This week, Barack Obama's Middle East peace envoy George Mitchell met in New York with Israeli Defense Minister Ehud Barak to begin discussing a potential "compromise" regarding the continued expansion of Israeli settlements in occupied Palestinian territory. Israel's continued settlement expansion has been at the top of America's Middle East agenda since Obama's Cairo speech in June, when he declared that "the United States does not accept the legitimacy of continued Israeli settlements."

Obama's statement has been heralded (and criticized) as a striking departure from the policy of George W. Bush. In fact, the Cairo speech squandered Obama's best opportunity to revitalize U.S. policy in the Arab-Israeli arena by describing Israeli settlement activity not merely as violating previous agreements and undermining efforts to achieve peace, but as "illegal," because the settlement of Israeli civilians in occupied territory violates the Fourth Geneva Convention.

More broadly, Obama's rhetoric in Cairo strongly suggests that his Middle East diplomacy will extend America's decades-long record of ineffectual efforts at Arab-Israeli peacemaking -- a record that has its origins in the Reagan administration's 1981 decision to abandon the Johnson, Nixon, Ford, and Carter administrations' characterization of Israeli settlements in occupied Arab territory as "illegal." While the European Union and most of the rest of the world have consistently done so, the last four U.S. administrations have not -- a position Obama is continuing.

By shrinking from declaring Israeli settlement activity illegal, Obama has guaranteed that, in substance, his Middle East policy cannot depart significantly from that of George W. Bush. Obama's
insipidly favorable response to Israeli Prime Minister Benjamin Netanyahu's conditional "acceptance" of the two-state formula underscores an unfortunate continuity in America's Middle East policy. In the end, Obama's Middle East policy is rooted in his predecessor's profoundly flawed 2003 road map for a two-state solution and the feckless process that Bush's secretary of state, Condoleeza Rice launched at Annapolis in 2007. Worse, in contrast to other policy mistakes made early in his presidential tenure, Obama will be hard put to reverse the damage done by his lack of clarity and courage on the settlements issue by coming back at a later date and arguing that Israeli settlements in occupied territory are, in fact, illegal.

To appreciate the full significance of Obama's obfuscation of the legal status of Israeli settlements, it is necessary to understand the road map's fundamental weaknesses. Among its many deficiencies are two especially damaging flaws.

First, in its initial phase, the road map makes restrictions on Israeli settlement activity contingent on Palestinian security performance. As senior director for Middle East affairs at the National Security Council in 2002 and early 2003, when the road map was being prepared, coauthor Flynt Leverett argued that the call for Israel to halt settlement activity in the first phase needed to stand on its own - just as the call for Palestinians to take action against terror and violence was not contingent on improvements in Israeli behavior. However, under pressure from the Sharon government, President Bush and his senior national security team retreated on this pivotal issue.

In the real world, Palestinian security performance will never be perfect, so, under the road map, Israel will never be obliged to stop settlement activity -- not even through the kind of settlement "freeze" that was theoretically entertained by Ariel Sharon and Ehud Olmert (with ample allowance for the "natural growth" of existing settlements). Had President Obama explicitly declared Israeli settlements illegal, however, his call for a halt to settlement activity would not be based on a (disputable) judgment that such activity is "unhelpful" or creates "facts on the ground" that prejudge final negotiating outcomes. Instead, the U.S. call to end settlement activity would be grounded in a straightforward argument: Because Israeli settlements are illegal, no negotiating process rooted in international law could responsibly tolerate their expansion.
Beyond its mishandling of the settlements issue, the road map's most significant flaw comes in its third and final phase, where not a single word is presented regarding the parameters for resolving the "final status" issues -- borders, Jerusalem, and Palestinian refugees -- at the heart of the Israeli-Palestinian conflict. We all know what these parameters are: 1967 boundaries will be the starting point for negotiating final borders, with the possibility of marginal and mutually agreed adjustments. Jerusalem will be shared as the capital of both Israel and Palestine, with special arrangements for the holy sites in the center of the Old City. Whatever arrangements are made to recompense and resettle Palestinian refugees, perhaps even with the theoretical acknowledgement of a "right of return," those arrangements will not be implemented in a way that threatens Israel's Jewish-majority character.

