The myth of Jewish settlements in int'l law

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By permitting Jewish residence in the West Bank, is Israel ignoring international law? Ruth Gavison, a law professor at Jerusalem's Hebrew University, seems to thinks so.

Gavison criticized the report issued last year by former Israeli Supreme Court Justice Edmund Levy which affirmed the legality of building under international law.

Yet, the law was clear long before Justice Levy produced his report: the territory of the West Bank was earmarked for Jewish settlement in 1920 at the San Remo Conference that drafted the League of Nations Charter. This decision, enshrined in the British Mandate for Palestine that shortly followed, has never been superseded by an internationally binding agreement.

The 1947 UN partition plan, which sought to create Arab and Jewish states, could have been such an agreement, but it was rejected by the Arabs. Being a General Assembly resolution, the plan had no legal force of its own.

In contrast, the 1993 Oslo Accords do possess legal force but, but as these contain no prohibition on the existence and growth of these Jewish communities, Jewish rights remain unimpaired. Whether one supports or opposes Jewish residence in the West Bank, all should be able to agree on this.

Yet Gavison laments, "The courts have never addressed the significance and ramifications of the injunction against an occupying state transferring its population into conquered territories."

The injunction to which she refers is Article 49 of the Fourth Geneva Convention, which prohibits "Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not." It also ordains that "The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies."

The reason Israeli courts have not addressed Article 49's applicability is straightforward – Palestinians are *not* being deported or forcibly transferred from the West Bank to another territory. Jews are *not* being deported or transferred from Israel to the West Bank; they are moving there freely of their own will.

Moreover, the Fourth Geneva Convention deals only with territories belonging to a *sovereign* power. In contrast, the West Bank, illegally seized by Jordan in 1948and captured by Israel following Jordanian attack in 1967, remains unallocated territory under international law. Only Israeli annexation or an Arab-Israeli agreement on its status could alter this – something that has not occurred. Accordingly, Article 49 has no bearing on the situation.

Why has Gavison ignored the decisive legal and commonsensical objections to criminalizing Jewish residence in the West Bank? Because she is a proponent of a perversion of international legal norms which holds that voluntary Jewish settlement in the West Bank amounts to illegal "transfer."

On what basis? Gavison refers to a recent report on behalf of the UN Human Rights Council – a body Gavison herself admits is "biased, anti-Israel" – which condemned Jewish settlements as "illegal." In her opinion, however, its view is valid, because it represents "the maturation of a prolonged process" which goes back to the 1998 Rome Treaty that established the International Criminal Court (ICC). The ICC, Gavison claims, "had the Israeli-Palestinian conflict in mind when choosing the wording of this definition" outlawing transfer of populations as a war crime.

Naturally, this makes no sense. First, there has been no binding legal decision affirming this novel interpretation of the law. Second, arbitrary redefinition of a peremptory legal norm – such as a war crime – is a dangerously undemocratic procedure that clashes with the traditionally consensual nature of international law considered necessary to state sovereignty.

There was a time when a war crime was understood to mean such things as murdering enemy civilians or putting them to forced labor in camps. Now, according to Gavison's Kafkaesque process of legal alchemy, it can mean residence in the West Bank – if one is an Israeli Jew.

Yet, as absurd as the idea is, Gavison points to something nonetheless real that highlights a general problem for free societies, not merely Israel: time *does* tend to work in favor of processes of legal perversion, when new, sometimes scarcely-known, treaties or "norms"

are increasingly given standing by transnational forums and courts with little interest or sympathy for the values and interests of free societies.

The day arrives thus when a new legal fact has been created, no matter how absurd or noxious. In respect of Article 49, that day hasn't arrived, but Palestinian agitprop is working on it.

Therefore, it is not enough for Israel to restate the law. It must explore avenues old and new – commissioning authoritative legal opinions, working to obtain a US Congressional resolution on the subject, seeking repudiation by democratic governments of the mangling of Article 49, detailed refutation of each and every contrary assertion by governments and international organizations, to name several – to prevent today's absurdity becoming tomorrow's settled law.

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