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THE

POMPEO DOCTRINE

REGARDING THE LEGALITY OF ISRAELI SETTLEMENTS IN JUDEA & SAMARIA

November 18, 2019

Making history

1. U.S. Secretary of State Mike Pompeo's Declaration on the Legality of Jewish Settlements

November 18, 2019

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Turning now to Israel, the Trump administration is reversing the Obama administration's approach towards Israeli settlements.

US public statements on settlement activities in the West Bank have been inconsistent over decades. In 1978, the Carter administration categorically concluded that Israel's establishment of civilian settlements was inconsistent with international law. However, in 1981, President Reagan disagreed with that conclusion and stated that he didn't believe that the settlements were inherently illegal.

Subsequent administrations recognized that unrestrained settlement activity could be an obstacle to peace, but they wisely and prudently recognized that dwelling on legal positions didn't advance peace. However, in December 2016, at the very end of the previous administration, Secretary Kerry changed decades of this careful, bipartisan approach by publicly reaffirming the supposed illegality of settlements.

After carefully studying all sides of the legal debate, this administration agrees with President Reagan. The establishment of Israeli civilian settlements in the West Bank is not per se inconsistent with international law.

I want to emphasize several important considerations.

First, look, we recognize that, as Israeli courts have, the legal conclusions relating to individual settlements must depend on an assessment of specific facts and circumstances on the ground. Therefore, the United States Government is expressing no view on the legal status of any individual settlement.

The Israeli legal system affords an opportunity to challenge settlement activity and assess humanitarian considerations connected to it. Israeli courts have confirmed the legality of certain settlement activities and has concluded that others cannot be legally sustained.

Second, we are not addressing or prejudging the ultimate status of the West Bank. This is for the Israelis and the Palestinians to negotiate. International law does not compel a particular outcome, nor create any legal obstacle to a negotiated resolution.

Third, the conclusion that we will no longer recognize Israeli settlements as per se inconsistent with international law is based on the unique facts, history, and circumstances presented by the establishment of civilian settlements in the West Bank. Our decision today does not prejudice or decide legal conclusions regarding situations in any other parts of the world.

And finally, finally, calling the establishment of civilian settlements inconsistent with international law hasn't worked. It hasn't advanced the cause of peace.

The hard truth is there will never be a judicial resolution to the conflict, and arguments about who is right and wrong as a matter of international law will not bring peace. This is a complex political problem that can only be solved by negotiations between the Israelis and the Palestinians.

The United States remains deeply committed to helping facilitate peace, and I will do everything I can to help this cause. The United States encourages the Israelis and the Palestinians to resolve the status of Israeli settlements in the West Bank in any final status negotiations.

And further, we encourage both sides to find a solution that promotes, protects the security and welfare of Palestinians and Israelis alike.

2. Secretary Pompeo's Response to Critics

THE SECRETARY OF STATE
WASHINGTON

The Honorable
Andy Levin
House of Representatives
Washington, DC 20515

Dear Mr. Levin:

I am in receipt of your letter of November 21 in which you criticize the State Department's determination that the establishment of Israeli civilian settlements in the West Bank is not categorically inconsistent with international law - a decision which you contend reverses "decades of bipartisan US policy on Israeli settlements." You further argue. in conclusory fashion, that this determination "blatantly disregards Article 49 of the Fourth Geneva Convention."

While I appreciate your interest in this important issue, I could not disagree more with those two foolish positions. I will briefly respond to your principal points.

First, the State Department's determination did not reverse any policy with regard to Israeli settlements. Rather, the State Department reversed

a legal determination by Secretary Kerry, made during the waning days of the Obama Administration, that the establishment of settlements was categorically inconsistent with international law. That determination was made in a failed attempt to justify the Obama Administration's betrayal of Israel in allowing UNSCR 2334 - whose foundation was the purported illegality of the settlements and which referred to them as "a flagrant violation" of international law - to pass the Security Council on December 23, 2016.

Second, Secretary Kerry's determination did not enjoy bipartisan consensus. Rather, it received bipartisan condemnation, including from leading Democrats in both chambers of Congress. Indeed, an overwhelming number of Senators and House Members, on both sides of the aisle, supported resolutions objecting to the passage of UNSCR 2334. Secretary Kerry's statement departed from decades of bipartisan consensus, reverting to an approach last advanced by the Administration of President Carter in 1978 whose position was reversed by the next succeeding president, Ronald Reagan.

