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The Trump Administration's Statement on Israeli Settlements: Legal Status and Political Reality

Gilead Sher, Isaac and Mildred Brochstein Fellow in Middle East Peace and Security in Honor of Yitzhak Rabin
Daniel Cohen, Intern, Center for the Middle East

Since 1978, U.S. policy has generally held in variable levels of consistency that Israeli settlements in the West Bank contravene international law, and at the very least present an obstacle to peace. On November 18, 2019, U.S. Secretary of State Michael Pompeo announced a reversal of the policy, stating that "the establishment of Israeli civilian settlements in the West Bank is not, per se, inconsistent with international law."[1] The Palestinians received this news as another act of hostility by the Trump administration toward them,[2] as it followed a series of pro-Israel decisions in the recent past, including the relocation of the U.S. embassy in Israel from Tel Aviv to Jerusalem, the recognition of Israeli sovereignty in the Golan Heights, a cut in U.S. financial support for the Palestinians, and the cessation of U.S. contribution to the United Nations Relief and Work Agency for Palestinian Refugees.

The legal significance of Pompeo's announcement is secondary to its impact on the political situation on the ground and the international arena. Despite resolutions by international bodies regarding the Israeli presence in the West Bank, the 1993 Declaration of Principles (Oslo I)[3] has addressed Israeli settlements as an issue for final status negotiations, along with other core issues, namely Palestinian refugees, security arrangements, and the status of Jerusalem. To a degree, the Pompeo statement aligns with the Israeli perspective: preoccupation with the settlements limits flexible negotiations and hinders a successful and nuanced political process.[4] However, the potential for the new U.S. policy to incite dangerous consequences represents a major spoiler to any eventual peace process.

This brief will assess the consequences of the Trump administration's new settlement policy, particularly within the context of past legal arguments and the stances of six previous U.S. presidential administrations— i.e., those of Jimmy Carter, Ronald Reagan, George H.W. Bush, Bill Clinton, George W. Bush, and Barack Obama. Pompeo's statement is misguided, not because of its legal-political determination, but because of what it threatens to induce: further gridlock between Israelis and Palestinians, potential Israeli annexation of the West Bank (as has been proposed by Israeli Prime Minister Benjamin Netanyahu numerous times[5, 6]), and a dangerous Israeli decline into a single state that all but eliminates the Zionist enterprise.[7]

The authors suggest that the Israeli government must not abide by foreign interference in its affairs, from allies and adversaries alike, but must instead prioritize its own security and prosperity, predicated on an eventual two-state-for-two-people paradigm. Regardless of attempts by the Trump administration to predetermine the outcome, Israel should endeavor to secure a democratic national home for the Jewish people within secure boundaries alongside



a viable, demilitarized Palestinian state. Starting traction toward a reality of two distinct political entities would be best served by a proactive, phased, systematic approach to preserving the conditions for a two-state solution through the gradual creation of a two-state reality.

LEGAL ARGUMENTS REGARDING ISRAELI SETTLEMENTS

International Arguments

The consensus international argument holds that Israeli civilian settlements in the West Bank are illegal under international law, a position held by the UN Security Council and General Assembly, the UN's International Court of Justice (IJC), and the International Committee of the Red Cross (ICRC).[8] These institutions argue that Israeli settlements violate Article 49(6) of the Geneva Convention relative to the Protection of Civilian Persons in Time of War—also known as the Fourth Geneva Convention (GCIV)[9]—which states that an occupying power "shall not deport or transfer parts of its own civilian population into the territory it occupies."[10]

Most recently, the International Criminal Court's chief prosecutor, Fatou Bensouda, said that there is a basis for proceeding with an investigation into Israeli crimes allegedly committed in the Palestinian territories, adding: "Despite the clear and enduring calls that Israel cease activities in the Occupied Palestinian Territory deemed contrary to international law, there is no indication that they will end. To the contrary, there are indications that they may not only continue, but that Israel may seek to annex these territories. Numerous reports reflect concerns of a potential de jure annexation. In August and September 2019, Prime Minister Benjamin Netanyahu vowed to annex large parts of the West Bank if re-elected."[11]

While typical legal arguments, as well as non-legal political standpoints, cite Israel's rights and responsibilities under the GCIV as the basis for absolute restriction on all settlement activity in occupied Palestinian territory, some legal scholars contend this consensus opinion elides important considerations particular to the Israeli case.[12]

