

U.S. Policy on Israeli Settlements

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- The Obama administration's tough, confrontational rhetoric on Israeli settlements raises a number of specific questions: Were Israeli settlements a violation of international law? Were Israeli settlements a violation of agreements and an obstacle to further progress in any future peace talks? Did the administration envision Israel withdrawing completely to the 1967 lines or did it accept the idea that Israel would retain part of the territories for defensible borders?
- 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. If the U.S. is now 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.
- President Bush's deputy national security advisor, Elliot Abrams, wrote in the Washington Post on April 8, 2009, that the U.S. and Israel negotiated specific guidelines for settlement activity, whereby "settlement activity is not diminishing the territory of a future Palestinian entity." If the U.S. is concerned that Israel might diminish the territory that the Palestinians will receive in the future, then the Obama team could continue with the quiet guidelines followed by the Bush administration and the Sharon government.
- Given the fact that the amount of territory taken up by the built-up areas of all the settlements in the West Bank is estimated to be 1.7 percent of the territory, the marginal increase in territory that might be affected by natural growth is infinitesimal. Moreover, since Israel unilaterally withdrew 9,000 Israeli settlers from the Gaza Strip in 2005, the argument that a settler presence will undermine a future territorial compromise has lost much of its previous force.
- The U.S. and Israel need to reach a new understanding on the settlements question. Legally and diplomatically, settlements do not represent a problem that can possibly justify putting at risk the U.S.–Israel relationship. It might be that the present tension in U.S.–Israeli relations is not over settlements, but rather over the extent of an Israeli withdrawal from the West Bank that the Obama administration envisions.
- Disturbingly, on June 1, 2009, the State Department spokesman, Robert Wood, refused to answer repeated questions about whether the Obama administration viewed itself as legally bound by the April 2004 Bush letter to Sharon on defensible borders and settlement blocs. It

would be better to obtain earlier clarification of that point, rather than having both countries expend their energies over an issue that may not be the real underlying source of their dispute.

In his June 4, 2009, Cairo speech, President Barack Obama continued to focus U.S. policy on Israel's construction practices in the West Bank, which he forcefully criticized: "The United States does not accept the legitimacy of continued Israeli settlements. This construction violates previous agreements and undermines efforts to achieve peace. It is time for these settlements to stop." His secretary of state, Hillary Clinton, was no less forceful when speaking on May 27, 2009 about Obama's stand on this issue: "He wants to see a stop to settlements—not some settlements, not outposts, not 'natural growth' exceptions."

The Obama administration's tough, confrontational rhetoric on Israeli settlements raises the question of whether it represents a sharp break from the policies of past administrations. Moreover, Obama's assertion that current Israeli construction represents a violation of past agreements raises the question of which agreement he had in mind.

Israeli settlements in the territories captured in the 1967 Six-Day War date back more than forty years. They began as military and agricultural outposts that were located, for the most part, in strategically significant areas of the West Bank, which Israel planned to eventually claim. These settlements were also situated in areas from which Jews had been evicted during the 1948 War. While the U.S. did not support the settlement enterprise, its response to the settlements has varied in intensity, depending on the overall relationship between the two countries.

For example, the Carter administration abstained in the UN Security Council repeatedly in 1979 when draft resolutions came up for a vote that condemned Israeli settlement activity. Yet, suddenly in March 1980, the administration initially decided to support Resolution 465 that called for "dismantling" all settlements, although later it reversed its position.

This varying response to the settlement issue also stemmed from U.S. policy on a number of specific questions raised by the establishment of Israeli settlements:

- Were Israeli settlements a violation of international law?
- Were Israeli settlements a violation of specific bilateral agreements between Israel and its Arab neighbors and an obstacle to further progress in any future peace talks?



US President Barack Obama meets with former US President George W. Bush.

- To what extent did the administration envision Israel withdrawing completely to the 1967 lines or did it accept the idea that Israel would retain part of the territories for defensible borders and its security needs?

There were also two other conflicting considerations. For years, Washington opposed settlements because it was felt that they were unilateral actions that pre-judged the outcome of future negotiations. But at the same time, there was the view that constrained U.S. statements or activities against the settlements: while all administrations opposed settlement activity on policy grounds, the U.S. felt that using the UN to press Israel was inappropriate, since it was argued that Arab-Israeli differences of this nature should be resolved bilaterally between the parties themselves.

The Settlements and International Law

Before turning to the specific issue of the settlements, it is instructive to recall that Israel's entry into the West Bank, in particular, created a number of legal dilemmas that would ultimately impinge on how the legal question of settlements was examined. Israel entered the West Bank in a war of self-defense, so that the UN Security Council did not call on Israel to withdraw from all the territory that it captured, when it adopted UN Security Council Resolution 242 in November 1967. The previous occupant in the West Bank from 1949 to 1967 had been the Hashemite Kingdom of Jordan, whose sovereignty in the territory the entire international community refused to recognize—except for Britain and Pakistan. Prior to 1949, the

governing document for legal rights in the West Bank was the 1922 Palestine Mandate, which gave international recognition to Jewish legal rights.