While you are free to fixate on settlements as a barrier to peace. you are simply wrong in referring to that view as being subject to bipartisan agreement. No less a Democratic spokesman than the Senate Minority Leader publicly stated at his AIPAC address on March 5, 2018, that "it's sure not the settlements that are the blockage to peace."

Third, you assert that we have "blatantly disregarded" the Fourth Geneva Convention. The Trump Administration has thoroughly reviewed and analyzed this issue and we respectfully disagree. Among the numerous sources and authorities supporting our view, I commend to you the writings of Eugene Rostow, who left his position as Dean of the Yale Law School to become Under Secretary of State for Political Affairs in the Johnson Administration. Dean Rostow represented the United States in the peace talks that followed the 1967 Six Day War and was responsible for the drafting of UNSCR 242, which even today remains the primary architecture for the Israeli-Palestinian peace process. Dean Rostow stated in 1983 that "Israel has an unassailable legal right to establish settlements in the West Bank."

Fourth, US policy with regard to the Israeli-Palestinian conflict largely has been consistent for decades and remains so: we support and seek to facilitate

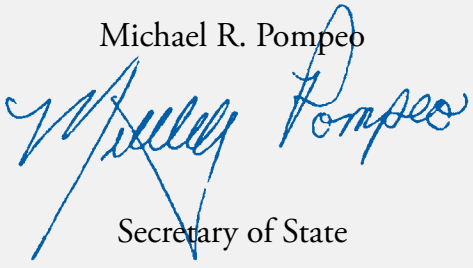
direct negotiations between the parties towards the goal of a just and lasting peace agreement. Regrettably. as many experts concur, UNSCR 2334 and the related self-justifying remarks by Secretary Kerry have saddled the Trump Administration with a significant handicap in advancing the cause of peace by erroneously injecting into the conflict an incorrect and largely irrelevant legal component. This in turn has led to the hardening of positions. especially on the Palestinian side. By way of example, the closing of the Office of the General Delegation of the Palestine Liberation Organization in Washington D.C., which you criticize, was mandated by Federal statute following President Abbas' announcement before the United Nations General Assembly on September 20, 2017, that the Palestinian Authority "called on the International Criminal Court... to prosecute Israeli officials for their involvement in settlement activities..." I doubt that President Abbas, with apparent animus towards Israel, would have taken such an inappropriate and unlawful position absent the cover mistakenly granted under UNSCR 2334 and Secretary Kerry's unfortunate speech.

The Trump Administration is committed to working tirelessly to advance the cause of peace between Israelis and Palestinians. We approach the issue pragmatically and diplomatically, but we eschew the erroneous positions of international law that have gained favor in the past decades. The Obama-Kerry departure from America's historic support of Israel has done nothing to make peace more attainable. The State Department's recent determination that the establishment of Israeli civilian settlements in the West Bank is not per se illegal is an important step in the peace process and we are confident that it creates the right platform for further Progress.

We hope this information is helpful to you. Please let us know if we may be of further assistance.

Sincerely.

Michael R. Pompeo



Secretary of State

3. Legal Background on Israeli Settlements

Prior to the declaration of Secretary of State Mike Pompeo, the last time the US Department of State addressed the question of the legality of Jewish settlement in Judea and Samaria was in 1978, when State Department Legal Advisor Herbert Hansell, authored a memorandum, to become known as the "Hansell Memo," which concluded that Israeli settlements in the West Bank were illegal.

Hansell's conclusions were controversial at the time, and were disputed by former Under Secretary of State Eugene Rostow (also Dean of Yale Law School) and many others. However, although Hansell's position was not adopted as official US policy since the Carter Administration, because the Memo was not revisited or formally repudiated, it shaped State Department policy and views over the ensuing four decades. This resulted in a faulty legal premise upon which US foreign policy in the region was often predicated.

The withdrawal of the Hansell Memo as an expression of U.S. policy was long overdue. Aside from the fact that the Memo came to major novel legal conclusions in just a few pages of cursory analysis and was hence a highly questionable document at the time it was issued, factual changes and changes in U.S. policy since that time have rendered the Memo's conclusions completely obsolete.

The Pompeo declaration rectifies the anomaly created by the Hansell Memo, and the doctrine that emerges from it, based on clear and ineluctable legal grounds, sets a new and constructive basis for U.S. policy toward Israel's presence in Judea and Samaria.

