

CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW

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GENERAL INTERNATIONAL AND U.S. FOREIGN RELATIONS LAW

United States Abstains on Security Council Resolution Criticizing Israeli Settlements
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On December 23, 2016, the United States abstained from voting on a United Nations Security Council resolution that condemned Israeli settlement construction, thereby allowing the resolution to be adopted by a vote of 14–0.¹ Israel's response was swift and disapproving. The text of Resolution 2334 follows:

The Security Council,

...

Reaffirming the obligation of Israel, the occupying Power, to abide scrupulously by its legal obligations and responsibilities under the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, and recalling the advisory opinion rendered on 9 July 2004 by the International Court of Justice,

Condemning all measures aimed at altering the demographic composition, character and status of the Palestinian Territory occupied since 1967, including East Jerusalem, including, inter alia, the construction and expansion of settlements, transfer of Israeli settlers, confiscation of land, demolition of homes and displacement of Palestinian civilians, in violation of international humanitarian law and relevant resolutions,

Expressing grave concern that continuing Israeli settlement activities are dangerously imperilling the viability of the two-State solution based on the 1967 lines,

Recalling the obligation under the Quartet Roadmap,² endorsed by its resolution 1515 (2003), for a freeze by Israel of all settlement activity, including “natural growth”, and the dismantlement of all settlement outposts erected since March 2001,

Recalling also the obligation under the Quartet roadmap for the Palestinian Authority Security Forces to maintain effective operations aimed at confronting all those engaged in terror and dismantling terrorist capabilities, including the confiscation of illegal weapons,

Condemning all acts of violence against civilians, including acts of terror, as well as all acts of provocation, incitement and destruction,

...

Stressing that the status quo is not sustainable and that significant steps, consistent with the transition contemplated by prior agreements, are urgently needed in order to (i) stabilize the situation and to reverse negative trends on the ground, which are steadily eroding the two-State solution and entrenching a one-State reality, and (ii) to create the conditions for successful final status negotiations and for advancing the two-State solution through those negotiations and on the ground,

1. *Reaffirms* 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 and a major obstacle to the achievement of the two-State solution and a just, lasting and comprehensive peace;

¹ UN SCOR, 7853rd mtg., UN Doc. S/PV.7853, at 4 (Dec. 23, 2016); SC Res. 2334, UN Doc. S/RES/2334 (Dec. 23, 2016) (adopted by a vote of 14–0–1).

² [Editors' note: The “Quartet Roadmap” refers to a plan developed in 2003 by the United States, the European Union, the Russian Federation, and the UN secretary-general to advance the 1991 Madrid Conference process for peacefully resolving the Israeli-Palestinian conflict. Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law: ICJ Advisory Opinion on Israeli Security Fence*, 98 AJIL 349, 361 (2004).]

2. *Reiterates* its demand that Israel immediately and completely cease all settlement activities in the occupied Palestinian territory, including East Jerusalem, and that it fully respect all of its legal obligations in this regard;
 3. *Underlines* that it will not recognize any changes to the 4 June 1967 lines, including with regard to Jerusalem, other than those agreed by the parties through negotiations;
 4. *Stresses* that the cessation of all Israeli settlement activities is essential for salvaging the two-State solution, and calls for affirmative steps to be taken immediately to reverse the negative trends on the ground that are imperiling the two-State solution;
 5. *Calls* upon all States, bearing in mind paragraph 1 of this resolution, to distinguish, in their relevant dealings, between the territory of the State of Israel and the territories occupied since 1967;
 6. *Calls for* immediate steps to prevent all acts of violence against civilians, including acts of terror, as well as all acts of provocation and destruction, calls for accountability in this regard, and calls for compliance with obligations under international law for the strengthening of ongoing efforts to combat terrorism, including through existing security coordination, and to clearly condemn all acts of terrorism;
 7. *Calls upon* both parties to act on the basis of international law, including international humanitarian law, and their previous agreements and obligations, to observe calm and restraint, and to refrain from provocative actions, incitement and inflammatory rhetoric, with the aim, inter alia, of de-escalating the situation on the ground, rebuilding trust and confidence, demonstrating through policies and actions a genuine commitment to the two-State solution, and creating the conditions necessary for promoting peace;
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In an address to the Security Council after the vote, U.S. Permanent Representative to the UN Samantha Power said the United States' abstention was consistent with long-standing, bipartisan U.S. policy toward Israel and the Middle East. She quoted a 1982 statement by President Ronald Reagan that "underscore[d] the United States' deep and long-standing commitment to achieving a comprehensive and lasting peace . . ." and "highlight[ed] the United States' long-standing position that Israeli settlement activity in territories occupied in 1967 undermines Israel's security, harms the viability of a negotiated two-State outcome and erodes prospects for peace and stability in the region."³

