

crimes.⁵⁴ There is considerable variation among these state laws, including whether they criminalize travel outside the state for the performance of FGM and what sentences they impose for FGM.⁵⁵ Unless Congress amends the FGM Criminalization Statute or the DOJ reverses its position that the statute is unconstitutional, there is no federal alternative to these state laws for the prosecution of FGM as a crime. But other federal criminal laws may be brought to bear against the perpetrators of FGM. In the Eastern District of Michigan, the DOJ continues to pursue charges against Jumana Nagarwala for the crime of conspiracy to travel with intent to engage in illicit sexual conduct.⁵⁶

Secretary of State Describes Israeli Settlements in the West Bank as “Not Per Se Inconsistent with International Law”

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On November 18, 2019, Secretary of State Mike Pompeo stated that the “establishment of Israeli civilian settlements in the West Bank is not per se inconsistent with international law.”¹ This announcement contrasts with the approach taken by the State Department late in the Obama administration. Although embraced by Israel, the position announced by Pompeo was criticized by Palestinians, Security Council members and other states, who maintain that Israeli settlements in the West Bank violate international law. In January of 2020, the Trump administration released its proposed peace plan for the Israelis and Palestinians, which met with approval from Israeli leaders and rejection from Palestinian leaders.

Israeli citizens began moving to the West Bank after Israel captured the territory in the Six-Day War in 1967, and U.S. perspectives about the legality of the settlements have varied over the course of different administrations. The Carter administration declared the settlements to be illegal in a State Department letter, concluding that “[w]hile Israel may undertake, in the occupied territories, actions necessary to meet its military needs and to provide for orderly government during the occupation . . . the civilian settlements in those territories is inconsistent with international law.”² In 1981, President Reagan told reporters that he disagreed with his predecessor’s position and did not consider the settlements to be illegal.³ President

⁵⁴ See Limor Ezioni, *Contemporary Aspects of Female Genital Mutilation Prohibitions in the United States*, 28 AM. U. J. GENDER SOC. POL’Y & L. 39, 49–61 (2019) (surveying state laws); see also *id.* at 61 (concluding that “about half of the states have not enacted an anti-FGM bill”).

⁵⁵ See *id.* at 49–61 (discussing the variation in state laws).

⁵⁶ See 18 U.S.C. § 2423(b); Gov.’s Response to Def.’s Mot. to Dismiss Count Seven (R.373), *United States v. Nagarwala* (E.D. Mich filed January 31, 2020) (No. 17-20274), ECF. No. 422.

¹ U.S. State Dep’t Press Release, Secretary Michael R. Pompeo Remarks to the Press (Nov. 18, 2019), at <https://www.state.gov/secretary-michael-r-pompeo-remarks-to-the-press> [<https://perma.cc/5L3G-GMER>] [hereinafter Pompeo Remarks].

² Letter from State Department Legal Adviser Concerning Legality of Israeli Settlements in the Occupied Territories, Apr. 21, 1978, 17 ILM 777.

³ *Excerpts from Interview with President Reagan Conducted by Five Reporters*, N.Y. TIMES (Feb. 3, 1981), at <https://www.nytimes.com/1981/02/03/world/excerpts-from-interview-with-president-reagan-conducted-by-five-reporters.html>.

George H.W. Bush called the settlements “counterproductive to peace,”⁴ but his administration did not describe them as illegal.⁵ The Clinton and George W. Bush administrations raised various criticisms related to settlements, but did not expressly declare them to be illegal.⁶

In a 2009 speech, President Obama stated that the “United States does not accept the legitimacy of continued Israeli settlements” without speaking directly to their legality.⁷ At the end of his administration, however, the United States declined to veto Security Council Resolution 2334, which “[r]eaffirms that the establishment by Israel of settlements in the Palestinian territory occupied since 1967 . . . has no legal validity and constitutes a flagrant violation under international law”⁸ In remarks explaining the decision to abstain, Secretary of State John Kerry stated that the settlements, in combination with other actions, “destroy hopes for peace on both sides and increasingly cement[] an irreversible one-state reality.”⁹ He observed that in “1978, the State Department Legal Adviser advised the Congress on his conclusion that Israel’s government, the Israeli Government’s program of establishing civilian settlements in the occupied territory is inconsistent with international law, and we see no change since then to affect that fundamental conclusion.”¹⁰

