/> .

**Professor of Law Eugene Kontorovich** is one of the world’s preeminent experts on universal jurisdiction, international law, and the Israel-Arab conflict.

He is Professor of Law and Director of the George Mason University Scalia Law School's Center for the Middle East and International Law and a scholar at the Kohelet Policy Forum in Jerusalem, from where he is joining us today.

Before joining George Mason University he was a professor of law at Northwestern University from 2011 to 2018, which he had joined from the faculty of the University of Chicago, where he received his undergraduate and law degrees.

Professor Kontorovich has published over thirty major scholarly articles and book chapters in leading law reviews and peer-reviewed journals in the United States and Europe. His scholarship has been cited by appellate courts in the U.S. and around the world.

I’d urge you to review his c.v. fully on the website of George Mason University and to look up some of his scholarly work, which, though I’m not a lawyer, I find very accessible and understandable – his writing is clear and straightforward, which is why...

His expertise is often sought out and quoted and he’s a major contributor to major news organizations such the *New York Times*, *Wall Street Journal*, NPR News, *The New Yorker*, *Los Angeles Times*, and numerous television and radio programs.

On a personal note, I’ve had contact with Eugene for the past 6+ years regarding various activities on which SFMEW has worked. He’s always accessible and succinct in responding with precise comments and help. Thank you for all of your help in the past, Eugene.

Professor Kontorovich will speak for 30-40 minutes, focusing primarily on the topic of occupation and settlements, as well as, if there is time, on Masafer Yatta, and then take questions, which, again, you can ask through the Q&A function.

**Eugene Kontorovich:** Thank you all. Thank you for joining. I'm speaking from Jerusalem.

We are going to discuss some of the bigger issues involving Israel and international law – in particular the overall proposition: Israel is an occupying power in the West Bank, and therefore Israel is, as a result, restricted from letting Jews live in the West Bank related to the claim of settlements.

Now. I want to first talk about how to think about this. The question is, “how do we think about a claim?” You hear the claim: Israel is an occupying power in the West Bank and is also occupying Palestinian territory. How do we assess that claim, thinking about it as a lawyer?

As a lawyer, you can't look at the claim by reference to other things people have said about it. You can't judge the case by the case itself. What you have to do is figure out whether a purported rule of international law is a rule.

How do you figure it out? You have to see if this principle has been applied in similar circumstances in other situations. Is there truly such a rule? So, in other words, to understand anything about Israel and the West Bank, one needs to understand the general rules of international boundaries. One needs to step aside from the situation of Israel. Look at situations other than Israel, and see, “what are the rules of the international community to the extent that they exist on the question of a country's border.”

What is a rule? A rule is a general principle that applies to indefinite future cases. In other words, it's not a judgment about a particular case. It is if X, then y for unknown future parties. You don't know the identity of the X; i.e., you don't know the identity of the defendant.

So we need to identify not what the UN has said about Israel. That's not international law - the United Nations General Assembly is a political body. It's not a rule-making institution. So we have to look for genuine rules of international law, and one clear sign of being a rule of international law is, it has to be general and applied across countries. A rule that applies only to Israel is not international law.

So, we're going to take a little bit of a detour here. And I understand this is a Zionist group, a group that's interested in Israel. But on when we talk about international, we can't understand the situation of Israel unless one understands the situation of the world more broadly.

### **How does one figure out the borders of countries?**

Let's use a current example: take Crimea, as Vladimir Putin did in 2014.

The international community universally regards Crimea as being occupied by the Russian Federation, because it is Ukrainian territory. Now let's consider: is Crimea considered occupied? Yes, but it isn't because the people there are Ukrainian. Most are Russian, and they don't actually want to be part of Ukraine.

In fact, most of the people, the great majority now in Crimea, are ethnic Russians; they are Russian-speaking. The majority of them clearly prefer to be part of the Russian Federation. Now, it's probably not 95% like Putin said in the election that they claimed to have conducted

before Russia took over Crimea. (95% is the only number that comes out of Russian ballot machines.) The population of Crimea is ethnically Russian. So if we talk about a principle, we often hear in connection with Israel self-determination is why the West Bank should be Palestinian, but in the Crimean context the principle of self-determination would support Russian sovereignty.

So if population preference doesn't determine borders, well, maybe the world thinks that Russia is an occupying power because it's colonial and far away from Russia. But in fact Ukraine's borders have been right in the middle of Russia.

Maybe it's historic? Maybe Crimea has always been part of Ukraine. But in fact, for the vast majority of the past several 100 years, it's always been part of Russia.