Power also commented, however, that the U.S. decision had "not [been] straightforward," because Israel is "treated differently from other Member States" in the United Nations, as evidenced by the number of Israel-specific resolutions adopted by the General Assembly and Human Rights Council. Observing that the "Obama Administration has worked tirelessly to fight for Israel's right simply to be treated just like any other country,"⁴ Power explained:

³ UN SCOR, *supra* note 1, at 5.

⁴ *Id.*

It is because this forum too often continues to be biased against Israel, because there are important issues that are not sufficiently addressed in the resolution and because the United States does not agree with every word in this text that the United States did not vote in favor of the resolution. But it is because the resolution reflects the facts on the ground and is consistent with United States policy across Republican and Democratic administrations throughout the history of the State of Israel that the United States did not veto it.⁵

Power took particular care to distinguish Resolution 2334 from a similar resolution that had been vetoed by the United States in 2011.⁶ Whereas the vetoed resolution “focused exclusively on the settlements,” Power explained, Resolution 2334 “condemns violence, terrorism and incitement, which also pose extremely grave risks to the two-State solution.”⁷

Finally, Power emphasized that the United States saw no tension between its increasing criticisms of the “settlement problem” and its long-term alliance with Israel. On the first point, she cited the increasing numbers of settlers (an additional 355,000 since the 1993 Oslo Accords) as well as recent statements by the Israeli prime minister describing his government as “more committed to settlements than any in Israel’s history.”⁸ The settlements, she said, “put the two-State solution at risk and threaten Israel’s stated objective to remain both a Jewish State and a democracy.”⁹ On the second point, Power underscored that U.S. criticism of the settlements would not compromise long-standing United States financial and military support of Israel. She concluded: “Our vote today does not in any way diminish the United States’ steadfast and unparalleled commitment to the security of Israel, the only democracy in the Middle East.”¹⁰

At a speech presented at the State Department several days after the Security Council adopted Resolution 2334, Secretary of State John Kerry offered extended remarks on Resolution 2334 and the Israeli-Palestinian conflict. Kerry emphasized that the resolution was consistent with established international law and long-standing U.S. policy. Addressing the resolution’s conclusion that Israeli settlements are unlawful, he said:

[T]his resolution simply reaffirms statements made by the Security Council on the legality of settlements over several decades. It does not break new ground. In 1978, the State Department Legal Adviser advised the Congress on his conclusion that . . . 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.¹¹

In that 1978 opinion, written during the Carter administration, the State Department legal adviser noted that Israel had established some seventy-five civilian settlements in territories captured during the 1967 war:

⁵ *Id.* at 6.

⁶ SC Draft Res., UN Doc. S/2011/24 (Feb. 18, 2011); UN SCOR, 6484th mtg. at 5, UN Doc. S/PV.6484 (Feb. 18, 2011) (Ambassador Susan Rice explained the U.S. veto: “While we agree with our fellow Council members—and indeed with the wider world—about the folly and illegitimacy of continued Israeli settlement activity, we think it unwise for this Council to attempt to resolve the core issues that divide Israelis and Palestinians. Therefore, regrettably, we have opposed this draft resolution.”); see J.R. Crook, *Contemporary Practice of the United States*, 105 AJIL 333, 345–47 (2011).

