

BOFAXE

Does Policy “Trump” International Law?

ON THE LEGALITY OF THE US STATEMENT REGARDING ISRAEL’S SETTLEMENT POLICY

US secretary of state Mike Pompeo has [announced](#) a reversal of US policy on Israeli settlements in the West Bank. While the Obama Administration deemed Israel’s settlement activities [illegal](#) under international as well as Israeli law and an obstacle to the peace process in the region, the Trump Administration now officially breaks with that position by stressing that *“the establishment of Israeli civilian settlements in the West Bank is not per se inconsistent with international law”*. This decision has caused a large echo in the media and entails two related questions: Do Pompeo’s words simply form a political statement or do they have legal significance and, if so, what consequences do they entail under international law? The history of US-Israeli friendship goes back a long time. In the last decades, US rhetoric on Israel’s position with regard to Palestine has varied significantly. Former President Carter held Israel’s settlement policy to be inconsistent with international law. Under the Reagan Administration, Israel made strong security ties with the US and was [awarded](#) the status of *“major non-NATO ally”* in 1987. President Clinton reacted to Israel’s plans for fostering and intensifying the settlements with strong disagreement. President Obama equally contradicted Israel on its settlement plans and [continuously urged](#) for a two-state solution. Now, the Trump Administration has officially declared to end the *“inconsistent”* US foreign policy by effectively continuing the seesaw.

The US manoeuvre declaredly intends to make room for Israel and Palestine to solve their conflict themselves. However, the statement on non-illegality of Israeli settlements is not any longer part of a mere US foreign-policy matter which may change depending on the Administration in power. The Israeli settlement policy has on more than one occasion been qualified as territorial acquisition by force or annexation as a matter of international law by the [Council of the EU](#), the [UN General Assembly](#), and even the [UN Security Council](#). Under Article 41(2) of the [ILC Draft Articles on State Responsibility](#) (Draft Articles), States are under a duty of abstention that includes two obligations: the obligation of non-recognition and the obligation not to render aid or assistance in maintaining a situation in violation of a peremptory norm of international law. Article 53 of the [Vienna Convention on the Law of Treaties](#) defines such norm as *“a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”*. The ongoing occupation, which the [Supreme Court of Israel](#) has legally qualified as such, is not a temporary one, but has resulted in the annexation of East Jerusalem, the West Bank and the Gaza Strip.

The prohibition of acquisition of territory brought about by the use of force is regarded as customary law and a peremptory norm (cf. only [Commentaries on Draft Articles](#), p. 112, at para 4). In case of a breach of such norm, already the recognition of the situation as lawful violates international law as expressed in Article 41(2) Draft Articles and stated by the International Court of Justice (ICJ) in its Israeli [Wall advisory opinion of 2003](#) (at para. 87), itself referring to the 1970 [Friendly Relations Declaration](#). Non-recognition extends to the international community as a whole and includes all situations that result from the breach. Furthermore, it is also prohibited to act in any way that would imply recognition. This last aspect reaches rather far as demonstrated in another context by [UN Security Council Resolution 662](#) (at para. 2) that referred to *“any action or dealing that might be interpreted as an indirect recognition of the annexation”*. Crucially, does the Trump Administration recognize Israel’s settlement as lawful or does it at least imply such recognition?

To begin with, the statement has legal significance. Mike Pompeo’s elaborations, made in his capacity as Secretary of State, leave the area of mere policy by explicitly referring to the US evaluation of the settlements’ (il-)legality under international law. Answering questions after his initial statement, he explicitly refers to it as *“legal interpretation”*, the product of *“legal analysis”* and *“legal review”*. As a matter of content, Pompeo emphasizes the following considerations underlying the current US position: First, he points out that the US *“is expressing no view on the legal status of any individual settlement”*. Instead, it regards the assessments of each individual situation a purely domestic matter, to be administered by the Israeli judiciary. *“Israeli courts have confirmed the legality of certain settlement activities and has concluded that others cannot be legally sustained.”* Second, he states that condemning Israeli settlements has so far simply not led to peace and that international law will not bring peace at all.

In order to determine the statement’s legal effect, it is necessary to take account of its content, of all factual circumstances in which it was made, and of the reactions to which they gave rise (cf. Principle 3 of the [Guiding Principles applicable to unilateral declarations of States](#)). Taking another look at the text of Pompeo’s statement, it is noteworthy that he does not declare Israeli settlements legal but says that they are *“not per se inconsistent with international law”*. The wording *“not inconsistent”* does not necessarily mean *“consistent”* with international law, just as mere abstention from a vote does not imply endorsement. Besides, the statement is blurred by the words *“per se”* from which one may infer that settlements in fact could violate international law, just not in any given case. This is supported by his remark on the necessity to legally assess every situation individually. While Pompeo’s refusal of generalization is to be welcomed, on this particular issue, it is somewhat misplaced. While the mere withdrawal from a definite position on settlements may not imply support for Israel, granting Israel the full scope of discretion on their legality actually does. The matter has moved from the domestic level to an issue of international legal concern as highlighted above.

Furthermore, ignoring international law for reasons of political expediency does not render any action legal. One cannot deny that all steps taken so far in solving the Israeli-Palestinian situation have indeed failed. However, giving Israel political leeway does not fix the problem either. Pompeo, explicitly refers to Ronald Reagan, who in his [1982 speech](#), militated against Israel’s occupation as well as the establishment of an independent Palestinian state, favouring negotiations. Pompeo apparently relies on the same idea. Yet, his statement demonstrates willingness to ignore binding international law on a level that disregards the seriousness of Israel’s violation of a peremptory norm as well as binding UN resolutions for political gain. Lastly, if one applies Pompeo’s own test of success to President Reagan’s solution, one sees that the latter’s approach did not solve the situation either. Therefore, the Trump Administration contradicts its own benchmark. Contextually, this assessment aligns with immediate reactions to the statement, e.g. by the [EU High Representative](#) clarifying that Israeli settlements violate international law. Moreover, the US statement is part of a series of acts which all point in the same direction. As argued [elsewhere](#), the US have already breached international law by establishing a mission in unlawfully acquired territory, affirming Jerusalem as Israel’s undivided capital. Earlier this year, the Trump Administration also [formally recognized](#) the Golan Heights as part of Israel. Pompeo’s statement continues down the same path.

Overall, Pompeo’s statement has legal significance. In terms of content, one can infer support for Israel and its settlement policy, the context of prior US-Israeli developments at least implying recognition. The Trump Administration thus proceeds breaking with longstanding US policies and at the same time the international community’s legal understanding of Israel’s actions. The issue is not merely a political but a severe legal one. It contradicts not only UN Security Council Resolutions but, moreover, *ius cogens*. Unlike Pompeo might suggest, stressing the – highly dubious – pursuit of peace by ignoring international law, does not change the core principle of *ex inuria ius non oritur*.