**Obama administration was hypocritical on UN’s Israeli settlements vote**

December 27, 2016

By: Mark Goldfeder

CNN

http://edition.cnn.com/2016/12/26/opinions/us-role-in-israel-un-vote-was-hypocritical-goldfeder/index.html

On Friday, the Obama administration [decided not to veto](http://www.cnn.com/2016/12/23/politics/israel-official-rips-obama-un-settlements/) a UN Security Council resolution harshly criticizing Israel and calling its settlement activity illegal. The decision not to veto was cowardly, hypocritical, wrong, and yet, thankfully, ultimately ineffectual.

Do not be misled -- the decision to abstain was not the thoughtful action of a principled leader determined to make peace no matter what the cost. At worst, it was the cowardly move of a[lame-duck politician](https://www.washingtonpost.com/opinions/global-opinions/the-obama-administration-fires-a-dangerous-parting-shot/2016/12/23/f37f03b2-c94d-11e6-8bee-54e800ef2a63_story.html?postshare=1591482548677799&tid=ss_tw&utm_term=.04d62a31e7fe) who waited until there was [absolutely zero political accountability](http://www.businessinsider.com/obama-netanyahu-usnc-vote-israel-palestine-2016-12) before [reversing](https://www.washingtonpost.com/world/middle_east/official-israel-turned-to-trump-to-head-off-un-resolution/2016/12/23/bfd84306-c8ef-11e6-acda-59924caa2450_story.html?utm_term=.f53a5c29b7fb) his previously held position on vetoing anti-Israel Security Council resolutions (despite [bipartisan calls](http://dailycaller.com/2016/12/23/dems-rail-against-administrations-support-for-anti-israel-resolution/) from congressional leadership for him to stay the course) in order to take a symbolic [parting shot](http://www.vox.com/world/2016/12/23/14071550/united-nations-vote-israeli-settlements-obama-trump)at Prime Minister Benjamin Netanyahu, and President-elect Donald Trump.

At best, it was another failed attempt by President Obama to impose his will by any means available on a situation that he [has never fully understood](https://www.washingtonpost.com/opinions/what-obama-did-to-israel/2011/05/26/AGJfYJCH_story.html?utm_term=.9248fe504164)-- despite the fact that the entire time he had any political accountability he explicitly said that he would never sink to use these means, which he [acknowledged are ineffective](http://www.nytimes.com/2011/02/19/world/middleeast/19nations.html), and in fact even counterproductive because they encourage the parties to harden their positions and refrain from further direct negotiations.

That is why the decision Friday was so troublingly hypocritical - to [quote](https://www.whitehouse.gov/the-press-office/2011/09/21/remarks-president-obama-address-united-nations-general-assembly) from President Obama himself, in a speech at the United Nations itself in 2011 (when he did veto a similar proposal, right in the midst of his reelection campaign):

"Peace is hard work. Peace will not come through statements and resolutions at the United Nations -- if it were that easy, it would have been accomplished by now. Ultimately, it is the Israelis and the Palestinians who must live side by side. Ultimately, it is the Israelis and the Palestinians -- not us --- who must reach agreement on the issues that divide them: on borders and on security, on refugees and Jerusalem."

### History of the dispute

Apart from the hypocrisy, the president's decision was also wrong, as a matter of law.

Some brief history is in order. In 1922 the [League of Nations Mandate for Palestine](http://www.mandateforpalestine.org/)established an area (which included the West Bank) to be a national home for the Jewish people. Article 6 of the mandate explicitly encouraged "[close settlement by Jews on the land](http://avalon.law.yale.edu/20th_century/palmanda.asp)." ("The Administration of Palestine, while ensuring that the rights and position of other sections of the population are not prejudiced, shall facilitate Jewish immigration under suitable conditions and shall encourage, in co-operation with the Jewish agency referred to in Article 4, close settlement by Jews on the land, including State lands and waste lands not required for public purposes.")

When the United Nations was formed it affirmed existing arrangements of this nature, and after Britain announced that it would leave the area, the United Nations proposed a [partition plan](http://www.mefacts.com/cached.asp?x_id=10903)that was not accepted by the relevant sovereign parties, (because the Arab world rejected it) leaving the Mandate lines [unrevised](http://maurice-ostroff.tripod.com/id45.html).

Scholars such as Eugene Kontorovich and Abraham Bell have [noted](https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2745094) that under the international legal principle of Uti possidetis juris, "widely acknowledged as the doctrine of customary international law that is central to determining territorial sovereignty in the era of decolonization," emerging states presumptively inherit their pre-independence administrative boundaries, and thus international law clearly dictates that Israel inherit the boundaries of the Mandate of Palestine as they existed in May, 1948. Israel thus has title to the land.