Israeli Counterarguments

A primary counterargument is that the GCIV does not apply to the Israeli occupation of the West Bank because this convention only applies to post-war occupation of "the territory of a High Contracting Party."[13] According to this reasoning, the Fourth Geneva Convention does not apply since the West Bank was not a sovereign territory of any state—though Jordan annexed the West Bank in 1950, the act was never formally recognized by the international community.[14] However, at times Israel, along with the Israeli Supreme Court, has justified its own military operations in the West Bank under the principles of belligerent occupation, contrary to the claim that the West Bank is not occupied territory.[15]

A second argument holds that Article 49(6) only prohibits forcible, not voluntary, relocation of Israeli civilians to West Bank territory. Morris Abram, U.S. ambassador to the UN in Geneva and one of the drafters of the GCIV, has explained that this provision was a response to Nazi Germany's coercive eviction of German Jews to occupied territories for the purpose of mass extermination in death camps.[16] Though Israel argues voluntary settlers are excluded from this provision, United Nations Security Council Resolution 446 and other UN resolutions maintain that Article 49(6) categorically applies to West Bank settlements.[17]

Third, Israel has argued that settlements in the West Bank are permitted under Article 55 of the 1907 Hague Regulations with respect to the Laws and Customs of War on Land. Article 55 recognizes the occupying state as an "administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State."[18] According to Alan Baker, a former legal advisor to Israel's Ministry of Foreign Affairs, while local residents' private rights of ownership must be strictly protected, Israeli West Bank settlements on public land are permitted insofar as settlers are prohibited from assuming ownership rights.[19]

Israel's attorney general has recently responded to an opinion issued by the Office of the Prosecutor (OTP) of the International

Criminal Court (ICC) as follows: "Israel's presence in the West Bank is fully in accordance with international law: Israel gained control over the territory in an act of lawful self-defense; it applies the humanitarian provisions of the international law of occupation (despite its principled position that they do not apply de jure); and it has repeatedly expressed its commitment to negotiate with the Palestinians this state of affairs. As recognized in the agreements already concluded between Israel and the Palestinians and Security Council Resolution 242, the withdrawal of Israeli armed forces and the determination of secure and recognized boundaries is a matter for peace negotiations between the parties. The continued exercise of authority by Israel in this territory, pending such negotiations, is thus consistent with applicable international law and existing bilateral agreements. Any claim that Israel's presence in the West Bank amounts to 'unlawful occupation' is thus without any merit."[20]

THE HISTORICAL DEVELOPMENT OF SETTLEMENTS

During the 1967 Six-Day War—in which Israel was attacked by five Arab states, supported by eight additional ones—Israel seized the Gaza Strip and the Sinai Peninsula from Egypt, the Golan Heights from Syria, and East Jerusalem and the West Bank from Jordan. Though Israel built settlements in all of these territories, no settlements have flourished like those in the West Bank and East Jerusalem. In 1979, the entirety of Sinai was returned to Egypt, 6,000 settlers were uprooted, and all Israeli settlements in the territory were dismantled as part of the Egypt-Israel peace treaty under Prime Minister Menachem Begin. A quarter of a century later, in 2005, Israel fully disengaged from the Gaza Strip and withdrew 8,500 Israeli settlers under Prime Minister Ariel Sharon. Only ~20,000 people live in the 32 settlements in the Golan Heights, an area much less politically contentious in light of the sparse non-Jewish population there and the lack of any Israeli-Syrian political engagement.

Israeli settlements in the West Bank and the 12 Israeli neighborhoods in East Jerusalem, however, remain a constant point of friction in the Israeli-Palestinian conflict and in the international arena at large. The combined population of Israeli settlers in the West Bank and East Jerusalem residents has reached over 600,000. According to Israel's Central Bureau of Statistics, the population of West Bank settlers is 427,800, while the Yesha Council (an umbrella council for West Bank settlement leadership) database shows 448,672.[21] Additionally, the organization B'tselem cites the Israeli population within East Jerusalem at 209,270.[22] In the West Bank, there are over 250 settlements, of which 132 were established by the Israeli government, while an additional 121 illegal settler outposts have been independently constructed.[23] Together, these communities account for 4% of Israel's total population.

While much of the international community views all territory beyond the pre-1967 borders to be under the same rules of occupation, Israel considers Jerusalem to be its undivided capital and does not regard the population within the current municipal boundaries of Jerusalem—including East Jerusalem—as settlers. Soon after capturing East Jerusalem in 1967, the government extended Israeli jurisdiction over the area. A decade later, the Israeli Knesset enacted "Basic Law: Jerusalem, Capital of Israel in 1980," establishing Jerusalem as the "complete and united" capital of Israel.[24]

Practically speaking, there is a crucial distinction among many Israelis and past U.S. administrations between legitimate or accepted settlements and illegitimate outposts. It is tacitly understood in Israeli-Palestinian negotiations that the settlement blocs that house the largest numbers of settlers—together, they currently represent 75% of Israeli settlers—and that are adjacent to the June 4, 1967, "Green Line" will eventually be annexed to Israel in consideration for land swaps. The other ~100,000 remote settlers in the heart of a future Palestinian state will either be relocated to Israel's boundaries or eventually live under Palestinian sovereignty. U.S. administrations, namely those of Clinton and

George W. Bush, have long recognized this as a necessary political consideration in the debate over settlements.