The Historical Context

Jewish settlement in the territory of ancient Judea and Samaria (the West Bank) is often presented as merely a modern phenomenon. In fact, Jewish presence in this territory has existed for thousands of years and was recognized as legitimate in the Mandate for Palestine adopted by the League of Nations in 1922, which provided for the establishment of a Jewish state in the Jewish people's ancient homeland. This historical document - whose validity under international law has never expired - also formulated and established the legal right of the Jewish people to the Land of Israel, as well as the right of Jews to settle in all of the territory west of the Jordan River.

While "settlement" is not a term generally used in the international law of occupation, it is a term used by the Palestine Mandate. Article 6 of the Palestine Mandate requires the administrator of the territory to "encourage... close settlement by Jews on the land." With this provision, the League of Nations ordered the governors of the territory to honor Jews' right to live throughout the territory of Mandatory Palestine. Rostow argued that the rights of the Jewish people under the Mandate could not be terminated by the British withdrawal from the mandatory territory in 1948. Rostow added that the rights of the Jewish people under the Palestine Mandate were preserved by article 80 of the United Nations Charter. According to Rostow, "The Jewish right or settlement in the area is equivalent in every way to the right of the existing population to live there" (AJIL, 1990, vol. 84, p.72).

Some Jewish settlements, such as in Hebron, existed throughout the centuries of Ottoman rule, while settlements such as Neve Ya'acov, north of Jerusalem, the Gush Etzion bloc in southern Judea, and the communities north of the Dead Sea, were established under British Mandatory administration prior to the establishment of the State of Israel, and in accordance with the League of Nations Mandate.

Many contemporary Israeli settlements have actually been re-established on sites which were home to Jewish communities in previous generations, in an expression of the Jewish people's deep historic and abiding connection with this land - the cradle of Jewish civilization and the locus of the key events of the Hebrew Bible. A significant number are located in places where previous Jewish communities were forcibly ousted by Arab armies or militia, or slaughtered, as was the case with the ancient Jewish community of Hebron in 1929.

The Jordanian occupation administration, during the nineteen years of its rule (1948-1967), declared the sale of land to Jews a capital offense. The right of Jews to establish homes in these areas, and the private legal titles to the land which had been acquired, could not be legally invalidated by Jordanian occupation - which

resulted from their illegal armed invasion of Israel in 1948 and was never recognized internationally as legitimate - and such rights and titles remain valid to this day.

Stephen Schwebel, a deputy legal advisor in the State Department who later became a Justice and President of the International Court of Justice, argued for Israel's right to sovereignty since Israel lawfully captured the territory in a defensive war, while Jordan had previously unlawfully captured and occupied the territory in an illegal aggression. Eugene Rostow went even further in observing that the Palestine Mandate was established "in order to support the national liberation of the Jewish people because of their historic connection with the land."

In short, the attempt to portray Jewish communities in the West Bank as a new form of "colonial" settlement in the land of a foreign sovereign is as disingenuous as it is politically motivated. At no point in history were Jerusalem and the West Bank subject to Palestinian Arab sovereignty.

Uti Possidetis Juris

Mandatory Palestine ended as a political entity immediately prior to Israel's declaration of independence in 1948. According to the universally accepted legal doctrine of *uti possidetis juris*, a new state's borders are exactly the same as those of the last geopolitical entity in the territory. (This principle has been used to determine borders everywhere from Africa to the former Soviet Union.) This means that upon Israel's independence, its sovereign territory was congruent with that of former Mandatory Palestine, including Judea and Samaria, what would later be called the West Bank. According to law professors Abraham Bell and Eugene Kontorovich, "*Uti possidetis juris* is widely acknowledged as the doctrine of customary international law that has proven central to determining territorial sovereignty in the era of decolonization... Applying the rule... dictate[s] that Israel's borders are those of the Palestine Mandate that preceded it... Israel has territorial sovereignty over all the disputed areas of Jerusalem, [and] the West Bank."

In 1948, Jordan invaded and illegally seized control of Judea and Samaria. The Hashemite Kingdom's purported annexation of the territory was almost universally seen as ineffective and unlawful. Israel's 1949 armistice agreement with Jordan established a cease-fire line without establishing or altering borders.

When Israel terminated Jordan's unlawful occupation of the area in the 1967 War, it was retaking its own sovereign territory that had been under temporary foreign occupation.