Since taking office in 2017, President Trump has made other changes to previous administrations’ policies relating to Israel. In December 2017, Trump recognized Jerusalem as Israel’s capital and moved the U.S. embassy to Jerusalem a few months later.¹¹ In response, Palestine initiated a lawsuit in the International Court of Justice arguing that the relocation of the U.S. embassy to Jerusalem violates the Vienna Convention on Diplomatic Relations.¹² Then, in March 2019, the Trump administration recognized Israeli sovereignty over the Golan Heights, another disputed territory that Israel captured during the Six-Day

⁴ President George H.W. Bush, Remarks at a St. Patrick’s Day Ceremony and an Exchange with Reporters, 1 PUB. PAPERS 467 (March 17, 1992).

⁵ AMERICAN FOREIGN POLICY CURRENT DOCUMENTS 1991, at 570 (Paul Claussen & Evan M. Duncan eds., 1994) (Secretary of State James Baker: “The settlement activity is something that the United States has opposed for a long time. Our particular opposition today to settlement activity is that it constitutes an obstacle to peace. In the past, the position of the United States has been that it was, in fact, illegal.” Q: “But that’s not this administration?” Secretary Baker: “That is not our policy, No.”).

⁶ See President William J. Clinton, News Conference with European Union Leaders of Dec. 16, 1996, 32 WEEKLY COMP. PRES. DOCS. 2520 (Dec. 23, 1996) (responding “absolutely” when asked if the settlements were an “obstacle to peace”); President George W. Bush, Interview with Nahum Barnea and Shimon Shiffer of Yedioth Ahronoth of Jan. 2, 2008, 44 WEEKLY COMP. PRES. DOCS. 5 (Jan. 14, 2008) (distinguishing between “authorized” and “unauthorized” settlements and expressing the expectation that Israel would “get rid of unauthorized settlements”).

⁷ White House Press Release, Remarks by President Obama at Cairo University (June 4, 2009), at <https://obamawhitehouse.archives.gov/the-press-office/remarks-president-cairo-university-6-04-09> [<https://perma.cc/8CUX-ZDW2>].

⁸ SC Res. 2334, para. 1 (Dec. 23, 2016).

⁹ U.S. Dep’t of State Press Release, John Kerry, Remarks on Middle East Peace (Dec. 28, 2016), at <https://2009-2017.state.gov/secretary/remarks/2016/12/266119.htm> [<https://perma.cc/JVX6-FSDY>].

¹⁰ *Id.*; see also Kristina Daugirdas & Julian Davis Mortenson, Contemporary Practice of the United States, 111 AJIL 477 (2017) (providing further discussion of the U.S. abstention).

¹¹ Jean Galbraith, Contemporary Practice of the United States, 112 AJIL 306, 307 (2018).

¹² ICJ Press Release, The State of Palestine Institutes Proceedings Against the United States of America (Sept. 28, 2018), available at <https://www.icj-cij.org/files/case-related/176/176-20180928-PRE-01-00-EN.pdf> [<https://perma.cc/AM2C-438L>]. Palestine claims that the Vienna Convention requires embassies to be located in the territory of the host state, and disputes that Jerusalem is part of Israel’s territory. *Id.* The case remains pending. *Relocation of the United States Embassy to Jerusalem (Palestine v. United States of America): Latest Developments*, INT’L CT. OF JUST., at <https://www.icj-cij.org/en/case/176>.

War.¹³ Pompeo said that the U.S. decision does not set a precedent allowing territory to be taken from another country by force, describing the occupation of the Golan Heights as a “unique situation” because “the Israelis ended up with the Golan Heights as the result of having been attacked. . . . They were at risk of their very nation being overrun . . . and they defended themselves, and they retained that terrain to continue to defend themselves from the murderous regimes in Syria.”¹⁴

At a press conference on November 18, 2019, Pompeo stated that “the Trump administration is reversing the Obama administration approach towards Israeli settlements.”¹⁵ He elaborated:

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.¹⁶

¹³ Jean Galbraith, *Contemporary Practice of the United States*, 113 AJIL 613, 613 (2019).

¹⁴ *State Department Fiscal Year 2020 Budget Request*, C-SPAN, at 49:00–51:00 (Apr. 9, 2019), at <https://www.c-span.org/video/?459622-1/secretary-state-pompeo-testifies-fiscal-year-2020-budget-request&start=2953>; see Galbraith, *supra* note 13, at 617.

