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Are They Legal or Not?

Pompeo's Announcement on the Israeli Settlements

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The announcement by US Secretary of State Mike Pompeo that "the establishment of Israeli civilian settlements in the West Bank is not, per se, inconsistent with international law" is in line with Israel's official position, and its inherent message – that preoccupation with the question of the legality of the settlements narrows Palestinian flexibility and discourages the achievement of a negotiated resolution to the conflict – is correct. However, the announcement's practical value is minor, and there are even potential risks and costs for Israel. Inter alia, it may generate increased pressure in Israel for annexation moves that are liable to harm the state from a security and political standpoint. Furthermore, there is a growing concern that the announcement will drag the settlements issue into the US election campaign, and with the next change of administration, will prompt the adoption of an opposite policy that would underscore the illegality of the settlements and perhaps encourage measures against Israel. Israel would do well to minimize this potential damage by bolstering ties with representatives and supporters of the Democratic Party and by emphasizing that a peace process between Israel and the Palestinians will not be advanced by redirecting the discussion to the legal sphere or adopting the Palestinian anti-Israel tack, but by restoring the United States role of unbiased mediator.

At a press conference on November 18, 2019, US Secretary of State Mike Pompeo announced a change in United States policy regarding the legality of the Israeli settlements, emphasizing that it constitutes a reversal of the Obama administration's approach. The new policy holds that "the establishment of Israeli civilian settlements in the West Bank is not, per se, inconsistent with international law." Pompeo noted that this represents a return to the position of the Reagan administration. Simultaneously, he underscored three considerations. First, the announcement does not address the legality of any individual settlement, a matter subject to Israel's judicial authority. Second, there is nothing in the announcement that might prejudge the ultimate status of the West Bank, which must be negotiated between Israel and the Palestinians, as international law will not decide this matter. Third, this position stems from the unique facts, history, and circumstances presented by the establishment of the settlements, and is no precedent for situations elsewhere in the world. Pompeo further stressed that above all, the position that

deemed the settlements inconsistent with international law had not advanced peace. He contended that there will be no judicial resolution to the conflict and that "arguments who is right and wrong as a matter of international law will not bring peace," as this is a complex political problem that can only be solved through negotiations.

The reasons for the timing of the announcement are unknown. According to various reports, the statement was drafted over recent months, and presumably it is a component of the "deal of the century." Perhaps the timing is linked to the administration's desire to highlight its opposition to the ruling by the Court of Justice of the European Union, handed down a week earlier, obligating EU member states to enforce the labelling of products that originate in the settlements or the Golan Heights. The announcement was also likely meant to satisfy Trump's Evangelical base as the US election nears, and to help Netanyahu within the Israeli political scene.

As Pompeo pointed out, US administrations have indeed differed on the matter over the years. Most administrations shunned the question of the settlements' legality, and for the most part, made do with rhetoric describing them as liable to present an obstacle to peace. The only exceptions were the Carter administration, which explicitly stated that the establishment of settlements violated international law, and even allowed three UN Security Council resolutions to that effect to pass in 1979-1980; and the Obama administration, which in December 2016, through an abstention vote, enabled the adoption of Security Council Resolution 2334, which designates the settlements as a "flagrant violation" of international law.

As a policy, emphasizing illegality of the settlements is not useful, and is even damaging to advancing the peace process. This is because such an approach has the potential to prompt the Palestinians to toughen their position, if they infer that they are being asked to surrender a legal right. In addition, emphasizing illegality of settlements undermines a core idea of the Oslo process, which deems settlements an issue to be addressed within the framework of final status negotiations. As such, the announcement constitutes an achievement for Israel. Simultaneously, however, its practical value is minor, and it encompasses inherent risks and costs for Israel on the legal and political levels.

From a legal standpoint, the main argument against the settlements' legality is that they constitute a violation of Article 49 of the Fourth Geneva Convention, which forbids an occupying power from transferring its citizens to the territory occupied. It is also claimed that there is a violation of the Palestinians' right to self-determination. Israel has counter-arguments, both regarding the very applicability of the Geneva Convention to the West Bank and regarding interpretations of Article 49. Israel further asserts that even with recognizing the Palestinians' right to self-determination, there is no categorical

delineation of the territory where the Palestinians are meant to realize this right, as the Green Line is by definition not an agreed border.