How then does the international community regard Crimea as being occupied Ukrainian territory? So, here's the story.

Before Ukraine and Russia, what existed in this area was the Soviet Union, which was composed of a bunch of Soviet socialist republics, called the Union of Soviet Socialist Republics. This was kind of roughly comparable to American states, except they were not actually independent. And the 2 biggest ones were the Ukrainian and the Russian Socialist Republics.

Crimea was part of the Russian Soviet Socialist Republic, because it had been part of Russia and the Russian Empire for many hundreds of years. But in the 1950s Nikita Khrushchev, the General Secretary of the Communist party, redrew unilaterally, without asking anyone, without having a vote, or looking to see if it's fair, redrew the borders of Russia and Ukraine to basically make a gift from Russia to Ukraine of Crimea, and he had various internal political reasons for doing this; he wanted to support and strengthen the leadership of the Ukrainian Soviet Socialist Republic.

He, Khrushchev, basically just took Crimea away from Russia and gave it to Ukraine. Is that democratic? Is that fair? Is that in keeping with self-determination? No one asked. It was the Soviet Union. So this is the most arbitrary authoritarian line / border drawing decision that could be made.

Nonetheless, when the Soviet Union collapses and Ukraine becomes independent, Ukraine says, "Our borders are the borders of the former Ukrainian Soviet Socialist Republic – no more and no less." And thus it includes even Crimea, because that was included after the 1950s in the borders of the Ukrainian Soviet Socialist Republic.

Putin says, "That's not fair. Why should Nikita Khrushchev's weird unilateral act get to determine the borders of Russia forever? And so why should we give this dictator the last word? The people there are Russians, and they want to be part of Russia." And he takes over Crimea.

The international community universally rejects Putin's claim.

Okay, that's one example.

Here's another example.

Remember Saddam Hussein and when he invaded Kuwait? He didn't just up and invade Kuwait out of the blue. Iraq had long had a territorial claim to it. Why? Because Iraq used to be a mandatory territory. Like the mandate of Palestine, Iraq was from the British-administered mandate from Mesopotamia. And under the mandate the British drew the southern borders of Iraq, and from that Iraq has a very, very small access to the Persian Gulf.

And even though Iraq has many tens of millions of people in it, Kuwait, which has very, very few people in it, has a lot of coastline, and that's basically because the British liked the people who ran Kuwait more; they had a special relationship with them.

So Iraq says, "That's not fair. There's tens of millions of us. We have like 30 kilometers of coastline and there are just a few of them; they have 300,000." As a fairness argument. It's actually not bad. So Iraq says, "We're going to take over Kuwait." The international community universally rejects Iraq's argument. Actually, the Palestinian regime accepts Iraq's claims. But other than that, the international community rejects Iraq's claims to Kuwait, and they say no.

The borders of Iraq, when it became independent which were the borders of the mandate from Mesopotamia, are the borders of Iraq forever, and it does not matter how they were drawn, if it was fair, or if it was colonial. We don't ask questions.

Okay. Now, what does all this have to do with Israel?

These are but 2 fairly prominent examples of a much broader rule, which is the rule for determining the borders of new countries in international law. There's not a rule for everything. But there happens to be a fairly clear rule about establishing the borders of new countries. Why? Because international law is the law that applies between countries. So you have to at least know more or less what the country is in order to have international law, and also because the creation of new countries is not an irregular event. That is to say, at the time of the UN Charter there were 50 something members, and now there's 190 members. Countries get formed fairly regularly.

What the general rule says, if you look up in a textbook "borders of new countries," what would it say? It says that the rule is that when a new country is created out of the territory of a former one, either through decolonization, the collapse of a federal system, kind of like divorce like the Czech Republic and Slovak Republic, or secession, the borders of the new country are the borders of the last previous top level administrative unit in the territory.

I'm gonna say that again: the borders of the new country are the borders of the last top level administrative unit in the Territory.

So what does that mean?

That means we don't invent new borders for a new country. A new country inherits the borders of whatever the last thing was that was there.

So, for example, let's say, the United States split up. Let's say California secedes. What are

the borders of the new country? The borders of the State of California [before secession]. What happens if Canada breaks up? The borders of the new countries will be the borders of the provinces.

Why do we have this rule? Crucially, this rule overrides all other considerations. What do I mean it overrides all other considerations? It is one factor. You just look at the former borders, and you don't look who was there first or demographic issues or anything like that. Why? Because those factors, historical or demographic factors, don't yield single answers. Right? Political borders can never purely trace demographic borders because people don't live in so perfectly separated checker board mosaic demographic distributions. And so demographics isn't possible.

