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SYMPOSIUM ON REVISITING ISRAEL'S SETTLEMENTS

UNDERSTANDING THE SETTLEMENTS DEBATE

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Theodor Meron's editorial comment revisits the question of the legality of settlements.[1] I will try to offer an additional perspective which looks at the underlying values of the laws of occupation and how these impact the legal analysis of settlement activity in the Israeli context.

A Tale of Two Facets

As is well known, occupation law does not prejudge or impact the sovereign status of occupied territory. Occupation is a legal-factual concept determined solely on the basis of the facts on the ground. There is much merit to Meron's view, shared by many, that an occupied territory does not have to "belong" to another state, since occupation is not dependent on the sovereign status of the occupied territory.

So what are the laws of occupation intended to achieve? The classic model of belligerent occupation, reflected in the texts of both the Hague and Geneva Conventions, envisaged a state effectively controlling, through physical presence, a territory belonging to another state, without the latter's consent, as part of an armed conflict. In this classic scenario, the main role of the laws of occupation are humanitarian: namely to fill a legal gap by regulating the everyday lives of the inhabitants of the occupied territory, while taking into consideration the security interests of the occupying power.

The laws of occupation are, however, also aimed at protecting the sovereign rights of the "rightful sovereign" of the occupied territory. The occupier is envisioned as a "trustee" of the territory charged with preserving the prior occupant's sovereign interests in the territory given the fact that the occupier must return the occupied lands to the "rightful sovereign" upon the end of the occupation. It is thus accepted that occupation by itself does not give the occupier any new claim to sovereignty over occupied territory. At the same time, it does not eliminate any pre-existing claims or rights of the occupier, or create, in and of itself, new claims or rights over the territory to other political entities.

This duality of purpose helps us to understand various questions and challenges. It is of particular relevance to the issue of Israeli settlements, which can be seen through more than one prism: the humanitarian dimension that captures most of the international attention but also issues surrounding sovereign rights and claims which I will simply address as the "sovereignty dimension." The latter has to do with Israeli and Palestinian claims to territorial sovereignty and mechanisms through which such claims should be resolved.

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[1] Theodor Meron, *The West Bank and International Humanitarian Law on the Eve of the Fiftieth Anniversary of the Six-Day War*, 111 AJIL (forthcoming 2017).

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The "Sovereignty Dimension"

Like Meron, I will not address sovereignty arguments based on religious or biblical grounds. However, academic discourse tends to overlook the fact that both Israel and the Palestinians maintain legal claims to the territory as a matter of general international law.[2] I will not address the particulars or the relative strength of each party's claims, but a few facts are worth noting.

As is well known, immediately after the end of the British Mandate in 1948, Arab nations invaded the territory and waged a war against the newly-declared Jewish state. By the end of that war, Jordanian forces controlled a significant part of the territory of Mandatory Palestine, which came to be known as "the West Bank," while another part—the Gaza Strip—was controlled by Egypt. An early indication of the fact that sovereignty issues were left unresolved is found in the 1949 Armistice Agreements between Israel and its Arab neighbors. Notably, the Israel-Jordan armistice agreement made clear that the demarcation lines agreed upon by the parties were "without prejudice to future territorial settlements or boundary lines or to claims of either Party relating thereto," and that the provisions of that agreement "shall not be interpreted as prejudicing, in any sense, an ultimate political settlement between the Parties."[3]

In 1950 Jordan annexed the West Bank. However, this annexation was rejected by the international community.[4] In the 1967 war Israel captured this area, which together with the Gaza Strip, left it in control of the remaining territory of Mandatory Palestine. Following this war, the Security Council adopted Resolution 242[5] and determined that a just and lasting peace in the Middle East should include the application of two principles, namely:

- Withdrawal of Israel armed forces from territories occupied in the recent conflict;
- Termination of all claims or states of belligerency and respect for and acknowledgment of the sovereignty, territorial integrity and political independence of every State in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force.[6]