THE EVOLUTION OF PAST U.S. ADMINISTRATIONS

The Carter Administration

While William Scranton, the U.S. representative to the UN during the Ford administration, called Israeli civilian resettlement in the occupied territories "illegal under the [Fourth Geneva] Convention,"[25] the U.S. policy on settlements was not consolidated until 1978, when Herbert Hansell, a state department legal advisor, submitted a formal legal opinion on the issue. What became known as the "Hansell Memorandum" concluded that Israel's settlement policy is "inconsistent with international law."[26] Until Pompeo's November 2019 repudiation of the memo, the U.S. State Department had never officially disputed Hansell's determination. However, other U.S. administrations have dealt with the political issue of settlements in evolving ways to achieve their foreign policy objectives.

The Reagan Administration

Two weeks after his 1981 inauguration, President Ronald Reagan told the New York Times that "I believe the settlements [in the West Bank]—I disagreed when the previous administration referred to them as illegal, they're not illegal. Not under the UN resolution that leaves the West Bank open to all people—Arab and Israeli alike, Christian alike."[27] In the same interview Reagan did, however, call settlements "ill-advised" and "unnecessarily provocative."[28]

The specific UN resolution that Reagan said "leaves the West Bank open to all people" has never been identified. This interview has been used to justify some interpretations that the Reagan administration had a more favorable view toward settlements than most U.S. administrations. However, though the Reagan administration avoided calling settlements illegal outright, the administration abstained from—thus, did not veto—UNSCR 592 in 1986 and UNSCR 605 in 1987, both of which reaffirmed the applicability of the GCIV to territories occupied by Israel after 1967.[29] In 1988, the U.S. voted in favor of UNSCR 607, which again reaffirmed that "the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, is applicable to Palestinian and other Arab territories occupied by Israel since 1967."[30]

The Bush, Clinton, and Bush Administrations

President George H.W. Bush took a much firmer stand against settlements than the Reagan administration. Under the first Bush administration, the U.S. supported UNSCRs 681, 726, and 799, all of which referenced the applicability of the GCIV to Israeli occupied territories.[31] In 1991, Bush refused to issue Israel $10 billion in loan guarantees, which had previously been promised, until Israel halted settlement construction in the West Bank and Gaza. Despite much backlash from Israel and the U.S. pro-Israel lobby, Bush ultimately won the dispute, a process that led to the 1991 Madrid Conference.[32]

Presidents Bill Clinton and George W. Bush (Bush 43), on the other hand, both made important distinctions between the settlements that would eventually become sovereign Israeli territory in any negotiated agreement (i.e., large settlement blocs adjacent to pre-1967 lines) and remote settlements situated farther from the Green Line. Both recognized in principle that any negotiated two-state agreement between Israelis and Palestinians would include Israeli annexation of some of the settlements, due to facts on the ground.

Clinton recognized as much in his 2000 guidelines for Israeli-Palestinian permanent status negotiations (known as the Clinton Parameters), while Bush 43 wrote in a 2004 letter to Israeli Prime Minister Ariel Sharon that "In light of new realities on the ground, including already existing major Israeli populations centers, it is unrealistic to expect that the outcome of final status negotiations will be a full and complete return to the armistice lines of 1949."[33] Like all U.S. presidents, Clinton and Bush 43 criticized Israeli settlements as an impediment to peace.[34, 35] Nevertheless,

both administrations made a clear political distinction between "acceptable" settlements that will eventually become part of Israel, and all others.

The Obama Administration

During the Obama years, the U.S.–Israel relationship was fraught with tension related to the settlements. Though Obama stopped short of calling the settlements illegal—opting instead to deny the settlements' "legitimacy"[36]—he staunchly opposed the settlements as threats to the two-state solution. In 2009, Netanyahu agreed to a 10-month freeze on settlement construction to advance peace talks with the Palestinians. At the end of this period in 2010, however, Netanyahu refused Obama's request to extend the moratorium on settlement construction in the interest of ongoing negotiations.[37] Obama's confrontational approach ultimately failed to rein in Israeli settlement construction, while it reduced flexibility for a bilateral Israeli-Palestinian negotiation process.