History is complicated. But if you say we're going to look at the last borders, then that gives you a definitive answer, that gives you a clear and definitive answer to the question, and we need definitive answers.

What happens when you have a dispute over the borders of countries? You have war. So we need a clear rule. And this provides a clear rule. This rule has been used to determine the borders of countries around the world in Asia and Africa, and of course, in the Middle East.

Let me give you some examples.

Let's apply this to Israel. What was the last top level administrative unit when Israel was created in 1948, when the Declaration of Israel's Independence – what was at that moment there before? The mandate for Palestine, the British mandate, which was created by the League of Nations in 1922.

Now it's very important to know that the League of Nations mandate was not the only mandate issued by the League of Nations. This was not a special favor for the Jews. It's not like the League of Nations issued a mandate for the Jews, and that was it. After World War I the League of Nations issued mandates to provide government and supervision for the transition to nationhood of a variety of territories that were previously under the imperial control of either the Ottoman Empire or the German Empire: places in Africa, places in the Pacific, and in particular other countries in the Middle East. So Syria was a former mandatory territory. Lebanon was a form of mandatory territory. Iraq, as I mentioned before, was a former mandatory territory.

In each of those cases the mandatory territory lumped together some ethnic groups that did not like to be lumped together. For example, Lebanon was created by lumping a Sunni Muslim minority to a Christian majority; this did not make them happy, and despite Muslim request for partition, it was not granted, and the borders of all these mandatory countries were the borders at the time of independence. That is the rule of international law. The border is at the time of the mandate.

So what was it in Israel in 1948? What is the previous top-level entity mandate for Palestine? Just like when Lebanon becomes independent, you get the borders of Lebanon? Syria becomes independent. Lots of ethnic groups go together, the Arabs, and Jews and the Kurds, and they're also not happy about it. But nonetheless, nobody can contest that even today those borders are the borders of Syria.

So here is what the situation looks like in 1948 (Figure 1).

## Implementing Art. 25



Figure 1 – Palestine British Mandate

All of this white area and this orange area all part of the original League of Nations mandate for Palestine.

It was all one area that was all called Palestine.

But there was a sentence, a provision in the League of Nations mandate, Article 25, which said that if this area proves to be too big for carrying out the purposes of the mandate, which is the establishment of a national home for the Jewish people, then it could be split along this natural boundary of the Jordan [river] area and the Jewish provisions, the Jewish National Home provisions, suspended in this area and basically a different regime was created.

The British immediately exercised this power and basically split this, what was once Palestine, into 2 areas with this part still called Palestine, and this part [the orange area] called Transjordan.

This part [the orange area] is administered as a separate entity called Transjordan.

And when it becomes independent, what are the borders of this new country which comes to be called the Hashemite Kingdom of Jordan? They are exactly the borders of the previous entity under the mandate, the entity of Transjordan, even though this entire entity never existed before. There was no such thing on the map. It did not have this weird arm that sticks into Iraq; that was an odd feature of British map making. Nobody doubts today that these are the borders of the Hashemite Kingdom of Jordan, even though they owe themselves entirely to the League of Nations mandate.

So we see the League of Nations mandate creates binding borders for new countries.

Now, what's left here? This thing [the white area]: Palestine. Similarly, when this [white] territory becomes independent again this was called Palestine, now it's called Israel. This [orange area] was called Transjordan, now it's called the Hashemite Kingdom of Jordan. This [area to the northeast of Transjordan] was called Mesopotamia. Now it's called Iraq.

The borders of this [white] area would become the default borders of Israel at its moment of independence.

Now I saw [David] Shulman ask in the Q&A section: Doesn't resolution 181 of the UN General Assembly that includes the 1947 partition plan supersede the 1922 mandate?

What Shulman is referring to is the UN General Assembly partition resolution proposal of

1947 contained in resolution 181. Here's part of the 1922 mandate:

Figure 2 – League of Nations Mandate for Palestine – Preamble and Articles 5 and 6.

## League of Nations Mandate for Palestine (July 24, 1922)

### Preamble:

Whereas the Principal Allied Powers have also agreed that the Mandatory should be responsible for putting into effect the declaration originally made on November 2nd, 1917, by the Government of His Britannic Majesty, and adopted by the said Powers, **in favour of the establishment in Palestine of a national home for the Jewish people...**

- Whereas recognition has thereby been given to **the historical connection of the Jewish people with Palestine** and to the grounds for reconstituting their national home in that country...