It is evident that while the Security Council did not purport to decide on the sovereign status of the territories or the exact location of the borders, it signaled that such claims should be decided by a peace agreement between the parties. Although Resolution 242 originally addressed Israel and its neighboring states, the interpretation of this resolution has since evolved to encompass the Palestinians as a party to the conflict, based on their right to self-determination.[7] Accordingly, the Oslo Accords between Israel and the Palestinians endorse Resolution 242 as the basis for a permanent status resolution of the conflict.[8]

The Oslo Accords established interim arrangements between the parties and explicitly identified several issues that would only be resolved in the permanent peace treaty between the parties. These included: "Jerusalem,

[2] For the official Israel position, see: Israel Ministry of Foreign Affairs, *Israel, the Conflict and Peace: Answers to frequently asked questions* (Dec. 30, 2009); for the official Palestinian position, see: Saeb Erekat, *Palestine Liberation Organization Legal Brief in Support of Recognition of the State of Palestine*, *in* PALESTINE MEMBERSHIP IN THE UNITED NATIONS: LEGAL AND PRACTICAL IMPLICATIONS (Mutaz Qafisheh ed., 2013).

[3] Jordan-Israel General Armistice Agreement, art. 2, Apr. 3, 1949, 42 UNTS 243.

[4] Only the United Kingdom and Pakistan recognized the Jordanian annexation.

[5] SC Res. 242 (Nov. 22, 1967).

[6] *Id.* at para 1.

[7] Notably, in 1988 Jordan renounced any claims to the West Bank and acknowledged the Palestine Liberation Organization as the "sole legitimate representative of the Palestinian people." See King Hussein of Jordan, Address to the Nation (July 31, 1988).

[8] Israel-Palestine Liberation Organization: Declaration of Principles on Interim Self-Government Arrangements, art. I, Sep. 13, 1993, 32 I.L.M. 1525.

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settlements, specified military locations, Palestinian refugees, borders, foreign relations and Israelis."[9] The Accords also stated that neither party had waived its existing rights, claims, and positions, by entering into the agreements.[10] Resolution of these issues remains to be resolved through a permanent status agreement.

Application in practice

The two facets of occupation can explain the official position of the Israeli Government since 1967 that while it does not accept the de jure applicability of the laws of occupation it is however committed to applying its humanitarian provisions. This reflects an understanding that while residents of an area under the control of a foreign state require the protection of a legal framework, this does not infringe upon claims of sovereignty or on territorial disputes that must be decided by other (political) means.

The sovereignty dimension is especially pertinent with respect to settlements. The competing territorial claims of Israel and the Palestinians with regard to the West Bank go to the heart of the dispute over settlements and explain why the parties have expressly agreed to resolve such issues within the framework of a permanent status agreement.

Moreover, the argument that there is a sweeping prohibition on settlements anywhere in the West Bank ignores the fact that "borders" are also one of the issues to be determined through negotiations, meaning that at least some settlements are likely to remain on the Israeli side following an agreement.

In this respect, the reference by Meron to settlement activity in the West Bank as equivalent to a "colonization of territories" fails to recognize Israel's special links and legal claims over the territory. Discounting this aspect is prevalent in the discourse on settlements in the international arena. While this is to be expected from political bodies, such as the General Assembly, it is unfortunately also evident in legal institutions, such as the International Court of Justice in its Advisory Opinion with respect to the Security Fence/Wall.[11]

A related criticism of settlements, also expressed by Meron, is that they are an obstacle to achieving a peaceful resolution of the conflict since they erode the viability of a two-state solution. In fact, however, most of the settlements, and the vast majority of settlers (around 80 percent), are situated in blocks adjacent to Israel's borders and do not pose a challenge to an eventual two-state resolution. The U.S. government has previously acknowledged the differentiation between different kinds of settlements. Even the recent Quartet report hints to such an understanding in making a specific reference to settlements "deep in the West Bank."[12] In addition, it is important to remember that Israel has in the past expressed its readiness to evacuate settlements in the framework of an agreement, and has in fact dismantled several settlements unilaterally.