¹⁵ Pompeo Remarks, *supra* note 1.

¹⁶ *Id.*

Israeli Prime Minister Benjamin Netanyahu celebrated this announcement, saying that it “reflects an historical truth—that the Jewish people are not foreign colonialists in Judea and Samaria.”¹⁷ Palestinian leaders, in contrast, were angered. Palestinian negotiator Saeb Erekat criticized the Trump administration for “threatening the international system with its unceasing attempts to replace international law with the ‘law of the jungle.’”¹⁸ Palestinians in the West Bank responded to the announcement with a “day of rage,” protesting throughout the West Bank.¹⁹

In his remarks, Pompeo did not explain the U.S. reasoning with respect to international law. The Fourth Geneva Convention (Convention) applies to “all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them” and “all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.”²⁰ Article 49 of the Convention provides that “[t]he Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.”²¹ The widely prevailing view is that—either directly, as reflective of customary international law, or both—the Convention applies to the occupation of the West Bank, and that Israeli settlements violate the Convention’s prohibition on civilian population transfers.²²

Many nations responded to Pompeo’s announcement by reaffirming concerns about Israeli activity in the West Bank or by reiterating the conclusion that all Israeli settlements in the West Bank are illegal. On the day after Pompeo’s announcement, the Third Committee of the General Assembly advanced a resolution on “The right of the Palestinian people to self-

¹⁷ Isr. Ministry of Foreign Affairs Press Release, Statement from the Prime Minister’s Office (Nov. 18, 2019), at <https://mfa.gov.il/MFA/PressRoom/2019/Pages/Statement-from-the-Prime-Minister-s-Office-18-November-2019.aspx>. At the time the announcement was made, Netanyahu was facing a close election, and the U.S. announcement was seen as politically beneficial to him. Lara Jakes & David M. Halbfinger, *In Shift, U.S. Says Israeli Settlements in West Bank Do Not Violate International Law*, N.Y. TIMES (Nov. 18, 2019), at <https://www.nytimes.com/2019/11/18/world/middleeast/trump-israel-west-bank-settlements.html>. Pompeo denied that the timing of the announcement was connected to politics. Pompeo Remarks, *supra* note 1.

¹⁸ State of Palestine Negotiations Affairs Dep’t. Press Release, Dr. Saeb Erekat on Mike Pompeo Statement on Israeli Settlements (Nov. 18, 2019), at <https://www.nad.ps/en/media-room/press-releases/dr-saeb-erekat-mike-pompeo-statement-israeli-settlements> [<https://perma.cc/57RB-PXVS>].

¹⁹ Mohammed Daraghme, *Palestinians Protest Settlement Decision in “Day of Rage,”* ASSOC. PRESS (Nov. 26, 2019), at <https://apnews.com/f2049665002045869da66b237c3673c1>.

²⁰ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Art. 2, Aug. 12, 1949, 6 UST 3316.

²¹ *Id.* Art. 49.

²² Adam Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967*, 84 AJIL 44, 69 (1990) (observing that this understanding “has been very widely held internationally” and that “a remarkable degree of unanimity prevails on this matter”). The International Court of Justice, the General Assembly, and the Security Council have all supported this conclusion. *See, e.g.*, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, Advisory Opinion, 2004 ICJ Rep. 136, (July 9), at <https://unispal.un.org/UNISPAL.NSF/0/B59ECB7F4C73BDBC85256EEB004F6D20>; GA Res. 70/89, para. 2 (Dec. 15, 2015); SC Res. 2334, *supra* note 8; SC Res. 465, para. 5 (Mar. 1, 1980). For a recent description of arguments made by Israel and some others to the contrary, see generally Theodor Meron, *The West Bank and International Humanitarian Law on the Eve of the Fiftieth Anniversary of the Six-Day War*, 111 AJIL 357 (2017) (describing these arguments while concluding that, consistent with a position the author took in 1967 as the legal adviser to the Israeli Ministry of Foreign Affairs, the West Bank settlements violate the Fourth Geneva Convention).