**Article 5.** The Mandatory shall be responsible for seeing that no Palestine territory shall be ceded or leased to, or in any way placed under the control of, the Government of any foreign Power

**Article 6.** The Administration of Palestine. . . shall facilitate Jewish immigration under suitable conditions and shall encourage, in cooperation with the Jewish Agency..., close settlement by Jews on the land, including State lands and waste lands not required for public purposes.”

Now the question is, does UNGA resolution 181 supersede the League of Nations 1922 Mandate? The answer is, “No, for a variety of reasons.”

## GA Partition Proposal (1947)



Figure 3 – Proposed partition proposal of 1947 included in UNGA Resolution 181

First, the proposal does not *purport* to supersede the mandate. That is to say that it's a partition *proposal*. It says, “guys, we have an idea.” It does not actually claim to effect a partition, but rather claims to be a *recommendation* to the mandatory power, the British, which were the only ones that were authorized to take it.

That's just to say, with UN resolutions, what is the most important language? The verb.



For example: “condemns Syrian bombing of civilians,” “condemned in the strongest possible terms the construction of apartments for Jews in Jerusalem.” In resolution 181, the verb was *recommend*.

Now the reason they *recommended* this is because they had no power to do anything more than recommend. Why? Because any international organization only has the power granted to it. Why could the League of Nations issue mandates for territories? Because the treaty that creates the charter of the League of Nations, the countries that joined it, specifically bestowed upon it the power to deal with the territories of the defeated powers. In other words issuing mandates for the former Turkish and the German territories was an explicit power granted to the United Nations. That was actually one of the main things it was supposed to do.

The United Nations General Assembly, on the other hand, was not given any power to take any kind of binding action for obvious reasons: a majority of the nations [that formed the UN] were dictatorships, and if they could redraw the borders of countries that would not be something the United States could ever accept.

So the General Assembly does not have a power to change borders, nor did they *purport* to change the borders. They just said, “Hey, guys. look! When Israel is created, or when the mandate ends, there is going to be a fight. So why don't we try to avoid this fight; we're going to suggest splitting the mandate territory. And we suggest this very strange split with 3 Arab sectors and 3 Jewish sectors - Jaffe would actually be a little Arab enclave next to Tel Aviv. Jerusalem, the greater Jerusalem area, would be an international city. The orange part of the [Figure 3] would be part of an Arab state. Nazareth will be maybe part of an Arab state.”

So this proposal, as you can see, it looks awkward. It was regarded as awkward; and thus it was rejected both by the British and by the Arabs. So it was a proposal for a negotiated solution. It did not, in fact, change the borders, and by reference, just to give a comparison, there were similar proposals to split Iraq and create a Kurdish state. To split Lebanon, and to split Togoland, which was a mandate in Africa.

We don't go by *ideas* that people had regarding borders. The international rule for borders is what are the borders at the moment of independence? That is also why it's not relevant to look at the 1949 armistice lines, because they were created, of course, after independence; when Israel declares independence, its presumptive borders include all of this [white area from Figure 1], because this was the top level administrative unit.

Now, Israel is invaded in 1948, of course, by Jordan coming from the east, and Egypt coming from the west. But that does not mean that [Gaza and the West Bank] are not part of [Israel's mandate].

Here's another example.

Let's say that God smiles on Ukraine, and not only do they manage to beat back the Russian advance, but they actually manage to retake Crimea. Would anybody say that Russia is now occupied, or Ukraine is occupying Crimea? Of course not, because they have a claim to it? Through this legal principle *uti possidetis iuris* (meaning “you possess under law”), this basic law is for figuring out the borders of countries, and Israel is the only country to which it is not applied.

As you see, there was no West bank on the map prior to the War of Independence. The West Bank is simply the area of how far Jordan got in trying to take over all of Israel. When you retake territory that your enemy has taken from you, you're not an occupying power, you are regaining your own territory, just as if Ukraine regains Crimea.

### **Occupation defined and applied**

So what does that mean? What's an occupation? In international law an occupation is a specific situation that arises when one country comes and takes over the territory of another country and administers it.

If you come and take over your own territory, it's not an occupation. Even if it had been previously occupied by another power.

[Therefore Israel by international law definition is not an occupying power in the West Bank.]

You often hear about the the Geneva Convention, in particular, the Fourth Geneva Convention, which governs the treatment of civilians in wartime. That is a convention that applies with provisions dealing with occupied territory. But, [as I've just shown] you cannot occupy territory if it is, in fact, your own.

