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The Settlements Issue: Distorting the Geneva Convention and the Oslo Accords

Alan Baker

- Palestinian representatives at the UN have prepared a draft resolution that will seek to declare that Israeli settlements are “illegal and constitute a major obstacle to the achievement of peace.” The issue of the legality of Israel’s settlements policy has long been a central issue on the agenda of the international community.
- It is claimed that settlements are a violation of the Fourth Geneva Convention Relative to the Protection of Civilians (1949). But both the text of that convention, and the post-World War II circumstances under which it was drafted, clearly indicate that it was never intended to refer to situations like Israel's settlements. According to the International Committee of the Red Cross, Article 49 relates to situations where populations are coerced into being transferred. There is nothing to link such circumstances to Israel’s settlement policy.
- During the negotiation on the 1998 Rome Statute of the International Criminal Court, Arab states initiated an addition to the text in order to render it applicable to Israel's settlement policy. This was indicative of the international community’s acknowledgment that the original 1949 Geneva Convention language was simply not relevant to Israel's settlements.
- The continued reliance by the international community on the Geneva Convention as the basis for determining the illegality of Israel’s settlements fails to take into account the unique nature of the history, legal framework, and negotiating circumstances regarding the West Bank.
- A special regime between Israel and the Palestinians is set out in a series of agreements negotiated between 1993 and 1999 that are still valid – that govern all

issues between them, settlements included. In this framework there is no specific provision restricting planning, zoning, and continued construction by either party. The Palestinians cannot now invoke the Geneva Convention regime in order to bypass previous internationally acknowledged agreements.

Palestinian representatives at the UN have prepared a draft resolution dated December 21, that will seek to declare that Israeli settlements are “illegal and constitute a major obstacle to the achievement of peace.”¹ The claim is not new. The issue of the legality of Israel's settlements and the rationale of Israel's settlements 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,² 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, 1949.³

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,⁴ 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. 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 has developed since 1993 through a series of agreements between them. These agreements have created a *sui generis* framework that, of necessity, influences and even overrides any general determinations unrelated to that framework.

What Does Article 49 of the Fourth Geneva Convention Say?

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.⁵ 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.⁶

What is the exact meaning of this language? The authoritative and official commentary by the governing body of the International Red Cross movement, the International Committee of the Red Cross, published in 1958 in order to assist “Governments and armed forces...called upon to assume responsibility in applying the Geneva Conventions,”⁷ 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 40 million people were subjected to forced migration, evacuation, displacement, and expulsion, including 15 million Germans, 5 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 Undersecretary 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.⁸

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:

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.⁹

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.)¹⁰

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.

The series of agreements signed with the Palestinian leadership has 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.

The status of the territory, including the rights of the parties therein and the Israeli settlements, are the central negotiating issues between the two sides. In this context, and pursuant to its obligations in Article XXXI (7) of the Israeli-Palestinian Interim Agreement of 1993,¹¹ Israel has not taken any step to alter the status of the territory, which is open for determination in the Permanent Status negotiations. Israel's settlement activity does not alter the status of the territory.

During the negotiation on the 1998 Rome Statute of the International Criminal Court,¹² 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.”¹³ 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 acknowledgement of the fact that Article 49(6) as drafted in 1949 was simply not relevant to the circumstances of Israel's settlements.

The Unique Circumstances of the Territory and the Special Nature of the Israel-Palestinian Relationship

There is a further and no less important reason why the Geneva Convention provisions regarding transfer of populations cannot be considered relevant in any event to the Israeli-Palestinian context.

The entirely unique and *sui generis* situation, history, and circumstances of the Israeli-Palestinian conflict regarding the territories, as well as the series of agreements and memoranda that have been signed between the Palestinian leadership and the Government of Israel, have produced a special independent regime – a *lex specialis* – that governs all aspects of the relationship between them, including the settlements issue.

As stated above, the settlements issue is one of the core issues determined by the parties to be negotiated in the Permanent Status negotiations,¹⁴ and the Palestinian leadership has agreed and is committed to the fact that it does not exercise jurisdiction regarding such Permanent Status issues, settlements included, pending the Permanent Status negotiation.¹⁵

The special regime governing the relationship between Israel and the Palestinians is set out in the series of agreements and memoranda negotiated between 1993 and 1999 and still valid.¹⁶ These documents cover all the central issues between them including issues of governance, security, elections, jurisdiction, human rights, legal issues, and the like. In this framework there is no specific provision either restricting planning, zoning and continued construction by either party, of towns and villages, or freezing such construction.¹⁷

Furthermore, the two sides agreed in the 1995 Interim Agreement,¹⁸ signed and witnessed by the U.S., the EU, Egypt, Jordan, Russia, and Norway, on a division of their respective jurisdictions in the West Bank into areas A and B (Palestinian jurisdiction) and area C (Israeli jurisdiction). They defined the respective powers and responsibilities of each side in the areas they control. Israel’s powers and responsibilities in Area C include all aspects regarding its settlements – all this pending the outcome of the Permanent Status negotiations. This division was accepted and agreed upon by the Palestinians, who cannot now invoke the Geneva Convention regime in order to bypass their acceptance of the

Interim Agreement or their and the international community's acknowledgement of that agreement's relevance and continued validity.