⁷ UN SCOR, *supra* note 1, at 7.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ 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> [hereinafter Dec. 28, 2016 Kerry Remarks].

On the basis of the available information, the civilian settlements in the territories occupied by Israel do not appear to be consistent with the[] limits on Israel's authority as belligerent occupant in that they do not seem intended to be of limited duration or established to provide orderly government of the territories and, though some may serve incidental security purposes, they do not appear to be required to meet military needs during the occupation.¹²

The 1978 legal adviser's opinion also addressed Israel's obligations as a party to the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War.¹³ Article 49, paragraph 6 of that treaty provides: "The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies."¹⁴ The legal adviser's opinion concluded that the Israeli civilian settlements "appear to constitute" a transfer within the scope of that paragraph.¹⁵ Although the opinion has never been formally withdrawn, not all successive administrations have endorsed it. While critical of Israeli settlements, President Reagan had objected to describing them as illegal.¹⁶ And before its abstention to Resolution 2334, the Obama administration's position on the consistency of the settlements with international law had been unclear.¹⁷

In his speech on Resolution 2334, Kerry also responded to criticism of the resolution for describing East Jerusalem as "occupied territory." Kerry emphasized continuity with prior resolutions:

[T]o be clear, there was absolutely nothing new in last week's resolution on that issue. It was one of a long line of Security Council resolutions that included East Jerusalem as part of the territories occupied by Israel in 1967, and that includes resolutions passed by the Security Council under President Reagan and President George H.W. Bush. And remember that every U.S. administration since 1967, along with the entire international community, has recognized East Jerusalem as among the territories that Israel occupied in the Six-Day War.¹⁸

Kerry closed his discussion of Resolution 2334 by stating:

¹² Letter from the State Department Legal Adviser Concerning Legality of Israeli Settlements in the Occupied Territories, Apr. 21, 1978, reproduced in 17 ILM 777, 778 (1978) [hereinafter 1978 Opinion].

¹³ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 UST 3516 [hereinafter Fourth Geneva Convention]. See also Theodor Meron, *The West Bank and International Humanitarian Law on the Eve of the Fiftieth Anniversary of the Six-Day War* (in this issue of *AJIL*).

¹⁴ Fourth Geneva Convention, *supra* note 13, Art. 49, para. 6.

¹⁵ 1978 Opinion, *supra* note 12, at 779.

¹⁶ Glenn Kessler, *1979 State Dept. Legal Opinion Raises New Questions About Israeli Settlements*, WASH. POST (June 17, 2009), at <http://www.washingtonpost.com/wp-dyn/content/article/2009/06/16/AR2009061603285.html>; Bernard Gwertzman, *State Department; About the West Bank and the Emperor's Clothes*, N.Y. TIMES (Aug. 25, 1983), at <http://www.nytimes.com/1983/08/25/us/state-department-about-the-west-bank-and-the-emperor-s-clothes.html> (In a meeting with reporters two weeks after his inauguration, Reagan told them: "As to the West Bank, I believe the settlements there—I disagreed when the previous Administration referred to them as illegal—they're not illegal." He added, however, that the Israeli effort to continue to build new settlements was "unnecessarily provocative.").

¹⁷ During the summer of 2009, the State Department spokesperson declined to say whether the administration stood by the 1978 opinion. Kessler, *supra* note 16. Likewise, when the 2011 Security Council resolution on Israeli settlements came up for a vote, the United States had not yet declared settlement building illegal. See David E. Sanger, *U.S. Tries to Head Off Vote Against Israeli Settlements*, N.Y. TIMES (Feb. 18, 2011), at <http://www.nytimes.com/2011/02/18/world/middleeast/18israel.html>; see also Crook, *supra* note 6, at 346 (noting press reports suggested that the United States would have agreed to calling the settlements "illegitimate," but not "illegal").

