

Do Settlements Matter? An American Perspective

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Since 1967, one of the most pervasive questions in the Arab-Israeli peace process has been whether or not Israeli settlements represent a fundamental blockage toward progress. This question is surely on the agenda of the Obama administration as it weighs its options for advancing the prospects for peace. Thus, it is timely to review this matter in some detail.

There is a school of thought in Israel and among some Americans that argues that the settlements issue has been overdrawn, and that it does not account for the failure to make progress in negotiations between Israel and the Palestinians. The latest iteration of this view was in an op-ed by Elliott Abrams, the former deputy national security adviser in the administration of President George W. Bush. In an article entitled, "The Settlement Freeze Fallacy" (*Washington Post*, April 8, 2009), Abrams wrote that Israeli settlement activity past and present has no impact on whether or not the prospects for Israeli-Palestinian peace are advanced. Abrams dismissed past settlement activity—" [T]hose settlements exist and there is no point debating whether it was right to build them"—and minimized the impact of current building. He argued that most construction takes place in settlements that even Palestinians recognize will remain in Israel and that "[m]ost settlement expansion occurs in ways that do not much affect Palestinian life."

Abrams' argument represents just a small part of the rationale underpinning the views of those who believe settlements are not an obstacle to peace. This school of thought says that the West Bank and Gaza are not "occupied territory" but rather "disputed" territory, that is, territory whose ultimate status has yet to be determined. Israel has historical rights in these areas, and Jewish settlement existed in some places well before the advent of the modern Arab-Israeli conflict. (Some add to this argument the religious dimension, pointing to the biblical borders of the land promised to the Israelites, and the particular religious significance of some areas in the West Bank, such as Bethlehem and Hebron and Beit El, for example.)

It is further argued that Israel took control of these territories not as a result of aggression, but rather in a defensive war, in response to Arab belligerence in 1967. Thus, the conflict between Palestinians and Israelis has less to do with these particular territories than with the refusal of Palestinians to accept the legitimacy of a Jewish state anywhere in historic Eretz Israel. This argument is underlined by the fact that the conflict existed even when Arabs controlled these territories before 1967.

The argument continues that much of the land in these areas is public or state land, the disposition of which is in the hands of the controlling power. Consistent with Israeli court decisions, settlement on private land is not allowed, unless the land is purchased legally, but settlement on state land is permissible when the legal processes adopted by successive Israeli governments are followed. In this respect, Israeli governments since 1967 — whether led by Labor or Likud prime ministers — have not challenged the legality of settlements, but rather have expanded or contracted the approvals process depending on political circumstances.

Finally, it is noted that, just as there are Palestinian residents and citizens of the State of Israel, there can be Jewish residents and citizens of a state of Palestine, when it is created. Thus, settlements do not represent an impediment to the achievement of peace or to the establishment of an independent Palestinian state, but rather create some demographic changes with which negotiators and future Palestinian leaders will need to cope.

Those who challenge the settlement movement and who argue that settlements in fact impede movement toward peace mobilize a contrasting array of arguments. They argue that settlements are illegal under international law, citing the Fourth Geneva Convention, which prohibits an occupying power from transferring citizens from its own territory into the occupied territory; and the Hague Regulations, which prohibit an occupying power from undertaking permanent changes in the occupied area unless they are related to military needs or undertaken for the benefit of the local population. According to this argument, there may have been cases where the military or security needs of Israel dictated such “permanent changes” but these have been few and far between and, in any case, were not undertaken “for the benefit of the local population.”