[Figure 4] is the Geneva Convention for the Protection of Civilians in Time of War (Aug, 1949), article 2:

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**Settlements ?**

*Figure 4*      Geneva Convention IV Relative to the Protection of Civilians in Time of War (Aug. 1949)

- Common Art. 2
  - “... 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 claims of partial or total occupation of the territory of a High Contracting party, even if the said occupation meets with no armed resistance.”

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Occupation occurs when you control the territory of a High Contracting Party. In other words, a Member State, if taking its own territory, that is, in fact, not occupation. Otherwise it would be impossible to re-conquer any kind of territory in a war.

There is simply no application of the Geneva Convention in this case, because Israel was, from the beginning, not an occupier.

I should add that even if one disagrees with the previous analysis, and believes that for some reason Israel was an occupying power from 1967, that situation came to an end in 1994, because an occupation is again a situation that is based on the existence of war (or any other armed conflict - it doesn't need to be declared). But what it does not apply to is situations of peace. That's why it's called the "Geneva Convention Relative to the Protection of Civilians in Times of War."

When did the war end between Israel and Jordan? in 1994, when Israel signed an unconditional peace treaty with Jordan. And as a result, any Israeli presence and territory formally controlled by Jordan would not be an occupation, even if after that point, one thought it was originally.

Now don't take my word for it. Jimmy Carter's State Department legal adviser, Herbert Hansel, offered a memo (not a very good one, in my opinion) that argued in 1977, that Israel wasn't an occupying power, and said further, that if they were to make peace with Jordan, all the occupation would end, and there would be no question about [their not being an occupying power].

### **"Ethnic Cleansing" and "Settlements"**

So briefly, I don't think that we need to talk too much about settlements, because the only question about settlements arises potentially if an occupation exists. If an occupation exists, Article 49 of the Geneva Convention applies. [Figure 5.]. Most of Article 49 – clauses 1 through 5, deal with the situation of what we call "ethnic cleansing." That is when you kick people out of occupied territory; in other words, you come into a territory, and you ethnically cleanse or displace the occupants. That's not about letting people move in.

*Figure 5*

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#### **Settlements?** Geneva Convention IV slide 2

- **Art. 49**
  - Clause 1: "Individual or mass forcible transfers, as well as the deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country  
I ... are prohibited, regardless of their motive...."
  
  - Clause 6: "The occupying power shall not deport or transfer parts of its own civilian population into the territory it occupies."

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Now there is this sentence, and the entire argument against Israeli settlements is based on this one sentence – Clause 6 – which again, I don't think we need to be even opening re: the

Geneva conventions, because that's only if an occupation exists and I've shown that Israel is not an occupying power.

But Clause 6, says "the occupying power shall not deport or transfer parts of its own civilian population into the territory it occupies." And immediately you see why they're called settlements, because you don't want to call them deportation or transfer centers, because that only highlights the fact that nobody has been deported and nobody has been transferred.

These [settlements] are places to which Jews have moved voluntarily of their own accord. The way the international community wants to read the sentence – only in the case of Israel – is different than in the case of many other countries that have concrete territory and, in fact, have population migration into those areas, none of which have been said to violate Article 49, clause 6. Examples include: Western Sahara, Cyprus, and even Russia and Crimea. But what they wanted to say is, the occupying power shall not deport or transfer parts of its own civilian population from its territory that it occupies, and if they should come there, it shall make their life difficult; make it impossible for them to live and make sure that it is an ethnically pure state.

Now, that's not what it says, and I don't think it's a very liberal reading of international law, because, of course, Jews lived in these areas [of Palestine] until Jordan took over here in 1949 and ethnically cleansed the Jews from the region.

So to say that settlements are illegal is, first of all a misreading of the Geneva conventions, and second of all, has the effect of saying that the Jordanian ethnic cleansing of 1949 must now be made permanent, and the areas ethnically cleansed from Jews by Jordan in 1949 must be permanently *Judenrein*, and even if it were to come under Jewish control, the Jews must now endeavor to preserve the Jordanian-created *Judenrein* status of these lands. I don't think that's consistent with the liberal spirit of international law.

And [as an answer to a question] I have not read Ilan Pappé's book *Ethnic Cleansing*.<sup>1</sup>

But anyway, I think that's enough for now, because I want to make sure we have time for questions.

## Q&A

Halley Faust: Thank you, Eugene, stated so clearly.