When Israel declared independence in 1948 it was [immediately attacked](https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2745094) by five Arab nations. The United Nations blamed the Arabs for the violence and aggression meant to undermine the Resolution and forcefully take land, and the Spokesman for the Arab Higher Committee [readily agreed](http://www.jewishvirtuallibrary.org/jsource/History/1948_War.html).

If there was ever an occupation of Palestinian territory under international law, it happened between 1948 and 1967, when two of the invading Arab armies, Jordan (West Bank) and Egypt (Gaza Strip) occupied territory that they had taken through aggressive action -- the kind of aggressive action that the new Resolution explicitly reminds us is forbidden under international law.

This was, of course, territory that was part of the Mandate for Palestine and therefore rightfully under Israeli title: from 1949 to 1967, Jordan and Egypt literally occupied Palestine. The Green Line was drawn for no other reason than to mark off on a map how far the two invading armies had managed to get. The armistice agreements themselves state that these [were not ever meant to be actual borders](http://avalon.law.yale.edu/20th_century/arm03.asp). Thus to give meaning under international law to these 'pre-67 lines' is, ironically, to retroactively ratify aggression against the mandate and support occupation.

In 1967, Israel regained those territories in what was undisputedly a [defensive war](http://honestreporting.com/the-six-day-war-forty-years-on-2/). While the UN charter forbids aggression, [UN Charter Article 51](http://worldpress.org/specials/iraq/article51.htm) clearly recognizes "the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations." In 1967 then, Israel legitimately regained sovereignty having never lost title.

To [quote](http://www.maurice-ostroff.org/test/id248.html) Former State Department Legal Advisor Professor Stephen Schwebel, who later headed the International Court of Justice in the Hague: "Where the prior holder of territory had seized that territory unlawfully, the state which subsequently takes that territory in the lawful exercise of self-defense has, against that prior holder, better title."

As this was the [only defensive re-conquest](http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1685&context=cjil) of previously occupied territory that has ever happened under the UN charter one might be forgiven for wondering if the law on point is somewhat murky, but it is not; Kontorovich and others note that pre-1967 sources evidence the fact that defensive conquest would be considered legitimate, but the truth is that even if the law was somehow grey in this area, one of clearest doctrines of international law is the [Lotus principle](http://opil.ouplaw.com/view/10.1093/law:icgj/248pcij27.case.1/law-icgj-248pcij27), which says that sovereign states may act in any way they wish so long as they do not contravene an explicit prohibition, i.e. if there is no law against it -- and there is no law against defensive re-conquest - then it is legal under international law.

In short; Israel was given land under a Mandate that was never repealed, two other countries attacked Israel and squatted on the land for a while, and then, when they attacked Israel again and lost, Israel regained the land she had originally been given. Israel has exclusive title and sovereignty; from an international law perspective this is not an occupation.

### What everybody "knows"

How then, does every layperson 'know' with heartfelt surety that Israel's 'occupation' is illegal under international law?

Because, as Mark Twain [ironically never said](http://quoteinvestigator.com/2014/07/13/truth/), "A lie can travel halfway around the world while the truth Is putting on its shoes."

The occupation myth relies on the fact that the UN has continually condemned the Israeli 'occupation,' and people mistakenly believe that the UN's resolutions are internationally binding. The truth is that according to [Article 10](http://www.un.org/en/sections/un-charter/chapter-iv/index.html)of the UN's own Charter, General Assembly Resolutions are generally not binding, and do not create international law. UN Security Council Resolutions are theoretically binding in limited circumstances, when the Council is using its[UN Charter Chapter VII powers,](http://www.un.org/en/sections/un-charter/chapter-vii/) which deal with threats to the peace, breaches of the peace, or acts of aggression, but the Security Council has never made such a declaration regarding Israel.

The new resolution condemning the settlements was actually adopted under [Chapter VI](http://www.un.org/en/sections/un-charter/chapter-vi/index.html), which simply authorizes the Security Council to issue non-binding recommendations dealing with the peaceful settlement of disputes.

And so thankfully, aside from being wrong as a matter of law, the new Resolution is also ultimately, completely ineffectual, because despite what people might think, the resolution was merely the expression of a political opinion, and not, in any way, binding international law.

### Anti-Israel bias at UN

In his last speech to the Security Council just this month, outgoing Secretary General Ban Ki-Moon [admitted](http://www.jpost.com/Israel-News/UN-chief-urges-Israeli-lawmakers-to-reconsider-settlement-bill-475617)that there has been an anti-Israel bias at the United Nations, noting that, "Decades of political maneuverings have created a disproportionate volume of resolutions, reports and conferences criticizing Israel." In her abstention statement Friday, US Ambassador Samantha Powers[said](http://www.timesofisrael.com/full-text-of-us-envoy-samantha-powers-speech-after-abstention-on-anti-settlement-vote/) that, "One need only look at the 18 resolutions against Israel adopted during the UN General Assembly in September; or the 12 Israel-specific resolutions adopted this year in the Human Rights Council -- more than those focused on Syria, North Korea, Iran, and South Sudan put together -- to see that in 2016 Israel continues to be treated differently from other Member States." And yet Powers abstained, and Ban wholeheartedly welcomed the resolution. Neither of them seemed to notice that once again Israel was being singled out for disparate treatment.