¹⁸ Dec. 28, 2016 Kerry Remarks, *supra* note 11.

In the end, we did not agree with every word in this resolution. There are important issues that are not sufficiently addressed or even addressed at all. But we could not in good conscience veto a resolution that condemns violence and incitement and reiterates what has been for a long time the overwhelming consensus and international view on settlements and calls for the parties to start taking constructive steps to advance the two-state solution on the ground.¹⁹

Israel objected fiercely to the resolution. Its permanent representative to the United Nations called on the Security Council to

put an end to the bias and obsession with Israel, stop such endless attempts to blame all the problems of the Middle East on the one true democracy in the region and make clear to the Palestinians that the only way forward is to end the incitement and terror and enter into direct and meaningful negotiations with Israel.²⁰

Prime Minister Benjamin Netanyahu's office said that "[t]he Obama administration had 'not only failed to protect Israel against this gang-up at the UN, it ha[d] colluded with it behind the scenes.'"²¹ Netanyahu emphasized his hope that things would be different under the incoming Trump administration, saying that he looked forward to working with the president-elect "to negate the harmful effects of this absurd resolution."²² Israel also retaliated against several of the resolution's co-sponsors, recalling its ambassadors to New Zealand and Senegal and canceling the Senegalese foreign minister's planned visit to Israel.²³ Israel also vowed to cut aid to Senegal,²⁴ and Prime Minister Netanyahu reported that he "already instructed to stop about 30 m shekels in funding to five UN bodies that are especially hostile to Israel."²⁵

The Palestinian representative to the United Nations, by contrast, praised the resolution, saying it reflected "long-standing global consensus on the matter".²⁶

¹⁹ *Id.*

²⁰ UN SCOR, *supra* note 1, at 15.

²¹ Ruth Eglash, *Netanyahu Summons U.S. Envoy over Anti-Settlement Resolution Adopted by U.N.*, WASH. POST (Dec. 25, 2016), at https://www.washingtonpost.com/world/netanyahu-reprimands-nations-that-supported-un-settlement-resolution/2016/12/25/0519946f-3cdc-4e0c-96b3-a9926750dae0_story.html. The Obama administration denied the accusation of collusion. The press quoted a senior Obama administration official as saying:

To be clear: from the start, this was an Egyptian resolution. The Egyptians authored it, circulated it, and submitted it for a vote on Wednesday evening before asking for a delay and subsequently removing their sponsorship. Contrary to some claims, the administration was not involved in formulating the resolution nor have we promoted it.

Stephen Collinson, David Wright & Elise Labott, *US Abstains as UN Demands End to Israeli Settlements*, CNN.com (Dec. 24, 2016), at <http://edition.cnn.com/2016/12/23/politics/israel-official-rips-obama-un-settlements>.

²² Ruth Eglash & Carol Morello, *Netanyahu Blasts U.N., Obama over West Bank Settlements Resolution*, WASH. POST (Dec. 24, 2016), at https://www.washingtonpost.com/world/netanyahu-calls-un-resolution-on-settlements-shameful/2016/12/23/2d45fbac-c94cf-11e6-bf4b-2c064d32a4bf_story.html. The permanent representative had offered similar criticism. Collinson, *supra* note 21 ("It was to be expected that Israel's greatest ally would act in accordance with the values that we share and that they would have vetoed this disgraceful resolution. I have no doubt that the new U.S. administration and the incoming UN Secretary General will usher in a new era in terms of the UN's relationship with Israel.")

²³ Peter Beaumont, *Israel Rejects 'Shameful' UN Resolution amid Criticism of Netanyahu*, GUARDIAN (Dec. 24, 2016), at <https://www.theguardian.com/world/2016/dec/24/israel-rejects-shameful-un-resolution-amid-criticism-of-netanyahu>.

²⁴ Eglash, *supra* note 21.

²⁵ Beaumont, *supra* note 23.

