

ISRAEL'S RIGHTS REGARDING TERRITORIES AND THE SETTLEMENTS IN THE EYES OF THE INTERNATIONAL COMMUNITY

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For over fifty years, in countless United Nations resolutions adopted virtually *verbatim* year after year on various aspects of the Middle East problem, and specifically on issues regarding the territories, the reference to Israel is almost exclusively couched in terms of “*Israel, the occupying Power*” and the reference to the territories is termed “*the occupied Palestinian territories*.” Similarly, reference to Israel’s settlement policy consistently includes the element of illegitimacy or illegality.

These general and all-embracing terms have become the “*lingua franca*” of the United Nations – accepted phrases that neither generate nor attract any thought or discussion as to their legal, historical, or political accuracy. Nor do they connect with ongoing developments in the region. They are merely accepted as part of the reality of the UN General Assembly and other organs within the UN system.

As an illustration, one need merely refer to fourteen of the resolutions on the Middle East issue that were adopted at the recent 65th General Assembly in 2010,¹ to grasp the repetitiveness and the automatic usage of the above phrases in their various clauses. If one multiplies this number by over fifty years of constant repetition and brainwashing in UN resolutions, one may well perceive how the phrases “*Israel, the occupying Power*” and “*occupied Palestinian territories*” have indeed become accepted, standard UN terminology.

Strangely enough, this description is not limited to Israel’s status in the West Bank areas of Judea and Samaria, but, despite removal by Israel of all its forces and civilians from the Gaza Strip in

2005, including the dismantling of its settlements, these phrases are still used by UN bodies, in reports, other documentation, and in resolutions, to describe Israel's status in the Gaza Strip.²

In light of the developments over the years, including the signing of agreements between Israel and the PLO, the support and affirmation of such agreements by the United Nations, and the changes in the status of the respective parties vis-à-vis the territories that such agreements generated, one may well ask whether the continued usage of this standard terminology is accurate or relevant, and if it indeed reflects international realities, or rather the ongoing and blind "wishful thinking" of the initiators of the resolutions and those member states that blindly and unthinkingly support them.

Israel's status vis-à-vis the respective territories has indeed evolved over the years and has been accompanied by constant discussion as to its nature.

Following the 1967 Six Day War, the views as to Israel's status veered between a predominant section of the international community that considered, for whatever reason, that it was a classical occupation, as affirmed in the UN General Assembly resolutions, and others, predominantly Israel itself, that considered that Israel had come into control of the territories following a legitimately fought defensive war.³ Another very significant historical and legal viewpoint regards Israel's presence in the West Bank areas of Judea and Samaria as emanating from the historical rights granted in Palestine to the Jewish people by the Balfour Declaration and affirmed by resolution of the League of Nations in 1922, granting to the Jewish people a national home in all parts of Mandatory Palestine and enabling "close settlement on the land." The continued validity of this resolution, beyond the days of the League of Nations, was in fact maintained by Article 80 of the UN Charter, according to which rights granted to peoples by international instruments remain unaltered, and hence still valid.⁴

However Israel's status might have been perceived, up to the signing of the Oslo accords between Israel and the PLO in 1993, the legal and political nature of both the Gaza Strip and the West Bank has undergone a critical change. The fact that the international community has failed, and consistently fails to acknowledge this change, and repeats inaccuracies and absurdities in UN resolutions that are utterly disconnected from reality, is perhaps indicative of the selective blindness vis-à-vis Israel, and the extent to which the international community is being manipulated by the Arab and Muslim states.

While each of the various viewpoints set out above as to Israel's status in the territories has had, and in some cases continues to have its respective merits, no one in the international community – not even the United Nations – can negate the fact that with the signature by Israel and the Palestinian leadership of the Israel-Palestinian Interim Agreement of 1995,⁵ signed and witnessed by the United States, the European Union, Egypt, Jordan, Russia, and Norway, the status of the territory changed, and the status of each of the parties to the agreement vis-à-vis the territory changed as well.