A second argument relates to the changes on the ground created by the settlement activities. According to Peace Now, whose data derive largely from the Israeli government Central Bureau of Statistics (CBS), the built-up area of settlements takes up around one percent of the West Bank, but the total amount of land that is under the jurisdiction of settlements — and therefore off limits to Palestinians — constitutes around 9.3 percent of the West Bank. In the Jordan Valley, the built-

up area of the settlements is approximately 1,364 acres, but virtually the entire Jordan Valley (about 45,540 acres), with the exception of the built-up Palestinian areas, is under the jurisdiction of the settlement councils and thus off limits to Palestinian residents, and access to the Jordan Valley has for several years been almost completely cut off to Palestinians from other parts of the West Bank. An additional example relates to the settlement of Ma'ale Adumim, which has jurisdiction over 11,600 acres—larger than the Tel Aviv metropolitan area— even though its built-up area is just around 1,100 acres. This argument highlights the massive amount of territory alienated from Palestinian use by settlements, whose limits extend well beyond the actual built-up areas.

A third argument against settlements points to the substantial demographic change which settlement activity has generated. The Israeli population of West Bank settlements in 2008, as indicated by figures derived by Peace Now from the CBS was 289,600. In 1993, the corresponding number of settlers was 116,300. Thus, during this fifteen-year period, the settler population increased by about 150 percent. (This figure does not include East Jerusalem, in which there was an increase from 152,800 to 186,800 between 1993-2006.)

Significantly, large numbers of settlers moved into settlements at the height of the Oslo peace process. Between 1993-2000, the number of settlers increased from 116,300 to 198,300, an increase of about 70 percent. For Palestinians and outside observers, the dissonance between peace negotiations and settlement growth was incomprehensible. About a year ago, at a conference in Tel Aviv, a Palestinian negotiator recounted the daily debate she had with her mother: upon returning home from a day at work with the Palestinian Negotiations Support Unit, this woman would advise her mother about the progress of the negotiations; her mother would then point to the expanding settlement across the road from their house and ask rhetorically, “You call that progress?”

For those arguing against settlements, this point may be the most important of all. They ask how active peace negotiations can be accompanied by activities that change the very nature of the issues under discussion and call into question the seriousness of the Israeli partner. The response often given—that the government will take decisions on territory irrespective of where the settlements exist—is seen as disingenuous, and the proof of this is the tortuous path of the security barrier, ostensibly being built to impede infiltration, but very often routed so as to maximize the number of settlements and settlers encompassed by the project.

A fourth argument against settlements relates to their impact on Palestinian daily life. Because of the need to protect the settlers, especially in the face of Palestinian violence and terrorism such as erupted during the second intifada, the Israeli army

has created a system of barriers to movement among Palestinians. Palestinians routinely face long lines at checkpoints and roadblocks, and often must travel long and circuitous routes to their destinations. This has had a very serious impact on the Palestinian economy and on the access of Palestinians to vital services, such as health care. A system of new roads has been constructed in the West Bank, sometimes called bypass roads that, while not specifically restricted to settler-only use, have had the effect of creating a double road network. Palestinian cities under the jurisdiction of the Palestinian Authority, those cities located in Zone A, have become enclaves and islands surrounded in some cases by settlements and whose travel and communications have been impeded considerably by what the United Nations has determined to be more than 625 barriers to movement, as of February 2009.

A further argument relates to the radicalization that has taken place in both communities—Palestinian and settler—and the ensuing rise in violence between them. Local disputes have expanded and intensified into violence against people and property.

Finally, the settlement movement itself has changed unilaterally and unlawfully the rules established by successive Israeli governments by setting up unauthorized settlement outposts when government approval of settlement construction has not been forthcoming. Since 2001, more than a hundred such outposts have been established, and settlers have resisted with force government efforts to dismantle the outposts. In 2004, then-Prime Minister Ariel Sharon tasked a Justice Ministry official, Talia Sasson, to study how these illegal and unauthorized activities were taking place. Sharon also asked a retired brigadier general, Baruch Spiegel, to construct a database of what the settlers had done. Sharon's efforts were part of a commitment he made to President George W. Bush to dismantle all the outposts established after 2001. This commitment was incorporated in a letter from Sharon's adviser Dov Weissglas to then-National Security Adviser Condoleezza Rice on April 14, 2004.