Despite these counter-arguments, the accepted position among the majority of international jurists, which appears in the 2004 advisory opinion of the International Court of Justice in The Hague and which is stated in UN Security Council Resolution 2334, is that the settlements are a violation of international law. This is also the position of the European Union and of many other countries throughout the world. The American announcement is unlikely to change this position, especially given the Trump administration's perceived lack of commitment to international law. Similarly, it does not appear that this announcement will have significant sway over the decision of the prosecutor of the International Criminal Court, due in the coming year, on whether to launch a criminal investigation of Israeli figures in relation to settlements, which is one of the crimes included in the Court's founding treaty.

On the political level, the US announcement is unlikely to reduce criticism of Israel in relation to settlements in the international arena. As far as the Palestinians are concerned, the announcement is yet another expression of US partiality, making it even harder to view the current administration as a fair mediator and to seriously consider the "deal of the century" – if and when it is made public. Thus, it is difficult to see how this position could improve the likelihood of making progress toward a peace process.

Furthermore, given the upcoming US election in 2020, the announcement does not encourage the Palestinians to show flexibility on the matter of the settlements. They are likely to assume that a change in the US administration will bring about another policy reversal. This is a regrettable outcome, because those who want to advance negotiations should seek to avoid being dragged into a legalistic debate over the settlements.

As to the impact on Israel: one of the factors restraining Israeli annexation of West Bank territories or part thereof has been fear of the American reaction. Pompeo's announcement might be interpreted as a green light for such steps, and generate pressure on Israel's Prime Minister to advance them. Annexation could well undermine both Israel's national security and the prospects of reaching a future agreement with the Palestinians. In addition, it is liable to spark an anti-Israel backlash in other countries, and even in the United States, given the emphasis in Secretary Pompeo's announcement that the future of the territory should be decided through negotiations.

Indeed, as far as Israel is concerned, the main concern stemming from the announcement is the potential reaction to it from the next Democratic president. Since the 1980s, the position of US administrations that steered clear of the question of settlements' legality

transcended party lines, drawing adherence from Presidents Reagan and Bush – both father and son – as well as President Clinton. It was President Obama who deviated from this position and explicitly termed the settlements as illegal. Portraying President Trump's move as a reversal of Obama's policy is liable to trigger a parallel move from a future Democratic administration: a return to Obama's track, and perhaps adoption of an even tougher policy against the settlements. This concern becomes more substantial given the general trend whereby Israel is becoming a partisan issue, pursuant to its leadership's almost complete alignment with the Republican Party's ideology and policy line. Indeed, Joe Biden, considered the Democratic contender most supportive of Israel, fiercely denounced the decision, asserting that it constitutes "an obstacle to peace...in the service of Trump's personal politics."

More generally, the announcement bolsters the trend whereby Israel has become a controversial issue within American domestic politics. It can be expected that as part of the upcoming election campaign, that focuses on Jewish and Evangelical voters as well as other stakeholders with an interest in the Israeli-Palestinian conflict, both parties will emphasize their candidates' position on the matter with the aim of mustering votes. This development will amplify an already polarized debate around Israel's policy vis-à-vis the territories and can be expected to lead to a hardening of Democratic positions against Israel, such that it contradicts the salient Israeli interest of preserving bi-partisan support.

An additional, possible repercussion of the announcement is an increased polarization within the US Jewish community – some 70 percent of whom traditionally vote for the Democratic Party – as well as a sharpening of gaps between the Jewish community in the United States and the State of Israel.

The bottom line is that Pompeo's announcement is in harmony with Israel's position, and that its inherent message – that preoccupation with the question of the settlements' legality reduces Palestinian flexibility on matters pertinent to reaching a future agreement – is correct. Nevertheless, there is mounting concern that the announcement will drag the settlements issue into the US election campaign, and that the next Democratic president will work to reverse this policy – either by stressing that the settlements are illegal, as happened under the Obama administration, or by taking active measures against Israel due to this policy. Israel would do well to minimize these potential damages by bolstering ties with representatives and supporters of the Democratic Party. Furthermore Israel must emphasize that advancing a peace process between Israel and the Palestinians will not be achieved by diverting the discussion to the legal sphere or adopting the Palestinian anti-Israel approach, but by restoring the United States' role of an impartial mediator.