determination,” which calls for “an end to the Israeli occupation that began in 1967,” by a vote of 164 to five with nine abstentions.²³ The votes in favor included Canada, which had voted “no” or abstained on similar resolutions for the past fourteen years.²⁴ At a Security Council meeting two days after Pompeo’s statement, most members of the Security Council called the settlements illegal and many criticized the United States for issuing a unilateral declaration of international law that contravenes the UN’s position.²⁵ UN Special Coordinator for the Middle East Peace Process Nickolay Mladenov called Israeli settlements “a flagrant violation of international law” and an obstacle to a peaceful solution at the meeting.²⁶ The United Kingdom issued a statement reiterating its position that the settlements are illegal and urging Israel to “halt its counterproductive settlement expansion.”²⁷ In December 2019, Fatou Bensouda, the prosecutor of the International Criminal Court, stated, in submitting a request for a jurisdictional ruling to the Court, that “Palestine’s viability as a State (and the exercise of the Palestinian people’s right to self-determination) has been obstructed by the expansion of settlements and the construction of the barrier and its associated regime in the West Bank, including East Jerusalem, in violation of international law.”²⁸

The Trump administration’s West Bank policy gained renewed international attention in late January of 2020, when Trump announced his Middle East peace plan. On the issue of West Bank settlements, the plan would “incorporate the vast majority of Israeli settlements into contiguous Israeli territory,” while calling on Israel to refrain during negotiations from building any new settlements or expanding existing settlements outside of the territory proposed for incorporation.²⁹ The plan endorses a two-state solution, but makes the recognition of a Palestinian state contingent on Palestinian leaders “recognizing Israel as the Jewish state, rejecting terrorism in all its forms, allowing for special arrangements that address Israel’s and the region’s vital security needs, building effective institutions and choosing pragmatic solutions.”³⁰ The capital of the Palestinian state would be East Jerusalem, while Jerusalem would be the undivided capital of Israel.³¹

²³ UN GA, Social, Humanitarian & Cultural Issues (Third Committee): Status of Action on Draft Proposals, at <https://www.un.org/en/ga/third/74/proposalstatus.shtml>. The resolution passed in the General Assembly a month later. GA Res. 74/139 (Dec. 18, 2019), at <https://undocs.org/en/A/RES/74/139>.

²⁴ Evan Dyer, *Canada Reverses UN Stance on Palestinians in Break with U.S. Over Settlements*, CBC NEWS (Nov. 19, 2019), at <https://www.cbc.ca/news/politics/un-palestinian-vote-canada-israel-us-1.5365637>.

²⁵ UN Meetings Coverage, Israeli-Palestinian Escalation in Gaza Shows Urgent Need for Political Process on Middle East Peace Process, Special Coordinator Tells Security Council (Nov. 20, 2019), at <https://www.un.org/press/en/2019/sc14026.doc.htm> [<https://perma.cc/FV73-7Y39>].

²⁶ *Israeli Settlements Remain “Flagrant Violation” of International Law, UN Envoy Tells Security Council*, UN NEWS (Nov. 20, 2019), at <https://news.un.org/en/story/2019/11/1051781>.

²⁷ UK Foreign & Commonwealth Office Press Release, *Israeli Settlements: November 2019: UK Statement* (Nov. 21, 2019), at <https://www.gov.uk/government/news/israeli-settlements-uk-statement> [<https://perma.cc/7Y8R-9RSK>].

²⁸ Office of the Prosecutor, *Situation in the State of Palestine*, ICC-01/18, para. 146 (Jan. 22, 2020).

²⁹ White House Press Release, *Peace to Prosperity: A Vision to Improve the Lives of the Palestinian and Israeli People* (January 2020), at 12, 38 available at <https://www.whitehouse.gov/wp-content/uploads/2020/01/Peace-to-Prosperity-0120.pdf>.

³⁰ *Id.* at 4.

³¹ *Id.* at 17.

