Jerusalem

and

International Law

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In the Name of God the most Gracious most Merciful

Abstract

Jerusalem has always been a target for invaders and attackers, using various means and tools to establish their hands over it territories. Israel followed suit and since the very first day of capturing the city, either the western part before 1967 or the eastern part after its military occupation in 1967, it has been taking all sorts of measures to change its Arab, Islamic and Christian features. It has been destroying houses, seizing land and expelling its residents outside its borders. Since its occupation till 1993, it has been taking further measures in the eastern part of the city. It signed a Palestinian-Israeli declaration of principles on September 13, 1993. The fifth article, second paragraph of the said declaration states that the final status of Jerusalem shall be subject to negotiations before the third year of the transitional stage of the Palestinian self autonomy. However, Israel has been taking a series of measures against the city and its residents in violation of international law, international humanitarian law and human rights.

Since Jerusalem is part of the land occupied after 1967 war, then, it falls under the rules governing all the other occupied lands. Accordingly, we shall explain the relation between that, particularly the law of occupation in Jerusalem and international law. We shall highlight the competences and liabilities under the said law to show in the end that the measures undertaken by the Israeli government against the Palestinian residents are illegitimate.
This study shall be divided into two Parts and a conclusion.

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Part One

The Legal Status of the City of Jerusalem
Before and after 1967 War

To analyze the legal status of the city of Jerusalem, we should first identify three main issues. First, we need to briefly highlight the historical background of this city since its first inception and until the Othoman empire. Second, we should explain its legal status after the Othoman empire and until 1967 war. Finally, we shall conclude this Part with its legal status after 1967 war until these days.

Chapter One

The Historical Background of the City of Jerusalem

The city of Jerusalem was established in 3000 BC by Jebusites who called it Jebus (1). It had a commercial, military and strategic importance at the time. The Jebusites had ties with the Canaanites and the Pharaohs (2). Jebusites were one of the Canaanite Arab tribes who migrated from Palestine to the Arab peninsula. They developed their city which became known as Urushalim with reference to their god ‘Shalem’ which means the city of ‘Salam’ or peace (3). They built a temple for their god over one of the neighbouring hills.

In 1900 BC Abraham arrived to the city with 319 persons, a long time before the construction of the temple. They did not clash with the Jebusites. King David used to live in Hebron. In 1050 BC he captured Jerusalem after a long siege under his nephew Jacob’s commandment.
The people of Jerusalem spent a long time resisting his siege until he took it over and established his David Kingdom with Urushalim its capital (4). David started building the temple for prayers and brought its stones from a quarry in Jerusalem close to Damascus Gate which is now called Suliman Cave. He completed building the temple in 1005 BC on a space of 70 x 20 yards (5). The temple which replaced the Jebusites temple was called the Temple of Solomon and Urushalim became the capital of Judah. Then it was divided into two kingdoms, one in the north with Samaria its capital and one in the south and Urushalim its capital. The southern state was conquered by Nebuchadnezzar in 587 BC, who destroyed the temple of Solomon. He detained the Jews and took them as slaves to Iraq, but they returned back to Jerusalem in 538 BC with Persian King Cyrus liberated them and moved 40000 of them to Palestine, where he rebuilt the temple of Solomon which was destroyed from 520-515 BC (6). In 330 BC the Greeks occupied Palestine and then the Romans took over in 63 BC. Titus the Roman military commander totally destroyed the Temple of Solomon in 75 BC. Roman emperor Hadrian expelled the Jews from Urushalim in 125 BC, banned them from approaching it and renamed it as Colonia Aelia Capitolina (7).

Jerusalem fell under the Islamic ruling in 15th H/636AD when muslims entered it after a long siege which ended with a reconciliation agreement (8). Since then Jerusalem has been an Arab Islamic city, with successive muslim and Arab rulers from the rightly guided Caliphs to the Umayyads, Abbasids, Tulunids And Ikshidids, Fatimids, Seljuqs, Mamluks, Turks and finally the Palestinians. The only interruption to this series were the crusades (9). Similar to all the Arab countries, Palestine was ruled by the Turks in 1517 (10). This led to an administrative change, which consequently led to a massive demographic change. During their 400
years rule over it, the Othoman Turks did not try to occupy Jerusalem or any other Palestinian city, that is why Jerusalem retained its Arab and Islamic nature established since the Islamic Conquests. This period continued for 1400 years until Palestine including Jerusalem was occupied by Britain (11).

