



Bricks and Stones: Settling for Leverage; Palestinian Autonomy

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Over the past several weeks the long-standing American objection to further Israeli settlements in the West Bank has been pressed by the Bush administration with new vehemence. The outcome of this argument is crucial. It will affect the substance, fairness, and durability of any peace that may emerge.

With varying degrees of seriousness, all American administrations since 1967 have objected to Israeli settlements in the West Bank on the ground that they would make it more difficult to persuade the Arabs to make peace. President Carter decreed that the settlements were "illegal" as well as tactically unwise. President Reagan said that the settlements were legal but that they did make negotiations less likely. The strength of the argument is hardly self-evident. Jordan occupied the West Bank for nineteen years, allowed no Jewish settlements, and showed no sign of wanting to make peace. Yet if the West Bank were 98 or 100 percent Arab when the parties finally reached the bargaining table, the impulse to accept a peace that ceded the whole of the West Bank to an Arab state would be tempting to Americans and Europeans, and even to some weary Israelis. The growing reality of Israeli settlements in the area, on the other hand, should be a catalyst for peace, by imposing a price on the Arabs for their refusal to negotiate. But the American government keeps reciting the old formula.

Secretary of State James Baker has gone beyond previous American positions by threatening to cut aid if the Israelis build more settlements in the West Bank. He spoke after Arab protests against the possibility of large numbers of Soviet Jews settling in Israel, particularly in the West Bank. Wouldn't it have been more useful if Baker had told his Arab interlocutors that if they want any parts of the West Bank to become Arab territory, they should persuade Jordan and the Arabs living in the occupied territories to make peace with Israel as rapidly as possible? Since 1949 the U.N. Security Council has repeatedly urged and occasionally commanded the Arab states to make peace, most recently in Resolutions 242 and 338. Thus far, with the exception of Egypt in 1977, they have simply refused to comply. But Baker yielded to the Arab outcry, and is trying to maneuver Israel into a position that no Israeli majority can accept: to renounce the right of settlement "of the Jewish people"-in the words of the Mandate-in any part of the West Bank.

The Jewish right of settlement in the West Bank is conferred by the same provisions of the Mandate under which Jews settled in Haifa, Tel Aviv, and Jerusalem before the State of Israel was created. The Mandate for Palestine differs in one important respect from the other League of Nations mandates, which were trusts for the benefit of the indigenous population. The Palestine Mandate, recognizing "the historical connection of the Jewish people with Palestine and the grounds for reconstituting their national home in that country," is dedicated to "the establishment in Palestine of a national home for the Jewish people, it being clearly understood that nothing should be done which might prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country."

The Mandate qualifies the Jewish right of settlement and political development in Palestine in only one respect. Article 25 gave Great Britain and the League Council discretion to "postpone" or "withhold" the Jewish people's right of settlement in the Transjordanian province of Palestine-now the Kingdom of Jordan-if they decided that local conditions made such action desirable. With the divided support of the council, the British took that step in 1922.

The Mandate does not, however, permit even a temporary suspension of the Jewish right of settlement in the parts of the Mandate west of the Jordan River. The Armistice Lines of 1949, which are part of the West Bank boundary, represent nothing but the position of the contending armies when the final cease-fire was achieved in the War of Independence. And the Armistice Agreements specifically provide, except in the case of Lebanon, that the demarcation lines can be changed by agreement when the parties move from armistice to peace. Resolution 242 is based on that provision of the Armistice Agreements and states certain criteria that would justify changes in the demarcation lines when the parties make peace.

Many believe that the Palestine Mandate was somehow terminated in 1947, when the British government resigned as the mandatory power. This is incorrect. A trust never terminates when a trustee dies, resigns, embezzles the trust property, or is dismissed. The authority responsible for the trust appoints a new trustee, or otherwise arranges for the fulfillment of its purpose. Thus in the case of the Mandate for German South West Africa, the International Court of justice found the South African government to be derelict in its duties as the mandatory power, and it was deemed to have resigned. Decades of struggle and diplomacy then resulted in the creation of the new state of Namibia, which has just come into being. In Palestine the British Mandate ceased to be operative as to the territories of Israel and Jordan when those states were created and recognized by the international community. But its rules apply still to the West Bank and the Gaza Strip, which have not yet been allocated either to Israel or to Jordan or become an independent state. Jordan attempted to annex the West Bank in 1951, but that annexation was never generally recognized, even by the Arab states, and now Jordan has abandoned all its claims to the territory.

The State Department has never denied that under the Mandate "the Jewish people" have the right to settle in the area. Instead, it said that Jewish settlements in the West Bank violate Article 49 of the Fourth Geneva Convention of 1949, which deals with the protection of civilians in wartime. Where the territory of one contracting party is occupied by another contracting party, the Convention prohibits many of the inhumane practices of the Nazis and the Soviets before and during the Second World War—the mass transfer of people into or out of occupied territories for purposes of extermination, slave labor, or colonization, for example.

Article 49 provides that the occupying power "shall not deport or transfer part of its own civilian population into the territory it occupies." But the Jewish settlers in the West Bank are volunteers. They have not been "deported" or "transferred" by the government of Israel, and their movement involves none of the atrocious purposes or harmful effects on the existing population the Geneva Convention was designed to prevent. Furthermore, the Convention applies only to acts by one signatory "carried out on the territory of another." The West Bank is not the territory of a signatory power, but an unallocated part of the British Mandate. It is hard, therefore, to see how even the most literal-minded reading of the Convention could make it apply to Jewish settlement in territories of the British Mandate west of the Jordan River. Even if the Convention could be construed to prevent settlements during the period of occupation, however, it could do no more than suspend, not terminate, the rights conferred by the Mandate. Those rights can be ended only by the establishment and recognition of a new state or the incorporation of the territories into an old one.