The constant friction between Obama and Netanyahu culminated shortly before Obama's exit from the White House, when the U.S. abstained from UNSCR 2334 in 2016. The resolution affirmed that "the establishment by Israel of settlements in the Palestinian territory occupied since 1967, including East Jerusalem, has no legal validity and constitutes a flagrant violation under international law."[38] Whereas the two previous U.S. administrations attempted to remain flexible in practice to the ultimate judgment regarding the settlements, Resolution 2334 all but predetermined that two-state negotiations must operate on the basis of Israeli withdrawal from all territories occupied after 1967.

In contrast, UNSCR 242—which has historically formed the foundation for Israeli-Arab negotiations—specifically calls for the "withdrawal of Israel armed forces from territories occupied in the recent conflict."[39] Critically, Resolution 242 demands Israeli withdrawal from "territories" rather than "the territories," an omission that has had a significant role in framing the assumptions and expectations of all parties involved since 1967. As Yale University law professor Eugene Rostow and other legal scholars have clarified, this wording carefully avoids specific geographic prescriptions for Israeli withdrawal.[40], [41] Moreover, in 1969, U.S. Secretary of State William Rogers noted that pre-1967 boundaries were "armistice lines, not final political borders" and that UNSCR 242 "neither endorses nor precludes the armistice lines as the definitive political boundaries."[42]

THE IMPACT OF POMPEO'S STATEMENT

Though U.S. administrations have framed Israeli settlements in very different ways, no former administration in the last 40 years has formally overturned the 1978 Hansell Memorandum, which established the State Department position that Israeli settlements in occupied territory are inconsistent with international law. Regardless of presidential statements on the matter, all U.S. administrations since 1978 have tacitly adhered to the internal policy that the settlements are more or less illegal.

Pompeo's announcement in November is the first internal State Department rejection of the Hansell Memorandum on record. However, as he noted, the Israeli-Palestinian conflict will not be adjudicated by legal decisions, but rather by political negotiation. Thus, the true threat of Pompeo's announcement is its likelihood to exacerbate conditions such as the Israeli-Palestinian deadlock, settlement entrenchment in the West Bank, and the potential for annexation.

As a result of Pompeo's "historic" announcement, Netanyahu has advanced a bill to annex the Jordan Valley,[43] a prospect that has also been a negotiation token in coalition talks between the Likud and Blue & White parties.[44] This is another political boon to Netanyahu from the Trump administration, with the real potential for the annexation of West Bank territory—which would have a disastrous effect on hopes for a two-state solution and or a negotiated political resolution to the conflict.

The change in U.S. policy also has the potential to harm Israel's standing among U.S. Democrats in Congress. A few days after Pompeo's statement, over 100 Democratic House members released a letter criticizing the decision.[45] As support for Israel becomes increasingly politicized in Congress, the Trump administration's decision to reverse 40 years of U.S. policy on settlements will only increase the partisan divide, threaten Democratic support for Israel, and aggravate the controversies in the U.S. Jewish community.

Importantly, Israel is currently bound as a signatory of the 1993 Declaration of Principles, which affirms that settlements and borders are among the issues that can only be determined via permanent status negotiations.[46] Moreover, the settlement issue has been at the heart of controversy within Israeli society and political parties. Thus, the long-term future of settlers in the West Bank and a final Israeli-Palestinian territorial arrangement must be an Israeli domestic decision, either proactively and independently initiated in the absence of a valid partner, or preferably, mutually agreed upon in negotiations.

Such a decision must remain unaffected by the statement of a foreign government, but rather requires an internal consensus built through public and political discourse, and perhaps a referendum or a privileged majority vote in the Knesset. Israel's leadership and U.S. administrations should endeavor to preserve the conditions for an eventual two-state-for-two-people negotiated agreement and create in the interim a reality of two distinct national entities. Instead, the Trump administration has facilitated the incremental erosion of a future borderline between Israel and a future Palestinian state by endorsing Israeli settlement expansion and promoting its legality.

Much like the Palestinians' failure to attain statehood by unilaterally advancing their cause through international fora rather than via negotiation with Israel, Pompeo's statement will neither change the situation on the ground nor bring the parties closer to a negotiated resolution.

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AUTHOR

Gilead Sher is the Isaac and Mildred Brochstein Fellow in Middle East Peace and Security in Honor of Yitzhak Rabin at the Baker Institute. He is also a senior researcher at the Tel Aviv Institute for National Security Studies, where he heads the Center for Applied Negotiations.

Daniel Cohen is a research intern in the Baker Institute Center for the Middle East. He is an undergraduate at Rice University studying linguistics and Jewish studies, with a concentration in Arabic and Islamic texts.

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