THE UNIQUE CIRCUMSTANCES OF THE TERRITORY AND THE SPECIAL NATURE OF THE ISRAELI-PALESTINIAN RELATIONSHIP

The agreements and memoranda between the Palestinian leadership and the government of Israel, affirmed and recognized by the United Nations both in its signature as witness to the 1995 agreement, as well as in resolutions acknowledging the agreements,⁶ have produced a special regime – a *lex specialis* – that governs all aspects of the relationship between them, the relationship of each one of the parties to the territory under its responsibility and control, and its rights and duties in that territory.⁷

These documents⁸ cover all the central issues between them including governance, security, elections, jurisdiction, human rights, legal issues, and the like. In this framework, when referring to the rights and duties of each party in the territory that remains under its jurisdiction pending the outcome of the permanent status negotiations, there is no specific provision either restricting planning, zoning, and continued construction by either party, of towns, settlements, and villages, or freezing such construction. Article 27 of Annex III (Civil Affairs Annex) to the 1995 agreement sets out the agreed terms for planning and zoning, and construction powers in the territories, and places no limitation on either side to build in the areas under its respective jurisdiction.⁹

The central legal and political change brought about by the agreement is the fact that the two sides agreed pending the outcome of the negotiations on a permanent status agreement between them, to divide their respective jurisdictions in the West Bank into Areas A and B (Palestinian jurisdiction) and Area C (Israeli jurisdiction).¹⁰

They defined the respective powers and responsibilities of each side in the areas under its control. In Area A (the major cities and towns and highly populated areas) Israel completely transferred all powers and responsibilities to the Palestinian Authority including security and police powers. In Area B Israel transferred all powers and responsibilities except for security, over the villages that predominantly constituted Area B. Area C, without Palestinian villages and population centers, includes the Israeli settlements and military installations. Thus Israel's powers and responsibilities in Area C include all aspects regarding Israeli residents of settlements and military installations – all this pending the outcome of the permanent status negotiations.

This division of control, powers, and responsibilities was accepted and agreed upon by the Palestinians in the 1995 agreement and even acknowledged by the United Nations. As such it constitutes a radical change in the status and nature of the territory. Israel's continued presence in Area C, pending the outcome of the permanent status negotiations, enjoys the sanction of the PLO. It cannot, by any measure of political manipulation or legal acrobatics, be considered "occupied territory," and hence, Israel cannot be termed "the occupying Power." Israel's presence in the territory of the West Bank is with the full approval of the Palestinian leadership composing the PLO.

THE SETTLEMENTS ISSUE

In a similar vein, the legal nature of Israel's settlements, which has also become a cliché in UN terminology as being illegal, is equally part and parcel of this *lex specialis* regime based on the Oslo Accords. The Palestinian leadership cannot present this as an alleged violation by Israel of the 1949 Fourth Geneva Convention, in order to bypass their acceptance of the rights and responsibilities pursuant to the Interim Agreement as well as the international community's acknowledgment of that agreement's relevance and continued validity.

In fact, even in the 1993 Israeli-PLO Declaration of Principles, and as repeated in all the ensuing agreements including the 1995 Interim Agreement, the settlement issue is one of the core issues determined by the parties to be negotiated in the permanent status negotiations.¹¹ This is a mutually agreed-upon component of the accords between Israel and the Palestinian leadership. That Palestinian leadership has accepted and is committed to the fact that it does not exercise jurisdiction regarding permanent status issues, settlements included, in Area C pending the outcome of the permanent status negotiation.

As such, the Oslo Accords contain no requirement that prohibits, limits, or freezes construction by Israel in Area C.

In fact, during the course of the negotiations on the Interim Agreement in 1995, the Palestinian delegation requested that a "side letter" be attached, the text of which would be agreed upon, whereby Israel would commit to restricting settlement construction in Area C during the process of implementation of the agreement and the ensuing negotiations. Several drafts of this "side letter" passed between the negotiating teams until Israel indeed agreed to a formulation restricting construction activities on the basis of a government decision that would be adopted for that purpose. Ultimately, the Palestinian leadership withdrew its request for a side letter.