Without such final-status parameters, there can be no credible political horizon for resolving the Israeli-Palestinian conflict. But their omission was no accident. Again, during 2002 and early 2003, Flynt Leverett argued vociferously within the White House that such parameters were essential. But President Bush and his senior national-security team believed them to be unfairly demanding of Israel, and refused to include them.

By explicitly declaring Israeli settlements illegal, Obama could have transcended this fatal flaw in the road map. If settlements are illegal, then no negotiating process grounded in international law could take any starting point other than the 1967 boundaries for negotiating final borders. Similarly, if settlements are illegal, then any negotiating process grounded in international law would have to start from the premise that all of Jerusalem cannot remain under exclusive Israeli control.

Obama could have reinforced a declaration that Israeli settlements in occupied territory are illegal by embracing the 2002 Arab League peace initiative -- perhaps even proposing to make it the basis for a new U.N. Security Council resolution to jump start a revived Middle East peace process. Among other benefits, embracing the Arab initiative would have provided solid grounding for a U.S. position on Palestinian refugees. By stipulating that there should be a "just and agreed" resolution to the refugee issue, the Arab initiative acknowledges that the issue will not be resolved in a way that undermines Israel's Jewish-majority character. (We have confirmed this reading of the Arab initiative through discussions with Arab diplomats who were deeply involved in its preparation.)
Instead, while acknowledging the Arab peace initiative as a positive step, Obama argued in Cairo that the initiative was not the end, but rather just the "beginning" of Arab states' responsibilities to promote Middle East peace. In particular, he called on Arab states to "front load" their promise of normalized ties to Israel, before Israel has to take any concrete steps toward ending the occupation of Palestinians (or of the Golan Heights). This is a delusion, driven by a willful misreading of the Arab Peace Initiative. It is also a sad replay of George W. Bush's indifferent reaction to what in our view is the most significant diplomatic move in Arab-Israeli diplomacy since the 1991 Madrid peace conference, which relaunched the peace process after 12 years of stasis following the 1979 Camp David accords between Israel and Egypt.

There will be many who claim that all this will only make Israel feel less secure and therefore less likely to take "risks for peace." But the proposition that Israel becomes relatively forthcoming in peace negotiations only when it feels assured of unquestioning U.S. support -- a pillar of the Clinton administration's ultimately failed approach that is unfortunately being resurrected under Obama -- is not supported by the historical record. After all, no Israeli prime minister could have felt more assured of unquestioning U.S. support than Ariel Sharon, whom George W. Bush notoriously hailed as a "man of peace" -- a description that, in retrospect, seems puzzling at best.

On the other hand, during the Nixon and Ford administrations, when U.S. policy clearly defined Israeli settlements as illegal, Henry Kissinger was able to broker the disengagement agreements between Israel and neighboring Arab states that laid the groundwork for future peacemaking. Building on that foundation, Jimmy Carter -- who was arguably more forthright than any U.S. president in calling Israeli settlements illegal -- produced the historic Camp David accords between Egypt and Israel, the most important Arab-Israeli peace treaty to date.

In response to pressure from the Netanyahu government, Mitchell is reportedly already considering a "new" definition of "natural growth" in existing settlements -- a definition that would allow Israel to complete construction that has already been started. One can only imagine how many construction permits will be pulled out of drawers in Israeli settlements throughout the West Bank in anticipation of such an arrangement; the practical effect of such "limits" will be as meaningless as the Bush administration's "understandings" with Sharon and Olmert. For those genuinely interested in a negotiated two-state solution, Obama is hardly proving to be "change we can believe in."
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