This is not to say that criticisms regarding the settlements cannot be made from a humanitarian point of view without involving sovereignty issues, in particular when there is harm to individual Palestinian rights. Ever since the very first cases dealing with the territories came before Israel's High Court of Justice (HCJ), that Court has emphasized time and again the need to protect individual Palestinian rights in accordance with the laws of occupation. The Court, even in the 1970s, ruled against the expropriation of Palestinian-owned lands for the purpose of building settlements.[13] Recently the HCJ ordered the evacuation and demolition of the entire settlement of

[9] Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, art. XVII(1), Sep. 28, 1995, 36 I.L.M. 557 (1997).

[10] *Id.*, art. XXXI (6).

[11] The International Court of Justice's Advisory Opinion was heavily criticized on different aspects. As for the analysis of settlements, see for example: Ruth Lapidoth, *The Advisory Opinion and the Jewish Settlements*, 38 Isr. L. Rev. 292 (2005).

[12] The Quartet on the Middle East, Report (July 1, 2016).

[13] HCJ 390/79 Duweikat v. Government of Israel, IsrSc 34(1) (1979) (Isr.).

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Amona on the basis that it was built on private Palestinian lands.[14] Israeli authorities implemented that decision despite political pressure and violent resistance. Nor is this decision groundbreaking; on the contrary it reflects longstanding Israeli jurisprudence.

Recently, the Knesset adopted the so-called "Regularization Law," notwithstanding the clear and irreconcilable objection by Israel's Attorney General based, inter alia, on international law.[15] This law—which seeks to legalize illegal construction on private lands—suffers from many legal difficulties, as I have pointed out elsewhere.[16] It also contradicts longstanding Israeli policy, supported by firm jurisprudence of the HCJ. Several petitions were submitted to the HCJ challenging the law on both constitutional and international law grounds. The Attorney General has taken an extraordinary step by announcing that he will not represent the Government before the Court. It is generally assumed that the Court will strike down the law.

Meron and others, criticize the HCJ's reluctance to decide certain legal questions concerning the settlements. However, the two dimensions of occupation law help to place the Court's reticence in a more proper context. In rejecting generalized claims regarding all settlements and by requiring that petitions demonstrate a cause for concern on humanitarian grounds, the HCJ is in fact attempting to balance occupation law's twin concerns. It is reasonable for the Court to exercise restraint when dealing with issues touching upon the sovereignty dimension of occupation law.

Enter International Criminal Law

Attempts to transpose the issue of settlements into the field of international criminal law by portraying them as a war crime add more complications. The point of departure is Article 49(6) of the Fourth Geneva Convention, which prohibits an Occupying Power from "deport[ing] or transfer[ing] parts of its own civilian population into the territory it occupies." This provision was not included in the list of grave breaches of the Geneva Conventions to which Israel is a party, but was later defined as a grave breach in the 1977 First Additional Protocol, and included in the list of "war crimes" in the 1998 Rome Statute of the International Criminal Court (albeit with controversial changes). Israel is not a party to either of these two treaties.

Apart from the well-known political controversies leading up to the inclusion of this war crime in the said instruments, and the questionable customary status of this norm[17]—the "settlements crime" stands out in a number of ways and raises some important questions. Given limits of space, I will only address issues pertaining to the humanitarian and sovereignty aspects of occupation law.

With the possible exception of the crime of aggression (addressed below), today's international criminal law is generally concerned with the protection of individuals from wide scale atrocities. International crimes aim to prevent harm, or the risk of harm, to life, bodily integrity, property, and other fundamental rights and values, in particular in the context of mass violence.