Sasson's report shocked the Israeli political and legal system, for it documented systemic abuse and illegality in the construction of outposts, including extensive illegal collusion between settlers and supportive Israeli public servants. Despite this, the report was shelved and, to date, no action has been taken to correct the abuses. Spiegel's report, a comprehensive database of the illegal settlement outposts, similarly was shelved. Since 2004, the date of Sharon's commitment, only a very few outposts have been dismantled, and several of these have been rebuilt. More alarmingly, in recent days, press reports indicate that steps have been taken to move some of the outposts, such as Migron, from their current location to established settlements, effectively legalizing them *ex post facto*.

In this context of argument and counter-argument, the views of the United States—still recognized as the essential third party in the process of peacemaking—become more important. Every US administration since 1967 has argued strongly against Israeli settlement activity. During the administration of President Jimmy Carter, the United States took the view that settlements are illegal under the Fourth Geneva Convention. Secretary of State Cyrus Vance made this clear in Congressional testimony before the House Committee on Foreign Affairs, March 21, 1980:

US policy toward the establishment of Israeli settlements in the occupied territories is unequivocal and has long been a matter of public record. We consider it to be contrary to international law and an impediment to the successful conclusion of the Middle East peace process...Article 49, paragraph 6, of the Fourth Geneva Convention is, in my judgment, and has been in the judgment of each of the legal advisers of the State Department for many, many years, to be...that [settlements] are illegal and that [the Convention] applies to the territories.

Vance's view was based on longstanding US policy. For example, in March 1976, Ambassador William Scranton told the United Nations Security Council:

Substantial resettlement of the Israeli civilian population in occupied territories, including East Jerusalem, is illegal under the convention and cannot be considered to have prejudged the outcome of future negotiations between the parties on the locations of the borders of states by the Middle East. Indeed, the presence of these settlements is seen by my government as an obstacle to the success of the negotiations for a just and final peace between Israel and its neighbors.

Scranton's statement was based on the position expressed by Ambassador Charles Yost, who told the UN Security Council in July 1969:

Among the provisions of international law which bind Israel, as they would bind any occupier, are the provisions that the occupier has no right to make changes in laws or in administration other than those which are temporarily necessitated by his security interests, and that an occupier may not confiscate or destroy private property. The pattern of behavior authorized under the Geneva Convention and international law is clear: the occupier must maintain the occupied area as intact and unaltered as possible, without interfering with the customary life of the area, and any changes must be necessitated by the immediate needs of the occupation.

Starting with the Reagan administration, American policy makers refrained from commenting on the legality of settlements, but rather noted the impact that continued settlement activity would have on the peace process. In the Reagan Plan of September 1982, President Reagan stated his view as follows:

...the United States will not support the use of any additional land for the purpose of settlements during the transition period (five years after Palestinian election for a self-governing authority). Indeed, the immediate adoption of a settlement freeze by Israel, more than any other action, could create the confidence needed for wider participation in these talks. Further settlement activity is in no way necessary for the security of Israel and only diminishes the confidence of the Arabs that a final outcome can be freely and fairly negotiated.”

Speaking for the administration of President George H.W. Bush in 1989, Ambassador to the United Nations Thomas Pickering said:

Since the end of the 1967 war, the US has regarded Israel as the occupying power in the occupied territories, which includes the West Bank, Gaza, East Jerusalem, and the Golan Heights. The US considers Israel’s occupation to be governed by the Hague Regulations of 1907 and the 1949 Geneva Conventions concerning the protection of civilian populations under military occupation.

Secretary of State James A. Baker III amplified on this in the US Letter of Assurances delivered to the Palestinians on the eve of the Madrid Peace Conference in October 1991, as follows:

The United States believes that no party should take unilateral actions that seek to predetermine issues that can only be reached through negotiations. In this regard the United States has opposed, and will continue to oppose, settlement activity in territories occupied in 1967 which remain an obstacle to peace.

President Bill Clinton, whose administration was active in promoting the Oslo peace process, spoke out against settlements in a White House news conference on December 16, 1996. Referring to Israel’s decision at that time to increase benefits to settlers, Clinton said:

It just stands to reason that anything that preempts the outcome [of the negotiations]... cannot be helpful in making peace. I don’t think anything should be done that would be seen as preempting the outcome.”

