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Understanding the Issue of Israeli  
Settlements and Borders

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# Understanding the Issue of Israeli Settlements and Borders

The issue of Israeli settlements in the West Bank are a point of dispute between Israel and both the U.S. and the E.U. Just this summer more than a dozen E.U. states published warnings to their citizens not to invest in any Israeli settlements or in any entities connected to them. The statement coming out of European capitals argued that the settlements constituted “an obstacle to peace” that made a two state solution impossible. <sup>1</sup>

The announcement by the European states also included a statement defining any Israeli settlement activity in the West Bank or even East Jerusalem as a breach of international law. What clearly is emerging is that there is a wide gap between how Israel understands the settlements issue and the sentiment in important parts of the international community. Were the settlements really going to obstruct the achievement of a stable Middle East peace in the future? Were they inconsistent with international law?

## The Historical Framework for Understanding How Israel Understood the Settlements

The settlements issue is really part of the larger territorial question in the Israeli-Palestinian conflict. It should be recalled that as a result of the 1967 Six Day War, Israel captured territories from states belonging to an Arab military coalition that had massed their forces along Israel’s borders and thus posed an immediate threat to its existence. As a result the conflict that followed, Israel took control of the Sinai Peninsula and the Gaza Strip from Egypt, in the north, Israel captured the Golan Heights from Syria, and along its central front, Israel entered the West Bank which had been under the Hashemite Kingdom of Jordan. Israel also took control of East Jerusalem, which had been occupied by the Jordanians, since it was taken by the Arab Legion in 1948.

Israel understood that it was not expected to withdraw from all the territories that it had captured, but rather was entitled to new international boundaries that would replace the fragile armistice lines which had set the

stage for war against it. True, the Soviet Union tried to brand Israel as the aggressor right after the war in both the UN Security Council and the General Assembly, but failed to obtain the necessary votes. It was clear that Israel entered the territories it captured in a war of self-defense, which granted it legal rights, under international law, to argue that it was entitled to modify its future borders.

Indeed, after the Six-Day War, the main resolution adopted by the UN Security Council in November 1967 that would become the cornerstone of all future Arab-Israeli peace agreements was Resolution 242. It specifically called for an Israeli withdrawal «from territories,» but not «all the territories.» It also stated that the states of the region were entitled to «secure and recognized boundaries.»

What was meant by the phraseology? Lord Caradon, the British ambassador to the UN in 1967 who drafted Resolution 242, in consultation with the UK and U.S. governments, explained this language in subsequent interviews: «We could have said: well, you go back to the 1967 line. But I know the 1967 line, and it’s a rotten line». As a result, he explained the intent of the resolution’s language: «**We didn’t say there should be a withdrawal to the ‘67 line;** we did not put the ‘the’ in, we did not say ‘all the territories’ deliberately” (emphasis added).

The legal grounds for taking this position were facilitated by the fact that the pre-war boundaries had only been armistice demarcation lines, and not international borders. Moreover, in the West Bank, the previous power controlling the area was the Hashemite Kingdom of Jordan; its claim of sovereignty over the territory that was asserted after Israel’s War of Independence in 1948 was not accepted by the international community. Only Britain and Pakistan backed the Jordanian claim. Resolution 242, which had to take all these factors into account, implicitly recognized that a new permanent international border had to be drawn that could differ from the pre-1967 line.<sup>2</sup>

Britain’s Foreign Secretary, George Brown, to whom Lord Caradon reported, also backed his interpretation years later: «I formulated the Security Council Resolution. Before we submitted it to the Council, we showed it to Arab leaders. The proposal said “Israel will withdraw from territories that were occupied,” and not from “the” territories, **which means that Israel will not withdraw from all the territories**” (emphasis added)<sup>3</sup>.

The diplomatic history surrounding UN Security Council Resolution 242 is significant for the settlements issue because many of Israel's harshest critics believe that Israel is required to withdraw from all the territory it captured in 1967 and that it has no right whatsoever to retain any part of the West Bank as a result. But this understanding of Israel's requirements is simply incorrect regardless of whether one supports its right to build settlements or not.