²⁶ UN SCOR, *supra* note 1, at 16.

Israeli settlements in the occupied Palestinian territory, including East Jerusalem, the eternal capital of the State of Palestine, have no legal validity, constitute flagrant breaches under international law, namely the Fourth Geneva Convention, and constitute a major obstacle to peace, gravely diminishing the viability of the two-State solution based on the 4 June 1967 borders and the possibility of realizing it.²⁷

He dismissed Israel's claims of being "bashed" and said the resolution "may rightly be seen as a last attempt to preserve the two-state solution" that, for many, "seems virtually impossible at this point as Israel, the occupying Power, has been permitted to entrench its occupation and a one-State reality with absolute impunity, at times even being rewarded for its violations and intransigence."²⁸

Domestically, the Obama administration faced criticism from Republicans, including House Speaker Paul Ryan,²⁹ Senator John McCain,³⁰ and Senator Lindsey Graham,³¹ as well as from some Democrats, including Senate Minority Leader Chuck Schumer.³² Then-President-elect Donald Trump denounced the resolution and criticized the decision not to veto it. He tweeted: "As to the U.N., things will be different after Jan. 20th."³³ He described the resolution as a "big loss . . . for Israel in the United Nations [that] will make it much harder to negotiate peace."³⁴

Since Trump's inauguration, however, his administration seems to have taken a somewhat more critical view of settlements. In a February 2 statement, Press Secretary Sean Spicer said: "While we don't believe the existence of settlements is an impediment to peace, the construction of new settlements or the expansion of existing settlements beyond their current borders may not be helpful in achieving that goal."³⁵ Trump seemed to go further on February 10, reportedly telling an Israeli newspaper that settlements "don't help the process" and that "he did not believe that 'going forward with these settlements is a good thing for peace.'"³⁶ During his first meeting with Netanyahu as president, Trump said at their joint press conference on February 15:

I reject unfair and one-sided actions against Israel at the United Nations—just treated Israel, in my opinion, very, very unfairly—or other international forums, as well as boycotts that target Israel As far as settlements, I'd like to see [Israel] hold back on settlements for a little bit. We'll work something out. But I would like to see a deal be made. I think a deal will be made.³⁷

²⁷ *Id.*

²⁸ *Id.*

²⁹ *House Speaker Ryan, Senator McCain Condemn U.S. Abstention on U.N.'s Israel Vote*, REUTERS (Dec. 23, 2016), at <http://www.reuters.com/article/us-israel-palestinians-un-ryan-idUSKBN14C220>.

³⁰ *Id.*

³¹ Eglash, *supra* note 21.

³² Jeremy Berke, *Democrats Scorch Obama over UN Vote Condemning Israeli Settlements*, BUSINESS INSIDER (Dec. 23, 2016), at <http://www.businessinsider.com/un-israel-vote-obama-democrats-2016-12>.

³³ Rick Gladstone, *Trump and U.N. Leader Discuss 'Cooperation'*, N.Y. TIMES (Jan. 4, 2017), at <https://www.nytimes.com/2017/01/04/world/americas/united-nations-donald-trump-antonio-guterres.html>.

³⁴ Collinson, *supra* note 21.

³⁵ White House Press Release, Statement by the Press Secretary (Feb. 2, 2017), at <https://www.whitehouse.gov/the-press-office/2017/02/02/statement-press-secretary>.

³⁶ Peter Baker, *Trump Adopts a Harder Line on Israeli Settlements*, N.Y. TIMES (Feb. 10, 2017), at <https://www.nytimes.com/2017/02/10/world/middleeast/trump-adopts-a-harder-line-on-israeli-settlements.html>.

³⁷ White House Press Release, Remarks by President Trump and Prime Minister Netanyahu of Israel in Joint Press Conference (Feb. 15, 2017), at <https://www.whitehouse.gov/the-press-office/2017/02/15/remarks-president-trump-and-prime-minister-netanyahu-israel-joint-press>.