What sort of injury is covered by the "settlements crime"? It is often argued that the prohibition on settlements seeks to protect the local inhabitants of the occupied territory from a humanitarian prism. However, the plain reading of Article 8(2)(b)(viii) of the Rome Statute criminalizes the transfer by an Occupying Power of its own population to the occupied territory, without reference to any repercussion to the local population. The elements

[14] HCJ 9949/08 Hamad v. Minister of Defense (2017) (Isr., in Hebrew).

[15] Law for the Regularization of Settlement in Judea and Samaria, 5777–2017 (Isr.).

[16] Pnina Sharvit Baruch, *The Regularization Law and the Role of the Legal System*, INSS Insight No. 894 (Feb. 10, 2017).

[17] Antonio Cassese, *The Statute of the International Criminal Court: Some Preliminary Reflections*, 10 Eur. J. Int'l L. 144, 151 (1999); Gennady M. Danilenko, *ICC Statute and Third States*, *in* The Rome Statute of the International Criminal Court: A Commentary 1895 (Cassese et al. eds., 2002).

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of the crime also do not include any formal requirement that the prohibited act has an adverse impact on the local inhabitants.[18] If indeed the aim of this crime is to provide humanitarian protection to local residents, the assumption that settlement activity as such leads to such adverse consequences needs to be further established.

Since the crime of transfer of an Occupying Power's own nationals has never been prosecuted as such there are no authoritative pronouncements on this matter. As a result, there are many unanswered questions and potential complications.

One plausible approach would be to prosecute only in cases where the local population suffers direct, tangible, and individual harm that is closely linked to the act of transfer. For example, prosecutions might be appropriate in extreme situations where the Occupying Power advances a campaign of ethnic cleansing of the local population in order to make room for settlers. This approach would be in line with the general focus of international criminal law on the protection of individuals' fundamental rights, and the general context of Article 49 of the Fourth Geneva Convention, which deals with situations of deportation and forced transfer of the local population.

A different approach would be to treat the provision as aimed at preventing the Occupying Power from changing the demographic composition of the occupied territory in order to change the sovereign status of the territory. One could justify such an approach on the basis of humanitarian concerns insofar as the presence of settlers can be presumed to cause social and economic harm to the local population.[19] However, even if one agrees with these contentions, it seems clear that any humanitarian damage that is caused by the mere presence of settlers in the territory is—by definition—more remote and abstract than would usually be the case with respect to other international crimes.

Moreover, to the extent this second approach focuses on preserving the sovereign status of the territory, it is questionable whether international criminal law is an appropriate tool for dealing with sovereignty issues that need to be resolved at the interstate level. This is especially so in the sui generis circumstances of the Israel-Palestinian context, in which such sovereign concerns remain undecided, disputed, and subject to political resolution, as explained above.

Notably, the only international crime that purports to cover interstate issues—the crime of aggression—has not been applied beyond the events of World War II. While that crime does appear in the Rome Statute, it is subject to particular jurisdictional arrangements severely curtailing the prospects that it would ever be applied and specifically limiting its automatic application to cases where both states involved have consented to the Court's jurisdiction.

In sum, the ongoing conflict between Israel and the Palestinians, including with regard to settlements, raises humanitarian concerns that should be rightfully addressed. Israel is not immune from criticism, and it ought to be possible to have discussions on humanitarian and human rights concerns. However, ignoring the sovereignty aspects of the dispute, that are central to the debate on settlements, creates a distorted and over-simplified image. Such an approach will not solve the conflict but rather is more likely to hamper potential compromises critical for its peaceful resolution.

[18] During the drafting of the elements of the crime there was controversy whether the economic situation of the local population must be worsened and whether their separate identity must be endangered by the transfer, but it was eventually decided to leave the interpretation to the Court. Knut Dörmann, Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary 210–211 (2003).

[19] William Schabas, The International Criminal Court: A Commentary on the Rome Statute 272–273 (2d ed., 2016); Otto Triffterer & Kai Ambos, The Rome Statute of the International Criminal Court: A Commentary 405 (3d ed., 2016).

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