First question: What is made of the private purchase of land and houses in the Jerusalem area, and why do people claim that this is therefore illegal in some form? you? It's called a takeover of certain areas that in the past have been mostly occupied by the Palestinians.

Eugene Kontorovich: So I just want to say, these are 2 totally separate [legal] issues. The question of territorial sovereignty of a country is completely separate from the question of private property ownership. You could imagine a country that has certain borders, and if it

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<sup>1</sup> Transcript editor's note – this was not stated by Kontorovich: Pappé is a history fabricator as outlined in SFMEW's background, found [here](https://www.sfmew.org/more-lannan-pappe-sfmew-member-responses-and-alice-walker/) (https://www.sfmew.org/more-lannan-pappe-sfmew-member-responses-and-alice-walker/).

allows foreigners to purchase private property, all of the land inside could be owned by other people. And you can imagine the opposite.

The claim of Palestinian private ownership is simply entirely separate from the question of what the borders are, and who is sovereign. That is to say, Arabs can buy a house in Haifa, and that doesn't make Haifa not in Israel. And Arabs can buy a house in Jerusalem, and that doesn't make the house not in Jerusalem.

By the way, whatever the borders of Israel are, it's quite obviously the case that Arabs could infringe on private property rights of Jews – it happens all the time, and vice versa, because private property rights are poorly mapped and poorly delineated.

What people are saying when they say Jews are taking over houses in Jerusalem, is that, in fact, because the areas that Jordan kicked Jews out of, Jews now have no right to live in.

it's basically like saying, if a neighborhood is white, blacks are not allowed to move in because the neighbors don't like it. It's absolutely no different from saying it. But actually, it's a little bit worse, because it's saying in areas where blacks used to live, whites came and kicked them out. Now they can never also move back because the people who kicked them out aren't going to like it.

And Jews, in fact, do buy property in Arab neighborhoods, as Arabs also buy property in Jewish neighborhoods. You don't read a big stink when the latter happens. But it turns out wherever a Jew happens to buy land from an Arab, “the Arab didn't really mean to sell it.” So that becomes very suspicious, and whenever a Jew builds a house anywhere in Israel it turns out “to be private Arab property.” (I'm speaking sarcastically.)

Just to give you an idea, and you probably see this quite well, out west in the United States in 2023 two-thirds of the land belongs to either the Federal Government or the State Government. and that is after the United States has been trying to partialize and give away land for over 100 years doing a land office business.

The notion that in the sparsely populated, highly agricultural Palestine, every single strip of land belongs to some private individual is ludicrous, especially because the Turkish regime did not favor private property ownership, rather it was a feudal regime. But in any case, borders is what I'm talking about in international law and is totally separate from private property, which is a case-by-case fact-specific determination.

Halley Faust:

Second question: You are differentiating land borders vs. land ownership. And then you briefly mentioned the deportation or transfer of populations.

Some people call the now so-called settlements in West Bank a form of transfer of population. How would you characterize this? And why? Why is it, or isn't it associated with that article 49?

Eugene Kontorovich: So, first of all, nobody is actually transferred. A transfer means to take someone, pick them up and move them. What they're saying is because Israel makes it

possible for people to live there and gives them water, plumbing, and security – that's transfer. But that's just not the case.

Let's say that the US federal government built a city in the middle of the desert. That's where you guys live. Let's say they made some city. Does that mean they've transferred people there? No, the people have to go and live there. Or, if the government or power company provides power to a certain city block, does that mean the inhabitants of that block have been transferred there by the Power Company?

This is not how the word is used. Nor do we find that that is how it's understood in the context. So, for example, hundreds of thousands of Moroccans have moved into Western Sahara, which Morocco conquered in 1975. Hundreds of thousands of Russians have moved into Crimea just in the past 8 years. Turks – the majority of population of Northern Cyprus, occupied by Turkey is now Turks. In none of those cases has the international community said that a transfer has occurred.

Halley Faust: You mentioned this related to Crimea and Russia, might you extend a little bit to Cyprus re: Turkey or in Nagorno-karabakh and Armenia, or some of these other areas where we can only really learn what the rule means by seeing how it's applied in other parallel cases.

Eugene Kontorovich: You can't learn the rule that you're applying from the case in which you're trying to apply it. You have to look at the precedents. And so the precedents show absolutely no application for this rule. I can tell the International Criminal Court now, which is supposed to prosecute this crime but has decided that Russian population movements into Crimea do not qualify for prosecution, and Turkish population movements into occupied Northern Cyprus also do not qualify.

So what makes us different?