Israel offered to negotiate these territorial issues with the Arab states immediately after the Six Day War. When confronted with a firm refusal, that was formalized in the Arab League Summit in Khartoum on September 1, 1967, Israel began to stake out its territorial claims to new boundaries with civilian settlements that were established largely in areas of vital strategic importance to the defense of Israel. In the area of Jerusalem, new Israeli neighborhoods were also planned and built, many of which were located on strategic hilltops encircling Jerusalem, which had also served as firing positions for artillery that had pounded Israeli neighborhoods at the start of the Six Day War.

The first formal plan submitted to the Israeli government for settlement construction was prepared by Yigal Allon, the deputy prime minister, who commanded Israel's pre-state strike forces (the Palmach) during the 1948 War of Independence. He presented to the cabinet a plan already on July 26, 1967 for erecting civilian outposts and military bases in the territories that would eventually be attached to Israel, in accordance with Israel's security needs. Allon was an extremely significant figure since he also was a mentor to Yitzhak Rabin, who served under Allon in the Palmach, and would become Israel's prime minister in the 1970s and then again in the 1990s.<sup>4</sup>

According to Allon, the new Israeli presence was supposed to be located within a 10-15 kilometer strip along the Jordan River and in the Judean Desert, including a connecting road between Jerusalem, and the Dead Sea. This strip was conceived to be a forward defense line for preventing terrorist infiltration and for containing a conventional military attack. Allon helped establish Maale Adumim, which was founded in 1975 about seven kilometers east of Jerusalem. Today it is Israel's largest settlement, with 37,000 residents. However, what became known as the Allon Plan was never formally adopted. Nevertheless, it guided the strategic thinking of Labor governments in Israel for years to come.

In addition to Allon's territorial recommendations there were sites in the West Bank, where there had been Jewish residents prior to 1948 that had been overrun by invading Arab armies during Israel's War of Independence, like the Etzion Bloc settlements. These included Jewish villages in the vicinity of Jerusalem that fell to the Jordanians back in 1948, like Naveh Yaakov and Atarot. Now these were reclaimed. There was also the West Bank town of Hebron that had a Jewish community that was slaughtered in 1929 by Arab rioters. In the aftermath of the Six-Day War, some of the earliest settlement initiatives were from this category of recovered lands as well.

It is often forgotten that the Jewish people had a presence in parts of the West Bank prior to 1948 and that the settlements were not created in a legal vacuum. The original British Mandate over Palestine, from August 12, 1922, that was issued by the League of Nations, recognized the right of the Jewish people to a homeland that did not distinguish between the territory that would become Israel and the West Bank. Previously, since 1517, sovereignty over this territory had been exercised by the Ottoman Empire.

But in the Treaty of Sevres (1920) and the Treaty of Lausanne (1923), the Ottoman Empire formally renounced any title to the Supreme Allied and Associated Powers over the area that was to become the British Palestine Mandate. These states in turn exercised their power of disposition to grant the former Ottoman territories to the peoples of the Middle East; the Treaty of Sevres granted recognition to the historical connection of the Jewish people with Palestine, and to the grounds for reconstituting their National Home in that country." These treaties set the stage for the rights granted to the Jewish people in the British mandate.<sup>5</sup>

The Mandate document specifically called on the British to "encourage, in co-operation with the Jewish agency referred to in Article 4, **close settlement by Jews on the land...(emphasis added)**". The rights outlined by the League of Nations were not terminated when the organization was dismantled after the Second World War, but rather were preserved by its successor organization, the United Nations (UN Charter, Article 80). Thus the desire of Israelis to claim certain territory in the West Bank had legal roots dating back not only to 1967, but also to internationally mandated resolutions adopted after the First World War by the world community.<sup>6</sup>

## Settlements and Peacemaking

How did this initial settlement initiative affect the peace process years later? Did the settlements preclude any peace arrangements? When Egyptian President Anwar Sadat visited Jerusalem in November 1977 and new chapter in Arab-Israeli negotiations began. In the aftermath of the 1978 Camp David Agreement and the 1979 Egyptian-Israeli Treaty of Peace, Israel's prime minister, Menachem Begin decided that he was prepared to fully withdraw from the entire Sinai Peninsula in exchange for a peace treaty.