In fact, during the course of the negotiations with Israel, the Palestinian delegation requested that a "side letter" be attached to the agreement, 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.

Conclusion

The settlement issue is perceived in many quarters as the central and only problem obstructing the peaceful solution of the Middle East conflict, to the total exclusion of all other issues, including terror, incitement, Jerusalem, refugees, the Iranian threat, and the like.

The main proponent orchestrating the settlement issue over the years has been the Palestinian leadership, which has decided to isolate and take up the issue of settlements as an independent "*cause célèbre*," despite the fact that it is among the agreed-upon items to be negotiated between Israel and the Palestinians in the Permanent Status negotiations.

The Palestinians chose to proceed with this policy in full awareness of the fact that in their agreements, Israel had not obligated itself in any way to refrain from, halt, or freeze construction in the settlements.

The Palestinians preferred to take the settlement issue outside the framework of the agreements with a view to opening a concerted international campaign to isolate Israel on this issue and turn it into the international issue that we are witnessing today. Furthermore, raising the settlement issue has succeeded in blocking any progress in the negotiating process, so much so that the Palestinian leadership is now holding any return to a negotiation mode as a hostage to a settlement freeze.

The international community is faced with ongoing and unceasing attempts by the Palestinian leadership to bypass the negotiating process and to directly lobby the international community, and to seek intervention by the UN Security Council in order to attain a more formalized, institutionalized, and concerted opinion as to the illegality of Israel's settlements.

The international community cannot seriously ignore the factors set out above, as well as the implications that any such new resolution or decision might have on the already agreed-upon, delicate structure of the peace process.

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Notes

* The author wishes to thank Adam Shay of the Jerusalem Center for Public Affairs for his assistance in researching UN resolutions and other material for this article.

1. Mohammed Daraghme, "Palestinians to Take Settlement Battle to UN," Associated Press, December 29, 2010. See <http://www.washingtontimes.com/news/2010/dec/29/palestinians-take-settlement-battle-un/>.
2. 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.
3. United Nations, Treaty Series, vol. 75, No. 973, p. 287.
4. 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.
5. See *ICRC Commentary to the Fourth Geneva Convention*, edited by Jean S. Pictet (1958), at pages 3-9, for an extensive summary of the reasoning behind the drafting of the convention.
6. *Id.*, p. 278.
7. See the Foreword to the ICRC Commentary, at note 5 above.
8. *American Journal of International Law*, Vol. 84, 1990, p. 719.
9. Ambassador Morris Abram, in a discussion with Arab ambassadors in Geneva, February 1, 1990.
10. Quoted in Phillips, "The Illegal Settlements Myth," *Commentary*, 2010.
11. See note 14 supra
12. U.N. Doc. A/CONF.183/9*
13. 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).
14. 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>.
15. 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>.
16. 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/>.
17. Article 27 of Annex III (Civil Affairs Annex) to the 1995 Interim 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 their respective jurisdictions. <http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/Gaza-Jericho+Agreement+Annex+II.htm>.
18. Article IV (Land), see note 15.

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Amb. Alan Baker, Director of the Institute for Contemporary Affairs at the Jerusalem Center for Public Affairs, is former Legal Adviser to Israel's Foreign Ministry and former Ambassador of Israel to Canada. He is a partner in the law firm of Moshe, Bloomfield, Kobo, Baker & Co. He participated in the negotiation and drafting of the various agreements comprising the Oslo Accords.

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Dore Gold, Publisher; Yaacov Amidror, ICA Chairman; Alan Baker, ICA Director; Mark Ami-El, Managing Editor. Jerusalem Center for Public Affairs (Registered Amuta), 13 Tel-Hai St., Jerusalem, Israel; Tel. 972-2-561-9281, Fax. 972-2-561-9112, Email: jcpa@netvision.net.il. In U.S.A.: Center for Jewish Community Studies, 7 Church Lane, Suite 9, Baltimore, MD 21208; Tel. 410-653-7779; Fax 410-653-8889. Website: www.jcpa.org. © Copyright. The opinions expressed herein do not necessarily reflect those of the Board of Fellows of the Jerusalem Center for Public Affairs.

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