International Humanitarian Law in Judea and Samaria

The Fourth Geneva Convention prohibits the deportation or transfer of segments of the population of a state to the territory of another state which it has occupied as a result of the resort to armed force. This principle, which is reflected in Article 49(6), was drafted immediately following the Second World War and as a response to specific events that occurred during that war. Article 49(6) only applies to cases of belligerent occupation and thus has no applicability to a country retaking its own sovereign territory. It certainly has no application following a peace treaty between the belligerents. The Hansell Memo itself stated that if Israel were to sign a peace treaty with Jordan, as indeed it did in 1994, Article 49(6) would no longer apply.

As the International Red Cross' commentary to the Convention confirms, the Article was intended to protect the occupied population from massive demographic shocks "endangering its separate existence as a race". This referred to Nazi Germany's policy of ethnic cleansing and colonization of parts of Eastern Europe in World War II. Clearly, Israeli communities in Judea and Samaria have not endangered the Palestinians' "separate existence as a race", as is evident from the Palestinians' rapid population growth since 1967.

In any case, Article 49(6) regarding population transfer to occupied territory has never been interpreted, in any other context, as prohibiting individual voluntary migration into occupied territories. This is all the more so when the individual migrants have a personal or ancestral connection to the territory. Nor does it prohibit the movement of individuals to land which was not under the legitimate sovereignty of any state and which is not subject to private ownership.

Israeli-Palestinian Agreements

The bilateral agreements reached between Israel and the Palestinians, and which govern their relations, contain no prohibition on the building or expansion of settlements. On the contrary, it is specifically provided that the issue of settlements is reserved for permanent status negotiations, reflecting the understanding of both sides that this issue can only be resolved alongside other permanent status issues, such as borders and security. Indeed, the parties expressly agreed - in the Israeli-Palestinian Interim Agreement of 1995 - that the Palestinian Authority has no jurisdiction or control over settlements or Israelis and that the settlements are subject to exclusive Israeli jurisdiction pending the conclusion of a permanent status agreement.

It has been charged that the prohibition, contained in the Interim Agreement (Article 31(7), against unilateral steps which alter the "status" of the West Bank and Gaza Strip implies a ban on settlement activity. This position is unfounded. This prohibition was agreed upon in order to prevent either side from taking steps which purport to change the legal status of this territory (such as by annexation or unilateral declaration of statehood), pending the outcome of permanent status negotiations. Were this prohibition to be applied to building - and given that the provision is drafted to apply equally to both sides - it would lead to the dubious interpretation that neither side is permitted to build homes to accommodate for the needs of their respective communities until permanent status negotiations are successfully concluded.

In this regard, Israel's decision to dismantle all settlements from the Gaza Strip and some in the Northern West Bank in the context of the 2005 Disengagement Plan were unilateral Israeli measures rather than the fulfilment of a legal obligation.

Summary

- Attempts to present Jewish settlement in ancient Judea and Samaria (the West Bank) as illegal and "colonial" in nature ignores the complexity of this issue, the history of the land, and the unique legal circumstances of this case.
- Jewish communities in this territory have existed from time immemorial and express the deep connection of the Jewish people to land which is the cradle of their civilization, as affirmed by the League of Nations Mandate for Palestine, and from which they, or their ancestors, were ousted.
- The Fourth Geneva Convention has no applicability to Judea and Samaria because Israel, from the moment of its creation, had sovereignty over that territory. In any event, the signing of a peace treaty with Jordan in 1994 would end any possible application of the Convention, as the Hansell Memo itself makes clear.
- The prohibition against the transfer of civilians to territory of an occupied state under the Fourth Geneva Convention was not intended to relate to the circumstances of voluntary Jewish settlement in the West Bank on legitimately acquired land which did not belong to a previous lawful sovereign and which was designated as part of the Jewish State under the League of Nations Mandate.
- Bilateral Israeli-Palestinian Agreements specifically affirm that settlements are subject to agreed and exclusive Israeli jurisdiction pending the outcome of peace negotiations, and do not prohibit settlement activity.

The Kohelet Policy Forum in Jerusalem strives to secure the future of Israel as the nation-state of the Jewish People, to strengthen Israeli democracy, expand individual liberty, and deepen free market principles in Israel. The Forum is a non-partisan entity. It relies on private donations and does not accept, directly or indirectly, public funds from any government, domestic or foreign. The Forum's legislative research, policy papers, and other research-based products are offered to Israeli decision-makers and to the public free of charge.

The Shiloh Policy Forum, a research and policy institute founded by the Kohelet Policy Forum, strives to enrich knowledge regarding Jewish settlement in all parts of the country, its challenges, needs, importance, and its moral justification, and provides tools and data to strengthen, develop, and expand it.