At that time there were multiple Israeli settlements in eastern Sinai, including the city of Yamit. But the settlements in Sinai did not ultimately prove to be an obstacle for the peace agreement. In 1982, Begin ordered that all Sinai settlements be removed and was supported by his minister of defense Ariel Sharon. Years later, in 2005, when Sharon was prime minister and he decided on a unilateral Israeli disengagement from the Gaza Strip, he again oversaw the removal of the Gaza settlements and the 9,000 Israeli residents who lived there.

## The Legal Dimension of Settlements

The legal status of the settlements has been a contentious issue in the international legal community. Israel's Supreme Court never argued that the settlements were illegal. Israeli jurists pointed out that there was no previous sovereign in the West Bank prior to 1967, since Jordan's claim to sovereignty was not recognized by the majority of states, except for Britain and Pakistan. Therefore the international conventions for the protection of civilians in occupied territory, which would provide the guidelines for the legality of settlements, do not apply in this situation.<sup>7</sup>

On the American side, Eugene Rostow, a former dean of Yale Law School who was also Undersecretary of State in the Johnson years, would write years later that "Israel has an unassailable legal right to establish settlements in the West Bank." Behind much of this argument was the question of whether Israel could claim legal title to at least some of the territories it captured in the 1967 Six-Day War.

Eugene Rostow argued that Israel's claims to the territory were "at least as good as those of Jordan." Prof. Stephen Schwebel, who would become the

State Department legal advisor and subsequently the President of the International Court of Justice in The Hague, went a step further when he wrote in 1970 in the authoritative *American Journal of International Law* that “Israel has better title in the territory of what was Palestine, including the whole of Jerusalem, than do Jordan and Egypt.” On July 29, 1977, Secretary of State Cyrus Vance stated that “it is an open question as to who has legal right to the West Bank.”

In the late 1960s, the Johnson administration was critical of Israeli settlement activity, but did not characterize the settlements as illegal. It was not until the Carter administration that the State Department Legal Advisor, Herbert Hansell, expressed the view that the settlements violated international law. The Carter policy was reversed by all of his successors. Thus, President Ronald Reagan declared on February 2, 1981, that the settlements were “not illegal.” He criticized them on policy grounds, calling them “ill-advised” and “proactive.”<sup>8</sup>

The question about the legality of settlements came from how various legal authorities interpret the applicability of the 1949 Fourth Geneva Convention relative to civilian persons in times of war. Article 49 of the convention clearly prohibits “mass forcible transfers” of protected persons from occupied territories. Later in the article, it states that “the occupying power shall not deport or transfer parts of its own civilian population into the territory it occupies.”

American interpretations of this article maintained that this language referred to forcible deportations that were practiced by the Nazis in Eastern Europe and not to Israeli settlement activity. For example, the authors of the resolution had in mind the expulsion of German Jews to Poland where they were exterminated in death camps.

During the Bush (41) administration, the U.S. ambassador to the UN in Geneva, Morris Abram, explained that he had been on the U.S. staff during the Nuremberg trials and hence he was familiar with the “legislative intent” behind the Fourth Geneva Convention. He stated on February 1, 1990, that it applied to forcible transfers and not to the case of Israeli settlements.<sup>9</sup>

It should be added that in parts of the Israeli legal community, charging that settlement activity could be comparable to the forcible evictions by the Nazis during the Second World War was regarded as repulsive. When Israel had to vote on whether it accepted the Rome Statute creating the International

Criminal Court, the head of its delegation, Judge Eli Natan, explained that while it gave him great pain to vote against the creation of the court, Israel could not vote for a politicized statute that defined settlement activity among the “most heinous and serious war crimes.”

For Natan, who was himself a Holocaust survivor, as well as for his team, this was a vulgar charge. The U.S. stood with Israel against these abuses in the founding document of the International Criminal Court, which implied that the State of Israel, a country made up partly by survivors of the Holocaust, was guilty of crimes on the same order of magnitude as what its perpetrators had committed.