Netanyahu praised the plan as “a great plan for Israel” and “a great plan for peace.”³² Meanwhile, Palestinian leaders rejected the plan as “nonsense.”³³ Erekat said that the plan “specifies the elements of apartheid,”³⁴ and Palestinian President Abbas said “[w]e say 1,000 no’s” to the proposal.³⁵ Some other countries in the region, including the United Arab Emirates,³⁶ Saudi Arabia,³⁷ and Egypt³⁸ expressed appreciation for Trump’s efforts to develop a comprehensive peace plan and expressed hope that it would launch negotiations between Israel and Palestine. UK Foreign Secretary Dominic Raab also called the plan “a serious proposal, reflecting extensive time and effort,” but noted that “[o]nly the leaders of Israel and the Palestinian territories can determine whether these proposals can meet the needs and aspirations of the people they represent.”³⁹ Other countries strongly criticized the plan. Turkey described the plan as “an annexation plan aiming to destroy the two-state solution and seize the Palestinian territories” and said that “[t]here will be not be any peace in the Middle East without ending Israel’s occupation policies.”⁴⁰ German Foreign Minister Heiko Maas expressed concern about the plan’s compliance with international law, saying that it raises questions concerning “how the proposal related to internationally agreed parameters and legal positions.”⁴¹

³² White House Press Release, Remarks by President Trump and Prime Minister Netanyahu of the State of Israel in Joint Statements (Jan. 28, 2020), at <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-prime-minister-netanyahu-state-israel-joint-statements> [https://perma.cc/7XGK-GY8J]. After Trump stated during the unveiling of his peace plan that “the United States will recognize sovereignty over the territory that my vision provides to be part of the State of Israel,” *id.*, Netanyahu announced that Israel would annex parts of the West Bank. David M. Halbfinger & Isabel Kershner, *Trump Plan’s First Result: Israel Will Claim Sovereignty Over Part of West Bank*, N.Y. TIMES (Jan. 28, 2020), at <https://www.nytimes.com/2020/01/28/world/middleeast/israel-west-bank-annex-sovereignty.html>. The Trump administration then reportedly asked Netanyahu to postpone the annexation. Isabel Kershner, *Israel Puts Brakes on West Bank Annexation Plan*, N.Y. TIMES (Feb. 2, 2020), at <https://www.nytimes.com/2020/02/02/world/middleeast/israel-west-bank-annexation.html>.

³³ Aron Heller & Matthew Lee, *Trump Peace Plan Delights Israelis, Enrages Palestinians*, ASSOC. PRESS (Jan. 28, 2020), at <https://apnews.com/f7d36b9023309ce4b1e423b02abf52c6>.

³⁴ Mark Stone, *Trump’s Peace Plan Has “Elements of Apartheid,” Palestinian Official Says*, SKY NEWS (Jan. 28, 2020), at <https://news.sky.com/story/trumps-peace-plan-has-elements-of-apartheid-palestinian-official-says-11920958>.

³⁵ Heller & Lee, *supra* note 33.

³⁶ UAE Press Release, Ambassador Yousef Al Otaiba Statement on Peace Plan (Jan. 28, 2020), at <https://www.uae-embassy.org/news-media/ambassador-yousef-al-otaiba-statement-peace-plan> [https://perma.cc/FJ28-PNYN].

³⁷ Saudi Arabia Ministry of Foreign Affairs Press Release, Statement from the Ministry of Foreign Affairs of the Kingdom of Saudi Arabia (Jan. 28, 2020), at <https://www.spa.gov.sa/viewfullstory.php?lang=en&newsid=2027848#2027848> [https://perma.cc/6DHG-XSMB].

³⁸ Egypt Ministry of Foreign Affairs Press Release, Press Statement (Jan. 28, 2020), at <https://www.mfa.gov.eg/English/MediaCenter/News/Pages/You-are-making.aspx> [https://perma.cc/M6L8-GJFQ].

³⁹ UK Foreign & Commonwealth Office Press Release, Release of US Proposals for Middle East Peace: Foreign Secretary’s Statement (Jan. 28, 2020), at <https://www.gov.uk/government/news/foreign-secretary-statement-on-release-of-us-proposals-for-middle-east-peace> [https://perma.cc/P45A-7TAD].

⁴⁰ Turk. Ministry of Foreign Affairs Press Release, Press Release Regarding the Plan Released by US Administration on the Israeli-Palestinian Conflict (Jan. 28, 2020), at http://www.mfa.gov.tr/no_28_-abd-nin-israil-filistin-ihtilafina-yonelik-yayimladigi-plan-hk.en.mfa [https://perma.cc/J37Q-2747].

⁴¹ Ger. Federal Foreign Office Press Release, Foreign Minister Maas on US Proposal for Middle East Peace Process (Jan. 28, 2020), at <https://www.auswaertiges-amt.de/en/newsroom/news/-/2296906> [https://perma.cc/GQ7G-BKHX].