Asked if he viewed the settlements as an obstacle to peace, Clinton replied, “Absolutely. Absolutely.”

President Bush defined his administration's position on settlements in his seminal June 24, 2002 speech: "...consistent with the recommendations of the Mitchell Committee, Israeli settlement activity in the occupied territories must stop."

In the Roadmap for Peace, drafted by the United States and its partners in the international Quartet, this view—reflecting the policy of the Bush administration—was made even more explicit, saying that in the first phase of Roadmap implementation:

GOI [Government of Israel] immediately dismantles settlement outposts erected since March 2001.

Consistent with the Mitchell Report, GOI freezes all settlement activity (including natural growth of settlements).

President Barack Obama has already answered the key strategic question facing his administration: he sees Arab–Israeli peacemaking as a foreign policy priority and is prepared to devote presidential time to achieving progress. Obama's appointment of George Mitchell as a special envoy has sent a powerful signal of US intentions and determination. That said, there are at least five significant tactical issues with which the administration needs to wrestle in devising a peace strategy. The first question is whether to devote primary attention to the Palestinian track or the Syrian track. Some analysts have argued that the Syrian track offers a far better chance of achieving progress and that precedence should be given to resuming direct negotiations on the core issues of territory, security, political relations and water, as well as on the contextual issues of Syria's relations with Iran and Hizbullah and its support for terrorist groups. Others have argued that the core of this conflict remains the Palestinian issue and that the administration ought to try to build on the progress that was achieved in the 2008 negotiations conducted pursuant to the Annapolis conference.

If the Obama administration decides to devote attention to the Palestinian track, it faces two additional complementary challenges—does leadership exist in both communities willing and able to mobilize political support for the tough negotiations and tougher compromises required of a peace process? Prime Minister Benjamin Netanyahu has assembled a coalition that leaves him some latitude to deal with peace process issues, but a question exists whether Netanyahu's approach to the process will differ fundamentally from Annapolis by, for example, focusing on economic and institutional development as prerequisites to negotiations. On the Palestinian side, the political situation is far more complex, with Palestinian governance split geographically and with Gaza in the hands of Hamas, which has yet to meet internationally imposed conditions for dialogue and engagement.

The two substantive issues facing the administration are equally daunting. Until now, Palestinians have not come close to fulfilling their Roadmap obligation to uproot the terrorist infrastructure within their society. The problem is not confined to Gaza and the activities of Hamas, Palestine Islamic Jihad and other groups, but also exists in the West Bank. To be sure, excellent and far-reaching work has been accomplished through the training activities of United States Security Coordinator, General Keith Dayton. But even this progress has been held back by the relatively modest budget and small numbers of security forces actually trained and deployed.

The fifth tactical issue facing the Obama administration is whether to elevate the issue of settlements to the fore, irrespective of whether active negotiations are underway. Some would argue that it would be easier politically for the Obama administration to tie the settlement issue to the prospects for negotiations, and to argue that, when negotiations resume, settlement activity must stop, consistent with the Roadmap. This approach, however, risks tolerating settlement activity that could itself represent a deterrent to the resumption of negotiations. Accordingly, Obama could argue instead that settlements should stop now—and outposts should be dismantled now—in fulfillment of Israeli obligations undertaken in the Roadmap and in the 2004 Weissglas letter to Rice, irrespective of whether the peace process per se resumes soon.

As indicated above, President Obama would have a strong foundation of US policy precedent if he were to adopt this course of action. Equally, the president would be acting on the basis of political “capital” already in the bank. Despite initial dire predictions about concern in the American Jewish community about Obama’s stance on Israel, the president enjoyed the support of 78 percent of the American Jewish community, an extraordinary vote of confidence in his leadership and commitment both to Israel and to peace. The president could thus decide to “spend” some of that capital by making clear to the Israeli leadership that, whether negotiations do or do not take place, a complete settlement freeze is required and that settlements do matter.