## Settlements and Past Israeli-Palestinian Agreements

Many observers are surprised to learn that settlement activity was not defined as a violation of the 1993 Oslo Accords or their subsequent implementation agreements. During the secret negotiations leading up to the signing of Oslo, Yasser Arafat instructed his negotiators to seek a “settlement freeze,” but Prime Minister Yitzhak Rabin and Foreign Minister Shimon Peres refused to agree to Arafat’s demand. Nonetheless, Arafat agreed to the Oslo Accords despite the lack of a settlement freeze.

Under the Oslo II Interim Agreement, the West Bank was divided into areas A and B, where most of the Palestinian population lived and the Palestinian Authority had full civilian control, and Area C, where Israel continue to exercise civilian responsibilities. Thus, the Oslo Agreements recognized Palestinian responsibility for zoning and planning in Areas A and B as well as Israeli responsibility for zoning and planning in Area C, which also contained the Israeli settlements.

From the perspective of the agreement, the Palestinians could build in their cities and villages in areas A and B, while Israel could build in its settlements in Area C. These understandings were part of the Interim Agreement that was signed by PLO Chairman Yasser Arafat and Israeli Prime Minister Yitzhak Rabin in the White House on September 28, 1995. Also signing this agreement, as witnesses, were the US, Russia, the European Union, and Norway. Egypt and Jordan were also witnesses to the agreement.<sup>10</sup>

It is important to recall that the Oslo Accords were essentially an interim arrangement; they stipulated that the issue of settlements would be addressed

in permanent status negotiations. Rabin was clear on this point when he sought ratification of the 1995 Interim Agreement in the Knesset: “I want to remind you: we committed ourselves, that is, we came to an agreement, and committed ourselves before the Knesset, not to uproot a single settlement in the framework of the interim agreement, and not to hinder building for natural growth”. If the U.S. or the E.U. are subsequently seeking to constrain Israeli settlement activity, it is essentially trying to obtain additional Israeli concessions that were not formally required according to Israel’s legal obligations under the Oslo Accords.<sup>11</sup>

Settlements became a far more salient issue with the release on May 4, 2001, of the report of a commission headed by Senator George Mitchell that sought to address the outbreak of the Second Intifada in 2000 and to propose a return to negotiations. The Mitchell Report recommended that as a part of confidence-building measures between the parties, “Israel should freeze all settlement activity, including the ‘natural growth’ of existing settlements.” The Bush (43) administration adopted the Mitchell Report, putting the settlement issue right in the center of U.S.-Israeli discussions.

It appeared at the time that the U.S. felt itself to be in an awkward position as an honest broker in peacemaking if Israel were to expropriate more land for settlement growth during the course of future negotiations. To address this concern, the Sharon government proposed a formula whereby Israel could continue to build within existing settlements, but only from the outer ring of construction inward in each settlement. That way, Israel could address the need for natural growth without taking more land for Israelis living in the settlements. These ideas came up in discussions between Secretary of State Colin Powell and Foreign Minister Shimon Peres.

As the Bush administration drafted its 2003 Roadmap for Peace, it decided to include the Mitchell Report’s settlement freeze – that included natural growth. Dov Weisglass, who headed Sharon’s negotiating team on the settlement issue, has explained that Sharon had serious reservations about the proposed freeze. According to Weisglass’ account in *Yediot Ahronot* on June 2, 2009, in order to facilitate the Israeli government’s acceptance of the Roadmap, Israel reached an understanding with the U.S. about what exactly a settlement freeze entailed. The two sides concluded:

1. No new settlements would be built.
2. No Palestinian land would be expropriated or otherwise seized for the purpose of settlement.

- 3 Construction within the settlements would be confined to “the existing line of construction.”
- 4 Public funds would not be earmarked for encouraging settlements.

Weisglass wrote a letter to U.S. National Security Advisor Condoleezza Rice on April 18, 2004, in which he reconfirmed what he described as the “agreed principles of settlement activity,” indicating that it was his understanding at the time that such an understanding indeed existed. He also wrote that his government undertook to remove what were known as “unauthorized outposts” – small settlement extensions that were constructed at local initiative without formal Israeli government approval.