THE LEGALITY OF ISRAEL'S SETTLEMENTS

The issues of the legality of Israel's settlements and the rationale of Israel's settlement policy have for years dominated the attention of the international community. This has been evident in countless reports of different UN bodies, rapporteurs, and resolutions,¹² as well as in political declarations and statements by governments and leaders. In varying degrees, they consider Israel's settlements to be in violation of international law, specifically Article 49 of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, of August 12, 1949.¹³

But apart from the almost standardized, oft-repeated, and commonly accepted clichés as to the "illegality of Israel's settlements," or the "flagrant violation" of the Geneva Convention, repeated even by the International Court of Justice,¹⁴ there has been little genuine attempt to elaborate and consider the substantive legal reasoning behind this view. Yet there are a number of very relevant factors that inevitably must be considered when making such a serious accusation against Israel.



President Bill Clinton, Israeli Prime Minister Yitzhak Rabin, and PLO leader Yasser Arafat sign the Oslo II Interim Agreement, September 28, 1995, at the White House. (AP Photo/Doug Mills)

These factors include:

- ▶ the text of the sixth paragraph of Article 49 of the Fourth Geneva Convention and the circumstances of, and reasons for, its inclusion in the Convention in December 1949;
- ▶ the unique circumstances of the territory and the context of the Israeli-Palestinian relationship that, as set out above, has developed since 1993 through a series of agreements between them. These agreements have created the *sui generis* framework that overrides any general determinations unrelated to that framework.

IS ARTICLE 49 OF THE FOURTH GENEVA CONVENTION APPLICABLE TO ISRAEL'S SETTLEMENTS?

Immediately after the Second World War, the need arose to draft an international convention to protect civilians in times of armed conflict in light of the massive numbers of civilians forced to leave their homes during the war, and the glaring lack of effective protection for civilians under any

of the then valid conventions or treaties.¹⁵ In this context, the sixth paragraph of Article 49 of the Fourth Geneva Convention states:

The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.¹⁶

The authoritative and official commentary by the governing body of the International Red Cross movement, the International Committee of the Red Cross (ICRC), published in 1958 in order to assist “Governments and armed forces...called upon to assume responsibility in applying the Geneva Conventions,”¹⁷ clarifies this provision as follows:

It is intended to prevent a practice adopted during the Second World War by certain Powers, which transferred portions of their own population to occupied territory for political and racial reasons or in order, as they claimed, to colonize those territories. Such transfers worsened the economic situation of the native population and endangered their separate existence as a race.

In other words, according to the ICRC commentary, Article 49 relates to deportations, meaning the *forcible* transfer of an occupying power’s population into an occupied territory. Historically, over forty million people were subjected to forced migration, evacuation, displacement, and expulsion, including fifteen million Germans, five million Soviet citizens, and millions of Poles, Ukrainians, and Hungarians.

The vast numbers of people affected and the aims and purposes behind such a population movement speak for themselves. There is nothing to link such circumstances to Israel’s settlement policy. The circumstances in which Article 49(6) of the Geneva Convention was drafted, and specifically the meaning attached by the International Committee of the Red Cross itself to that article, raise a serious question as to the relevance of linkage to and reliance on the article by the international community as the basis and criterion for determining Israel’s settlements as illegal. One may further ask if this is not a misreading, misunderstanding, or even distortion of that article and its context.

The international lawyer Prof. Eugene V. Rostow, a former dean of Yale Law School and Under Secretary of State, stated in 1990:

[T]he Convention prohibits many of the inhumane practices of the Nazis and the Soviet Union during and before the Second World War – the mass transfer of people into and out of occupied territories for purposes of extermination, slave labor or colonization, for example... The Jewish settlers in the West Bank are most emphatically volunteers. They have not been “deported” or “transferred” to the area by the Government of Israel, and their movement involves none of the atrocious purposes or harmful effects on the existing population it is the goal of the Geneva Convention to prevent.¹⁸

Ambassador Morris Abram, a member of the U.S. staff at the Nuremburg Tribunal and later involved in the drafting of the Fourth Geneva Convention, is on record as stating that the convention:



Ariel, an Israeli settlement in the central West Bank

was not designed to cover situations like Israeli settlements in the occupied territories, but rather the forcible transfer, deportation or resettlement of large numbers of people.¹⁹

Similarly, international lawyer Prof. Julius Stone, in referring to the absurdity of considering Israeli settlements as a violation of Article 49(6), stated:

Irony would...be pushed to the absurdity of claiming that Article 49(6), designed to prevent repetition of Nazi-type genocidal policies of rendering Nazi metropolitan territories *judenrein*, has now come to mean that...the West Bank...must be made *judenrein* and must be so maintained, if necessary by the use of force by the government of Israel against its own inhabitants. Common sense as well as correct historical and functional context excludes so tyrannical a reading of Article 49(6).²⁰

Article 49(6) uses terminology that is indicative of governmental action in coercing its citizens to move. Yet Israel has not forcibly deported or mass-transferred its citizens into the territories. It has consistently maintained a policy enabling people to reside voluntarily on land that is not privately owned. Their continued presence is subject to the outcome of the negotiation process on the status of the territory, and without necessarily prejudicing that outcome.

In some cases Israel has permitted its citizens who have for many years owned property or tracts of land in the territory, and who had been previously dispossessed and displaced by Jordan, to return to their own properties. The presence in these areas of Jewish settlement from Ottoman and British Mandatory times is totally unrelated to the context of, or claims regarding, the Geneva Convention.

Israel has never expressed any intention to colonize the territories, to confiscate land, nor to displace the local population for political or racial reasons, nor to alter the demographic nature of the area.

As stated above, the agreements signed with the Palestinian leadership have in fact placed the entire issue of the status of the territory, as well as Israel's settlements, on the negotiating table – a factor that proves the lack of any intention to colonize or displace. The fact that Israel chose unilaterally to dismantle its settlements and remove its citizens from the Gaza Strip in 2005 is further evidence of this.

During the negotiation on the 1998 Rome Statute of the International Criminal Court,²¹ Arab states initiated an alteration in the text of the court's statute listing as a serious violation of the laws of armed conflict the war crime of "transferring, *directly or indirectly*, parts of the civil population into the occupied territory."²² The deliberate addition of the phrase "directly or indirectly" to the original 1949 text was intended by them to adapt the original 1949 Geneva Convention language in order to render it applicable to Israel's settlement policy. This in itself is indicative of the proponents' and the international community's acknowledgment of the fact that Article 49(6) as drafted in 1949 was simply not relevant to the circumstances of Israel's settlements.

CONCLUSION

The propensity of the international community, whether through constant, parrot-like repetition in UN documentation and annual resolutions or other means, to label Israel as the "occupying Power," and the West Bank and Gaza territories as the "occupied Palestinian territories," as well as the automatic labeling of Israel's settlements as "illegal," are indicative of a stubborn refusal to face the realities of the situation in the Middle East.

In permitting themselves to be driven by certain states with a clear political agenda, to ignore vital and serious agreements between the PLO and Israel in which the status of the Gaza Strip and West Bank territories is mutually redefined; and to ignore the legislative history and logic behind the Fourth Geneva Convention provision regarding forcible transfer of peoples, those member states of the United Nations supporting such resolutions and determinations are damaging the UN as a credible body in international law and society, and undermining the Middle East peace process.

The international community cannot seriously continue to bury its head in the sand and ignore these factors. It is high time that responsible and likeminded states endeavor to restore the credibility of the international community in general and the United Nations in particular, and bring it back into reality as a viable body capable of fulfilling the purposes for which it was established.