The settlements issue is actually a good example of this phenomenon: While the resolution condemned Israeli settlements as 'illegal' and obstacles to peace, the fact that the EU has been [funding](https://www.gatestoneinstitute.org/9490/illegal-settlements) the building of Palestinian settlements in the disputed territories somehow was not even mentioned, let alone condemned as illegal, or an obstacle to peace. Most of the new Palestinian settlements have been built in Area C of the West Bank, territory which, according to the Oslo Accords signed in 1993 between the Israeli and the Palestinians, "falls under full Israeli civil and security control," according to the [Times of Israel](http://www.timesofisrael.com/israel-clamping-down-on-illegal-eu-building-in-west-bank/). So when Ban Ki-Moon calls the Israeli settlements illegal, he is not just legally [wrong](http://www.theblaze.com/stories/2014/02/24/challenging-the-long-held-notion-that-israeli-settlements-are-illegal/), but also [deeply hypocritical](https://www.algemeiner.com/2016/12/21/ban-ki-moons-last-hypocritical-hurrah/).

### The politics

Which is not to say that on a political level the settlement issue is at all clear-cut. It is certainly true that the areas in question are disputed territory, and that "settlements are one of the obstacles to peace" in the sense that it would be helpful for the negotiations (at least for one side) if Israel would stop.

But it is also true that there is no consensus on what other "obstacles" there are, or how many there are, or how much of an "obstacle" the settlements are, or why only Israeli and not Palestinian settlements, and whether the Israeli settlements, which actually cover only [1.7 percent](http://www.standwithus.com/online_booklets/Settlements/Settlements.pdf) of the disputed West Bank territory, are in fact a necessary bargaining chip for Israel to hold when dealing with an opponent that still refuses to recognize its very right to exist.

And it is equally true that Israel has already given back the vast majority of the land it regained; that [98 percent](http://www.standwithus.com/online_booklets/Settlements/Settlements.pdf)of Palestinians in the West Bank already live under Palestinian, not Israeli rule; and that recent land-for-peace moves by Israel, including uprooting Israeli settlements, has led to more violence, and not peace.

Regardless, none of these political considerations make the legal argument(s) any different. It is important to remember that neither the UN (except in limited circumstances) nor the US make international law, and that the opinions they express about international law, and what it should be, are often simply political in nature, intended to pressure parties into conforming with a particular agenda. But the truth is that aside from being wrong and ineffectual, even from a political standpoint the U.S. allowing the Resolution to pass was likely actually harmful to the overall peace process.

As President Obama once famously explained, resolutions are not the way to make peace, negotiations are. And as former UN Ambassador for the United States Susan Rice explained when she[vetoed the 2011 vote](http://edition.cnn.com/2011/WORLD/meast/02/18/un.israel.settlements/), all these resolutions do is [make negotiations that much harder](https://www.theguardian.com/world/2011/feb/19/us-veto-israel-settlement).

So long as institutions like the United Nations continue to issue one-sided statements that ignore foundational concepts in international law, pressuring Israeli leadership to concede more and more while ignoring their previous concessions (i.e. like the ripping up of Jewish settlements in Gaza, which led not to peace but to Hamas terror tunnels and rockets, or the fact that Israel has already [returned](http://www.jewishvirtuallibrary.org/jsource/myths3/MFboundaries.html)roughly 95 percent of the territory it legitimately regained in 1967) and failing to hold Palestinian leadership accountable for their actions ([inciting hatred](http://zoa.org/2016/03/10316214-new-study-shows-abbas-p-a-still-inciting-hatred-murder-of-jews/)) and statements ([refusing to recognize](http://www.israelnationalnews.com/News/News.aspx/152676) Israel's right to exist), real peace cannot happen.

These resolutions are annoying and sad -- they incentivize Palestinian leadership to try and play end games around Israel instead of engaging directly with their bargaining opponent, and they leave Israel less inclined to even try.

In pulling his veto on the eve of Hanukkah President Obama failed to heed the lesson of the holiday. Historically speaking, unlike his own administration, when Israel faces illegitimate and unjust pressure to conform it does not bend. Instead it continues to shine its light as the only real democracy in the entire Middle East, with faith that its light will not be diminished but will eventually spread and grow.