Halley Faust:

Question 3: Nancy Murray asks, "Has China violated international law by occupying Tibet?" And related, I would ask, "Has China violated international law by transferring the Uighurs, even though it wasn't into occupied territory, it was within their own territory?"

Eugene Kontorovich: So it all depends. It depends on, whether there was an independent country there. In the case of Tibet it's debatable. But you know, it's very possible that there were feudal systems. It's kind of hard to understand what's an independent country and what's a feudal vassal state.

But yes, quite arguably it was the case with that. And quite arguably, it was actually also the case with the Uighurs, because the area where the Uighurs live used to actually be an independent country called the Second East Turkmen Republic, which was actually an independent country, briefly, from 1940 something until the early fifties until China had all of it. It was actually a very weird story. China had the entire leadership [of the Uighurs] invited to Moscow for a meeting, and then they were all killed, and then China invaded. So it was an occupation. But China had not yet ratified the Geneva Convention. But it's not clear that technically the Geneva convention will be relevant on occupation before China signed it. But certainly it violates the spirit.

Now Spain and those seeking independence within Spain: that's different. Secession is completely different. We all agree the borders of Spain include Catalonia. Catalonia wants to split away. Again, it's very important to understand, there's no international rule that every ethnic group that wants their own country gets one, because otherwise there'd be no end of it. There are many, many examples. Maybe there's *moral* claims for a new state, but they're not *legal* claims.

## **On Palestinian Refugees**

Halley Faust:

Question 4: It's not a border question in this case: how are folks who are living in the West Bank currently, who identify as Palestinian – are they considered to be refugees of some kind? And then what about the legal status of those who left the area during 1948?

Eugene Kontorovich: The refugee issue is truly indeed a weird one, because there's an international legal definition of refugee, and that is someone who has left their country because of war or due to some well-founded fear of persecution or violence based on a certain basis, and then they go to a different country which is the country of refuge. For the Palestinians – and we'll see this theme a lot – the United Nations literally invented a special separate definition for refugee in the Palestinian context. The principal definition for refugee comes from the Refugee Convention, which most of the countries of the world have signed. And so that's the United Nations definition which works through the United Nations High Commissioner for Refugees.

I was a refugee. I was a refugee from the Soviet Union. I came to the US on a refugee passport. When I came to America everything's fine. I'm not a refugee any longer. My kids are not refugees.

There is a unique agency that deals just with Palestinian so-called refugees. The United Nations created a special agency. And what makes the refugee status unique is that the Palestinian refugee status is permanent and hereditary. It is actually the only status in international law which is supposed to be quite progressive; that is, hereditary. So you could have been born in Lebanon, live there all your life, and you would be considered a Palestinian refugee. Which you're not. At this point you're not taking refuge from anything. You were born in [Lebanon], and the vast majority, maybe over 90% of so-called Palestinian refugees have, in fact, been born in the country where they're supposed to be refugees.

It would be more accurate to say that they are members of a Palestinian diaspora. Not only is it a hereditary status which is anomalous in international law, it's actually only hereditary on the father's side. If a Palestinian refugee woman marries a Lebanese man, their son or daughter would not be a refugee. But if a Palestinian man marries a Lebanese woman, then that child would be a Palestinian refugee.

## **The Oslo Accords and Legal Status of the West Bank**

Halley Faust:

Question 5: What about the Oslo accords, and how they effect borders or refugee status? So you say the treaty with Jordan in 1994 establishes the West Bank.

Eugene Kontorovich: Jordan has terminated the state of war, and with no war there is no recourse or reference to the Geneva conventions.

Halley Faust: so does the Oslo Accord change the legal status, then the A B and C areas of agreement?

Eugene Kontorovich: Israel does not govern the Palestinians. People often ask, "so what about the Palestinians?" Israel made them a deal [in the Oslo Accords], and in that deal the Palestinians were given a government. That government is not a sovereign government.

But you do not need sovereignty for self-determination. That is to say, what was the American original motto of the Revolution? "No taxation without representation." What were they objecting to? They were not objecting to the fact that King George was sovereign. They were objecting to the fact that they were not represented in Parliament, even though Parliament made taxes on them.

Now, does the Israeli Knesset make taxes on the Palestinians? No. Does it draft them into the army. No. Does it create their cultural programming with a suicide bomber and Mickey Mouse, and things like this. No. Does it control their welfare system, which pays them more for the more Jews they kill [so-called pay-to-slay]? No. In other words, the Palestinians have internal self-control. The only limitations on their governance power are those that would allow them to threaten the State of Israel, in particular: to have a military, to control borders, because every country has an inherent right of self-defense.