NOTES

- 1 See, for example, those resolutions most recently adopted in the 65th Session of the General Assembly in 2010 including A/RES/65/202 on “The right of the Palestinian People to Self-Determination” (in the 7th and 9th preambular paragraphs); A/65/179 on “Permanent sovereignty of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem, and of the Arab population in the occupied Syrian Golan over their natural resources” (in virtually all the preambular and substantive paragraphs); Resolution A/65/134 on “Assistance to the Palestinian people”; Resolution A/65/105 on “Israeli practices affecting the human rights of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem”; Resolution A/65/104 on “Israeli practices affecting the human rights of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem”; Resolution A/65/103 on “Applicability of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, to the Occupied Palestinian Territory, including East Jerusalem, and the other occupied Arab territories”; A/65/102 on “Work of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories”; A/65/100 on “Operations of the United Nations Relief and Works Agency for Palestine Refugees in the Near East”; A/65/98 on “Assistance to Palestine refugees”; A/65/17 on “Jerusalem”; A/65/16 on “Peaceful settlement of the question of Palestine”; A/65/15 on “Special information programme on the question of Palestine of the Department of Public Information of the Secretariat”; A/65/14 on “Division for Palestinian Rights of the Secretariat”; A/65/13 on “Committee on the Exercise of the Inalienable Rights of the Palestinian People.”
- 2 For a full analysis of Israel’s status in the Gaza Strip, see the chapter in this book by Pnina Sharvit Baruch, “Is the Gaza Strip Occupied by Israel?”
- 3 For a full analysis of Israel’s status following the 1967 war, see the chapter of this book by Nicholas Rostow, “The Historical and Legal Contexts of Israel’s Borders.”
- 4 See the chapter in this book by Martin Gilbert, “An Overwhelmingly Jewish State’ from the Balfour Declaration to the Palestine Mandate.”
- 5 <http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/THE+ISRAELI-PALESTINIAN+INTERIM+AGREEMENT.htm>. See also UN General Assembly Resolutions A/RES. 50/21, A/RES.50/29 and A/RES.50/84 of December 1995, in which the UN welcomed and expressed support for the Interim Agreement.
- 6 See annex to UN document A/48/486-S/26560 dated 11 October 1993.
- 7 See the Israeli-Palestinian Interim Agreement on the West Bank and Gaza Strip, Sept. 28, 1995, at Article XVIII, para. 1, <http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/THE+ISRAELI-PALESTINIAN+INTERIM+AGREEMENT.htm>.
- 8 Israel-Palestinian Declaration of Principles, September 13, 1993, Exchange of Letters between Prime Minister Rabin and Chairman Arafat of September 9-10, 1993, Agreement on the Gaza Strip and the Jericho Area, May 4, 1994, Interim Agreement between Israel and the Palestinians, September 28, 1995, Agreement on Temporary International Presence in Hebron, May 9, 1996, The Wye River Memorandum, October 23, 1998, The Sharm el-Sheikh Memorandum on Implementation Timeline of Outstanding Commitments of Agreements Signed and the Resumption of Permanent Status Negotiations, September 4, 1999, Protocol Concerning Safe Passage between the West Bank and the Gaza Strip, October 5, 1999. All these documents are referenced in <http://www.mfa.gov.il/mfa/peace%20process/reference%20documents>.
- 9 <http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/Gaza-Jericho+Agreement+Annex+II.htm>.
- 10 *Id.*, Article IV (Land).
- 11 Israel-Palestinian Declaration of Principles on Interim Self-Government Arrangements of Sept. 13, 1993, Article V, para. 3, as well as Article XXXI, para. 5 of the Interim Agreement, <http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/Declaration+of+Principles.htm>.
- 12 Extending from General Assembly Resolution A/RES/3005/(XXVII) of December 15, 1972, through Security Council Resolutions 446 (1979), 452 (1979), 465 (1980), to the most recent General Assembly resolution of December 10, 2010, A/RES/65/105.
- 13 United Nations, Treaty Series, vol. 75, No. 973, p. 287.
- 14 The International Court of Justice in its 2004 Advisory Opinion on Israel’s Security Fence. See <http://www.icj-cij.org/docket/files/131/1671.pdf> at paragraph 120.
- 15 See *ICRC Commentary to the Fourth Geneva Convention*, edited by Jean S. Pictet (1958), at pp. 3-9, for an extensive summary of the reasoning behind the drafting of the convention.
- 16 *Id.*, p. 278.
- 17 Foreword to the ICRC Commentary, at n. 13 above.
- 18 *American Journal of International Law*, Vol. 84, 1990, p. 719.

19 Ambassador Morris Abram, in a discussion with Arab ambassadors in Geneva, February 1, 1990.

20 Quoted in David M. Phillips, "The Illegal Settlements Myth," *Commentary*, December 2009.

21 U.N. Doc. A/CONF.183/9*.

22 The relevant part of Article 8, paragraph 2(b)(viii), listing the various war crimes, reads as follows: "The transfer, *directly or indirectly*, by the Occupying Power of parts of its own civilian population into the territory it occupies" (emphasis not in the original).