As claimants to the territory, the Israelis have denied that they are required to comply with the Geneva Convention but announced that they will do so as a matter of grace. The Israeli courts apply the Convention routinely, sometimes deciding against the Israeli government. Assuming for the moment the general applicability of the Convention, it could well be considered a violation if the Israelis deported convicts to the area or encouraged the settlement of people who had no right to live there (Americans, for example). But how can the Convention be deemed to apply to Jews who have a right to settle in the territories under international law: a legal right assured by treaty and specifically protected by Article 80 of the U.N. Charter, which provides that nothing in the Charter shall be construed "to alter in any manner" rights conferred by existing international instruments" like the Mandate. The Jewish right of settlement in the area is equivalent in every way to the right of the existing Palestinian population to live there.

Another principle of international law may affect the problem of the Jewish settlements. Under international law, an occupying power is supposed to apply the prevailing law of the occupied territory at the municipal level unless it interferes with the necessities of security or administration or is "repugnant to elementary conceptions of justice." From 1949 to 1967, when Jordan was the military occupant of the West Bank, it applied its own laws to prevent any Jews from living in the

territory. To suggest that Israel as occupant is required to enforce such Jordanian laws-a necessary implication of applying the Convention-is simply absurd. When the Allies occupied Germany after the Second World War, the abrogation of the Nuremberg Laws was among their first acts.

The general expectation of international law is that military occupations last a short time, and are succeeded by a state of peace established by treaty or otherwise. In the case of the West Bank, the territory was occupied by Jordan between 1949 and 1967, and has been occupied by Israel since 1967. Security Council Resolutions 242 and 338 rule that the Arab states and Israel must make peace, and that when "a just and lasting peace" is reached in the Middle East, Israel should withdraw from some but not all of the territory it occupied in the course of the 1967 war. The Resolutions leave it to the parties to agree on the terms of peace.

The controversy about Jewish settlements in the West Bank is not, therefore, about legal rights but about the political will to override legal rights. Is the United States prepared to use all its influence in Israel to award the whole of the West Bank to Jordan or to a new Arab state, and force Israel back to its 1967 borders? Throughout Israel's occupation, the Arab countries, helped by the United States, have pushed to keep Jews out of the territories, so that at a convenient moment, or in a peace negotiation, the claim that the West Bank is "Arab" territory could be made more plausible. Some in Israel favor the settlements for the obverse reason: to reinforce Israel's claim for the fulfillment of the Mandate and of Resolution 242 in a peace treaty that would at least divide the territory. For the international community, the issue is much deeper and more difficult: whether the purposes of the Mandate can be considered satisfied if the Jews finally receive only the parts of Palestine behind the Armistice Lines-less than 17.5 percent of the land promised them after the First World War. The extraordinary recent changes in the international environment have brought with them new diplomatic opportunities for the United States and its allies, not least in the Middle East. Soviet military aid apparently is no longer available to the Arabs for the purpose of making another war against Israel. The intifada has failed, and the Arabs' bargaining position is weakening. It now may be possible to take long steps toward peace. But to do so, the participants in the Middle East negotiations-the United States, Israel, Egypt, and the PLO-will have to look beyond the territories.

The goal of Yitzhak Shamir's election proposal is an interim regime of Arab autonomy in part of the West Bank and the Gaza Strip in accordance with the Camp David Accords; the goal of the PLO is to establish a Palestinian Arab state in the whole of the territories. It is hard to be sanguine about the possibility of reconciling those positions through negotiations. Establishing a cooperative relationship between Israel and the Arabs who live in the occupied territories is a crucial part of the Palestine problem, but it is not the whole of it, and surely not an end in itself. The last thing Israel wants is an Arab Bantustan. If the status of the occupied territories is viewed in isolation, negotiation will be excruciatingly

difficult, and every item on the agenda will be a tense and suspicious haggle on both sides.

The prospects for peace would be less forbidding if the question were approached as one element in a plan for achieving a larger goal: a confederation involving at least Israel, Jordan, and the occupied territories. Membership could perhaps be open to poor Lebanon as well, or parts of it. Even Syria, behind its ferocious words, may be preparing to move toward peace. Syria and Israel have congruent interest in Lebanon and elsewhere, and neither country wants a state dominated by the PLO as a neighbor.

The idea of a Palestinian confederation has been the recommendation of every serious study of the Palestine problem for more than fifty years. It was the essence of the partition proposals of the Peel Commission in 1936, and of the General Assembly's 1947 partition plan, at least for Israel and the West Bank. With different boundaries, it was also the basic idea of Israel's 1967 peace offer, which will always correspond to Israeli public opinion: Palestine divided into a Jewish and an Arab state, united in a common market, with special arrangements for Jerusalem and as much political cooperation as the traffic will bear. Before the intifada started, it was the notion behind the de facto Israel/Jordanian condominium for the West Bank, which was both effective and practical.

After the past year's events in Eastern Europe and the Soviet Union, who can say that progress in the Middle East is impossible?