U.S. officials were cognizant of these considerations. 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.” He argued that Israel’s claims to the territory were “at least as good as those of Jordan.” Professor 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 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.”

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 it referred to forcible deportations that were practiced by the Nazis and not to Israeli settlement activity. 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 was hence 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.

It should be added that in 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 extremely offensive. 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.

The Settlements and Past International 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. The Oslo Accords were essentially an interim arrangement; they stipulated that the issue of settlements would be addressed in permanent status negotiations. If the U.S. is 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.

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. This idea 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—which 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.”



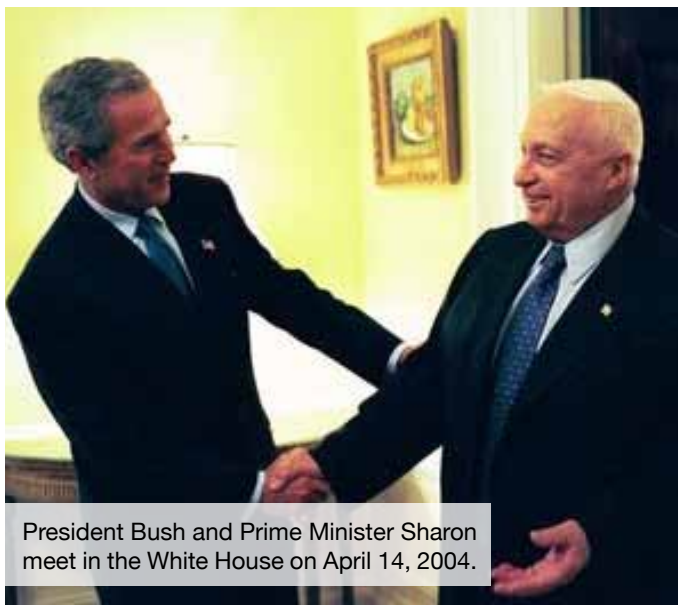
Senator George Mitchell,
special envoy to the Middle East

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.”



President Bush and Prime Minister Sharon meet in the White House on April 14, 2004.

The Settlements and Israel's Ultimate Borders

Prior to 1977, U.S. criticism of Israeli settlement activity was largely muted. During that period, much of this activity seemed to be confined to areas like the Jordan Valley, where there were compelling strategic arguments for Israel to retain them. Secretary of State Henry Kissinger had been sympathetic with Israel's claim for defensible borders during the first Rabin government.

The escalation in strong U.S. statements against Israeli settlements after 1977 was not only due to the Carter administration's determination that settlements were illegal, but also due to its demand that there be a full Israeli withdrawal from the territories it captured in the Six-Day War. At the same time, as Israeli settlement activity moved beyond the initial parameters that existed prior to 1977, U.S.–Israeli disagreements over this issue intensified.

When the U.S. again became more flexible over Israel's eventual retention of certain West Bank territories, settlement activity did not prove to be a major cause for bilateral tensions. Thus, when President George W. Bush sent Prime Minister Ariel Sharon a letter on April 14, 2004, acknowledging that, at the end of the day, Israel would obtain defensible borders as well as the large West Bank settlement blocs, Washington and Jerusalem were able to conduct a quiet but useful dialogue, as noted earlier, over the parameters Israel should follow in any settlement activity it undertakes.

The Obama administration's current focus on Israeli settlement activity—including natural growth—raises a number of questions. If the U.S. is concerned that Israel might diminish the territory that the Palestinians will receive in the future, then the Obama team could continue with the quiet guidelines followed by the Bush administration and the Sharon government.

Given the fact that the amount of territory taken up by the built-up areas of all the settlements in the West Bank is estimated to be 1.7 percent of the territory, the marginal increase in territory that might be affected by natural growth is infinitesimal. Moreover, since Israel unilaterally withdrew 9,000 Israeli settlers from the Gaza Strip in 2005, the argument that a settler presence will undermine a future territorial compromise has lost much of its previous force.

The U.S. and Israel need to reach a new understanding on the settlements question. It is clearly an overstated issue in the peace process. Legally and diplomatically, settlements do not represent a problem that can possibly justify putting at risk the U.S.–Israel relationship. It might be that the present tension in U.S.–Israeli relations is not over settlements, but rather over the extent of an Israeli withdrawal from the West Bank that the Obama administration envisions.

For example, it still needs to be clarified whether the Obama administration feels bound by the April 14, 2004, Bush letter to Sharon on defensible borders and settlement blocs, which was subsequently ratified by large bipartisan majorities in both the U.S. Senate (95–3) and the House of Representatives (407–9) on June 23–24, 2004. Disturbingly, on June 1, 2009, the State Department spokesman, Robert Wood, refused to answer repeated questions about whether the Obama administration viewed itself as legally bound by the Bush letter. It would be better to obtain earlier clarification of that point, rather than having both countries expend their energies over an issue that may not be the real underlying source of their dispute.

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