Question 6: If the West Bank and Jerusalem are Israeli territory, does that make the Palestinians citizens?

Eugene Kontorovich: And to Mr. Shulman's question [do the Palestinians automatically become Israeli citizens if they are living in Israeli territory?], there's no rule that people living in territory that you have sovereignty over become citizens. In Switzerland, perhaps half the population are permanent residents, not citizens. They don't want to become Swiss citizens.

At the same way, if Palestinians became citizens, what would Israel be able to do to them? Tax them, draft them into the army, edit their school books, and not allow, and not allow Abbas to fly around on his plane to different countries making his own foreign policy. So it's a tradeoff: with citizenship comes certain responsibilities and gives Israel certain powers over them.

If the Palestinians became Israeli citizen I think much of the international community actually would object if Israel gave it to them, because it would also come with things Israel could make them do.

They did offer citizenship to Jerusalem Palestinians, and notice what the international reaction was. It wasn't "oh, pat-on-the-back, Israel, that's so nice. Now you've made the Palestinian citizens." It was, "How dare you! How dare you! That's annexation! That's when they passed a resolution at the United Nations Security Council condemning it.

**Massafer Yatta**



Halley Faust:

Question 7: I know there are a few people who joined today because they're very interested in the Massafer Yatta claims and issue that went through the Israeli Supreme Court.

Eugene Kontorovich: it's another private properties issue, not about sovereign borders, but it is basically about squatters and Bedouin who roam around and camp out in different places and they have for a few decades camped out in an area that happens to be a military firing zone. But clearly, an area for which they have no private property rights. They have invented a story which I think only the most gullible can believe about some ancient settlement there. When it's quite clear through photographs, that they came in the eighties at the earliest, and the government has made various attempts to evict them. And finally, they're getting serious, and the international community is saying, "No, no, no, they've been there since Jesus, the Palestinian."

Halley Faust: Unfortunately, a couple of the members of Congress led by one of the members of Congress from CD1 [Albuquerque area] New Mexico, Melanie Stansbury, wrote a letter to [Secretary of State] Antony Blinken, asking him to fix this problem because the Supreme Court of Israel unanimously ruled against the Bedouin Palestinians.

Eugene Kontorovich: How it only goes one way, right? Note that if you have some Jews who come and just squat somewhere, the international community doesn't say, "Hey, they live there. Israel can't knock down their houses. It's the opposite, right? And these people [the Palestinians] don't have deeds. They don't have any property rights. They're claiming to be able to adversely possess the State. And if that was allowed, then it should be at least allowed for Jews also. No one is suggesting that, right?"

### **The Sheikh Jarrah Neighborhood**

Halley Faust:

Question 8: We have problems similar related to [the Jerusalem neighborhood of] Sheikh Jarrah, that is a private property issue, not a government issue.

Eugene Kontorovich: They're Jewish owners. They're undisputedly the owners that just even Peace Now [a self-described "left-wing Zionist movement"] says, "Okay, they're the owners. Even if they're the owners, we don't think they should be able to exercise their property rights because they're Jewish."

Arabs evict Arabs from houses in East Jerusalem all the time. Arabs don't just squat in Jewish houses. They will try to take over each other's houses also, and guess who the Arab with the house being taken over calls? He calls the Israeli police to help him, and everyone is fine with that .

So the Arabs are OK to dispute amongst themselves on the West Bank and in Eastern Jerusalem. Israeli police get involved. But if a Jew is the property owner, what they're saying is, "Jews should not be able to exercise their private property rights because they're Jewish. And Jews should not be allowed to live in a particular place because we want there to be a Palestinian state." And the Palestinians make a unique demand: that there are no Jewish property rights or Jews in a Palestinian state.

The Kurds don't demand this. The Uighurs don't demand this. The East Timorese didn't

demand this, the Kosovars don't demand this. The Palestinians say, "We want a country with no Jews." If you want the Palestinians to have a country, you have to make sure there's no Jews. That's an extraordinary, and I would say illiberal demand.

### **Closing**

Halley Faust: Eugene, I want to thank you very much for your being with us.

Thank you to the audience for joining us. And again, thanks to the Sushmans for all their technical and other assistance. And again, if you wish to get emails from Santa Fe Middle East Watch. Please go to [sfmew.org](http://sfmew.org), and on the right hand side you can sign up. Thank you, everybody. We look forward to seeing you with our next speaker. Thank you, Eugene.