

The United States and Israeli Settlements

by Michael Curtis



It was refreshing that an important policy statement has emerged from Washington, D.C., a city otherwise preoccupied with unending Congressional investigations. Secretary of State Mike Pompeo on November 18, 2019 announced a significant change in U.S. policy towards the State of Israel by rejecting a long held State Department legal opinion. The U.S., he said, will no longer recognize per se that Israeli civilian settlements in the West Bank are inconsistent with international law. Pompeo's statement was a deliberate reversal of policies of previous U.S. administrations.

The story of the dispute in essence starts with the Mandate for Palestine granted on July 24, 1922 to Britain by the Council of the League of Nations, recalling the historic

connection of the Jewish people with Palestine and suggesting their reconstituting their National Home in that country. Article 6 of the Mandate states that it would facilitate Jewish immigration under suitable conditions and encourage close settlement by Jews on the land, including State lands and waste lands not required for public purposes.

The history of Middle East territories still need understanding. Before World War I, the areas of the Sinai Peninsula, Gaza Strip, and the Golan Heights were ruled by the Ottoman Empire. After the War, the Empire ended. Sinai became part of Egypt. The Gaza Strip, the West Bank, and for a short time, the area east of the Jordan, were part of the League of Nations British Mandate for Palestine. The Golan Heights were part of the French Mandate for Syria. Syria and Jordan became independent states.

On November 29, 1947 the United Nations, Res. 181, recommended a plan of partition of the territory in the British Mandate, a plan rejected by the Arab League. The plan was accepted by the Jewish community, and the State of Israel was created on May 14, 1948. The new state was attacked by five Arab armies who were defeated. After the hostilities, Egypt occupied Gaza, and Jordan occupied the West Bank. The territorial demarcation were de facto lines not legal boundaries.

As a result of the June 1967 war, Israeli forces occupied Gaza, the Sinai Peninsula, the West Bank and the Golan Heights. Egypt gained some territory in Sinai as a result of the October 1973 war, but, apart from minor changes, Israel retained control of the other territories. These areas had not previously been under Israeli sovereignty nor its administration, but Israel began to exercise authority over them. Israeli civilian settlements began in 1968, most on public land outside the boundaries of any municipality, but some on private or municipal land.

As a result of this complex history, legal and political

differences, and continuing criticism of Israel , the crucial question is now whether the establishment of Israeli civilian settlements in the territories occupies by Israel since 1967 is consistent with international law. Much of the international community and the UN has taken and still takes the view that settlement activity is illegal. Most recently the UN Security Council, Res. 2334, on December 23, 2016 "reaffirmed the Israeli settlements had no legal validity, constituting a flagrant violation of international law and a major obstacle to the vision of a two-state solution. The Resolution passed 14-0, but noticeably the Obama Administration voted "present." Pompeo was a critic of President Barack Obama for not vetoing the 2016 resolution to stop settlement activities.

The administration of President Jimmy Carter wanted a statement of legal considerations about settlements. Herbert Hansell, legal adviser of state department, wrote a four page memorandum on April 21, 1978 concluding that while Israel may undertake in the occupied territories actions necessary to meet the military needs and to provide for orderly government, the establishment of the civilian population in the territories is inconsistent with international law. This has been the U.S. position until Secretary Pompeo said the U.S. no longer accepts the Hansell conclusion. For one thing the Hansell formula has not advanced the cause of peace.

Therefore, Pompeo on November 18, 2019 stated the establishment of Israeli civilian settlements in the West Bank is not per se inconsistent with international law. This was not a green light for Israel to build more settlements. The U.S. is expressing no view on the legal status of any individual settlement. Nor was Pompeo discussing the final status of the West Bank. He and the Trump Administration were consciously rejecting Obama policy on Israel settlements and other issues on the Middle East.

The Pompeo speech makes no difference from a legal point of

view, and international law will not bring peace to the area. But it is political, involving a basic issue of whether the land in question is "disputed" or "occupied."

The critical argument, really political for the most part, is based on allegations of Israel's lack of adherence to the Fourth Geneva Convention, passed in August 1949 to deal with humanitarian protection for civilians in a war zone. The Convention is now generally regarded as part of customary international law. Article 49 states that an occupying power "shall not deport or transfer parts of its own civilian population into the territory it occupies, regardless of the motive." Israel, in reply to criticism on this point, maintains it is not in violation of the Convention since Israeli citizens were neither deported nor transferred to the territories. Moreover, its presence is not "occupation," since there was no previous legal sovereign over the territories.

The Israeli defense has historical and political support. There was a Jewish presence in the West Bank as in in the State of Israel three thousand years ago. Except for the years 1948-67 when Jordan occupied part of the West Bank, Jews have lived in cities such as Hebron, Shiloh, and Jericho, as well as in Jerusalem. Politically, Israel has obtained territory through defensive wars. David Ben Gurion explained to the 1946 Anglo-American Committee of Inquiry that "we are not coming to Palestine, we are coming to a country which we are recreating. We did not take those Arab villages away, we established hundreds of new Jewish villages on virgin soil."

Official figures suggest there are 133 settlements, and 113 outposts, built without official authorization. Following the 1979 Egyptian-Israeli peace treaty, Israel evacuated 18 Sinai settlements. In 2005, all the 21 settlements in Gaza were dismantled. Presently, there are 450,000 settlers, about 15% of the West Bank population, a vast increase since the 116,000 in 1993, including East Jerusalem with 215,000 settlers. They take up 2% of the West Bank, plus land for agriculture and

roads, and for military presence. Some result from economic factors and get government subsidies. Others are based on religious belief that the land belongs to the Jewish people. Some settlements no doubt displace a part of the Palestinian population, but the main factor is they are not an obstacle to peace. On the contrary, they provide for security, in a way similar to the presence of U.S. troops post World War II in Germany, Japan, and Korea. At the extreme on the dispute, David M. Friedman, former U.S. Ambassador to Israel, asserted in June 2019 that under certain circumstances Israel had the right to retain some of the West Bank.

Trump Administration policy is not likely to propose annexation of territory, but its support for Israel is clear, going beyond the declaration of President Ronald Reagan that the settlements are not necessarily illegal though they may harm peace efforts. The Trump Administration, among other actions, recognized Israel's sovereignty over the Golan Heights, and Jerusalem as the capital of Israel, a position now adopted by Guatemala and Honduras.

Israel faces antagonisms. It is unhelpful that the EU, with a view to boycott is examining 206 companies doing business with those based in the settlements, 143 of which are Israeli and 22 American, and that the Human Rights Council similarly interested in BDS in March 2016 wanted a database about the companies doing business and are involved with Israel in occupied territory. At an extreme, the parliament of Ireland is considering a bill to ban imports from occupied territory, making it the first EU nation to enforce a boycott.

The reality is that there is no juridical resolution of the Palestinian-Israeli conflict, and resort to international law to determine settlements is a political device. The U.S. in realizing this is calling, as others have not sufficiently done, for the Palestinians to negotiate a final status agreement. Instead of misusing the concept of international law, the UN, the EU, and well-meaning members of the

international community must follow the U.S. lead and do the same thing.