However, the Bush administration and the Sharon government never put these understandings in writing, which has allowed the Obama administration to question their existence and validity, even if such commitments were made. Thus, Secretary of State Hillary Clinton told George Stephanopoulos on June 7, 2009, during a broadcast of ABC’s *This Week*: “Well, that was an understanding that was entered into, so far as we are told, orally. That was never made a part of the official record of the negotiations as it was passed on to our administration. No one in the Bush administration said to anyone that we can find in our administration....”

President Bush’s deputy national security advisor, Elliot Abrams, has been partially supportive of Weisglass’ claim. He wrote in the *Washington Post* on April 8, 2009, that the U.S. and Israel negotiated specific guidelines for settlement activity, but they were never “formally adopted.” On its part, Israel nonetheless felt that it had committed itself, despite the lack of any signed agreement, so that it largely adhered to those guidelines for over five years. According to Abrams, the formula succeeded in creating a situation whereby “settlement activity is not diminishing the territory of a future Palestinian entity.”

## How Much Land Are the Settlements Sitting On?

There is a political objection in much of the international community to any continued construction in Israeli settlements, even if it is for natural growth of the Israeli population alone. This is based on the perception that the settlements are “gobbling up” increasingly larger swathes of territory, leaving nothing for the Palestinians. Some argue that Israeli settlements are precluding the achievement of a two-state solution, as well. The criticism

of Israel in European circles emanates from what Western diplomats hear from the Palestinians themselves, either directly or through their television appearances in the international media.

But recent disclosures have raised serious questions about whether the settlement issue is a real Palestinian concern or merely an excuse for avoiding concrete negotiations. For example, Chief Palestinian Negotiator Saeb Erekat was interviewed in Arabic on Radio al-Shams on Nov. 3, 2011. At one point, he began talking about the settlements, but he stated that according to photographic evidence he had received from Europe, the built-up area of all the Israeli settlements together in the West Bank, along with the Jewish neighborhoods in east Jerusalem, comprise 1.1 percent of the territory. He then admitted: “The exact percentage of the built-up area is insignificant.”

Erekat was not alone. Palestinian Authority President Mahmoud Abbas also used the 1.1% figure in a conversation with Professor Bernard Avishai that was published in *The New York Times Magazine* on Feb. 13, 2011. Abbas argued on this basis that his offer of a land swap involving 1.9% of the West Bank to former Prime Minister Ehud Olmert was a generous proposal, since it entailed more territory than Israel needed in order to annex its settlements.

Taking Abbas at his word, if all the built-up area of the settlements is only 1.1% of the West Bank, then how much additional territory would be involved if Abbas acquiesced to natural growth of the Jewish population? Maybe, the number would reach 0.0002%? Whatever the precise number, it is an infinitesimal amount of land. Was this worth stopping negotiations with Israel?

Moreover, the Palestinians had negotiated with past Israeli governments that also built in the territories. After all, there was no settlement freeze in the original 1993 Oslo Accords or in the subsequent implementation agreements that were reached throughout the rest of the decade. At one point in an extremely revealing interview that Abbas gave to *Newsweek* in 2011, the Palestinian leader charged that the US pushed him to demand a settlement freeze during recent negotiating rounds: “It was Obama who suggested a full settlement freeze.” The Palestinians took on this demand and made it a core requirement of their diplomacy in recent years.<sup>12</sup>

Ironically, the US was sometimes critical of the Palestinians when they raised the settlement issue subsequently. In a meeting held at Chatham House in

London on Oct. 17, 2011, former U.S. special envoy Senator George Mitchell raised his own doubts about the Palestinian demand for a settlement freeze. He remarked that he personally negotiated a 10-month halt in new housing construction in the West Bank. He then admitted that the Palestinians had complained about the settlement freeze he achieved saying that “it was worse than useless.” For nine months, he said, they refused to negotiate and then in the tenth, they suddenly stated that the freeze they had rejected needed to be renewed: “What was worse than useless a few months before became indispensable.”

In truth, the settlements probably are sitting on more land than just 1.1% of the West Bank. There are access roads and perimeter fences beyond the line of building that need to be taken into account. But even if the territory involved with these additional considerations reaches 5% of the West Bank, the implications of Israeli construction are still minimal, especially if Israel were to build within the outer line of construction and refrain from building outwards, as it proposed during the talks between the Sharon government and the Bush administration.

## Conclusions

The settlements are plainly an issue of international debate. But practical ideas have been proposed which should be further considered about how to progress with a peace agreement anyway. Some of the ideas in past negotiations recognized that the settlements might be organized into settlement blocs, which was supported by the US in the past.

Palestinian negotiators understood the utility of this idea as well. It is possible by using the concept of the settlement blocs to incorporate the vast majority of settlers into Israel through contiguous roads. Equally, the settlements do not have to disrupt Palestinian contiguity. But for foreign ministries in Europe and elsewhere to issue blanket condemnations of any natural growth in settlements will only harden the Palestinian position and make a final agreement more difficult to reach.

In the meantime, settlements have become an exaggerated issue in the diplomatic discourse over Israel. Settlement activity, like the construction of homes and schools, does not constitute a violation of Israel’s signed agreements with the Palestinians. Indeed, as was pointed out, the Oslo Agreements were signed without a settlement freeze. Those agreements

allowed Israel to build in the areas under its jurisdiction as these allowed the Palestinians to build in the areas under their jurisdiction.

The assertion that settlement activity is a violation of international law is not universally accepted, though it is frequently stated in UN debates and in the declarations of the European Union. Nonetheless many European states are running ahead and limiting European economic ties with Israel because of the settlements issue by saying that commercial agreements with Israel should not be applied to territories where Israel's sovereignty is not recognized. This standard is not applied in other contested areas of the world from the Western Sahara to Northern Cyprus raising questions of whether it is a policy based on international law or on double standards against the Jewish state.

## Notes

- 1 Barak Ravid, "Another 12 European States Warn Against Doing Business with the Settlements," *Haaretz*, July 4, 2014.
- 2 MacNeil/Lehrer Report, PBS Television, March 30, 1978
- 3 *Jerusalem Post*, Jan. 23, 1970,
- 4 Yigal Allon, *In Search of Peace* (Tel Aviv: Hakibbutz Hameuchad, 1989) pp. 16-27. (in Hebrew)
- 5 Ian Brownlie, *Principles of Public International Law* (Seventh Edition) (Oxford: Oxford University Press, 2008) pp. 130-131.
- 6 <http://unispal.un.org/UNISPAL.NSF/o/2FCA2C68106F11AB05256BCF007BF3CB#sthash.WhDGWaSF.dpuf>
- 7 Malcolm N. Shaw, *International Law* (Cambridge: Cambridge University Press, 2008) pp.1178-1179. One noted Israeli legal authority who thought that the settlements contravene the provisions of the Fourth Geneva Convention was Theodor Moran, the legal advisor to the Israeli Foreign Ministry in September 1967, when he prepared a memo on the matter. See Gershon Gorenberg, *The Accidental Empire: Israel and the Birth of the Settlements* (New York: Henry Holt and Company, 2006) p.99.
- 8 Nicholas Rostow, "Are the Settlements Illegal?" *The American Interest*, Vol V. No. 4, March/April 2010.
- 9 Alan Baker, "The Settlements Issue: Distorting the Geneva Convention and the Oslo Accords," Jerusalem Issue Brief, Volume 10, Number 20, January 5, 2011, Jerusalem Center for Public Affairs.
- 10 Ibid.
- 11 See Address of Prime Minister Yitzhak Rabin, October 5, 1995 at: [http://www.mfa.gov.il/MFA/MFAArchive/1990\\_1999/1995/10/PM+Rabin+in+Knesset+-+Ratification+of+Interim+Agree.htm](http://www.mfa.gov.il/MFA/MFAArchive/1990_1999/1995/10/PM+Rabin+in+Knesset+-+Ratification+of+Interim+Agree.htm)
- 12 "Palestinian Leader Mahmoud Abbas's Frustration with Obama," *Newsweek*, April 24, 2011.

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