The Othoman Turks contributed to the architectural development of the city of Jerusalem. Sultan Suliman I -from 1520-1566- established the existing walls around the old city of Jerusalem to protect it against bedouin attacks. These walls were 2 miles long and 40 feet high with 43 towers left and seven gates (12). In 1876, the first Othoman parliament took place in Constantinople and Palestinian representatives for Jerusalem were elected for the first time. Meanwhile the Sanjak of Jerusalem was put in 1874 under the direct rule of Constantinople and its direct communication and affiliation continued with the State and the minister of interior even under the British occupation in 1917 (13).

In the 16th and 17th century a number of Jewish men of religion led the settlement campaign to the holy places. At the beginning of the 17th century there were 18 Talmud colleges and 21 churches in Safed city, however an earthquake that hit the city in 1837 made the Jews move south to Jerusalem. In 1857 Sir Moses Montefiori founded Mishkenot Sha'ananim, the first Jewish residence outside the walls of the Old city which was later called Yemin Moshe. In 29/8/1897 the first Zionist conference was held in Basel, Switzerland as a beginning of the Zionist movement led by Theodor-Herzl as a political movement aiming to establish the Jewish state in Palestine (15). When Sultan Abdel Hamid II felt its dangerous intentions towards Palestine, he sent employees from his palace to handle the Mutesarrifiyyet of Jerusalem. The first thing the Turks did was banning the Jews from migration to Palestine.
Hence, during the Ottoman rule of the Arab world including Palestine 1517, Jerusalem did not have an independent legal status. It was rather part of the Ottoman empire, like any other Palestinian city.

Chapter Two
The Legal Status of the City of Jerusalem
Before 1967

The previous chapter explained that Jerusalem had a similar legal status to all the other Palestinian cities, as part of the Ottoman empire until it fell under the British empire in 11/12/1917 and throughout the British period of military administration until 1922 when the British mandate was imposed till 1948 (16). Since then, Jerusalem has been representing a special legal status, particularly after the UN General Assembly resolution 181 (2) on the partition of Palestine in 29/11/1947 which recommended the following:

a- Terminating the British mandate Palestine at a deadline of 1/8/194.

b- Dividing Palestine into two independent states, one Arab and one Jewish, linked together under an economic union.

c- Establishing an independent entity in Jerusalem and its surrounding villages and putting it under an international system administered by the UN (17).

The resolution drew the borders of Jerusalem area including its surrounding villages from Abu Dis in the east to Ein Karm in the west, and from Shafat in the north to Bethlehem in the south. Jerusalem shall be separated from the two states “Corpus Separatum” under the UN administration (18). A series of other UN Security Council and General Assembly resolutions followed. In 26/4/1948 General Assembly
resolution 185, calling on the Trusteeship Council to discuss with the British mandate and the other concerned parties the required measures to protect the city of Jerusalem and its inhabitants and to submit their recommendations accordingly. Furthermore, in 6/5/1948 it submitted recommendation 178, requesting the appointment of a special commissioner to Jerusalem before 15/5/1948 (19). The UN had planned to make Jerusalem a corpus separatum, neutral and disarmed entity, run by a legislative council. It requested the Trusteeship Council to draw a special constitution for Jerusalem effective by 1/10/1948 for a period of ten years. Following that, Jerusalem's inhabitants would have had the freedom to express their desires in a referendum to make all necessary amendments to the city's ruling system (20). However, the said resolution was refused by both parties. The Palestinians refused it for a number of legal reasons but the Zionists did that in an indirect way (21).

The Jews declared the establishment of the Israeli state on 14/5/1948, a day before the end of the British mandate. On the withdrawal of the British forces from Palestine on 15/5/1948, chaos prevailed and Israel made use of it to seize the Arab territories in the western part of Jerusalem, comprising 12 Arab areas (22). The Arab armed forces tried to rescue Palestine. They besieged Jerusalem and separated it from the other Jewish settlements. The battle ended with the fall of the western part of the city in the hands of the Israelis and the Western part in the hands of the Jordanians (23). The UN General Assembly adopted its 303 resolution, dated 9/12/1949 declaring that Jerusalem should be put under a permanent international system. The resolution called on the Trusteeship Council to prepare Jerusalem statute and to immediately implement it (24). However, in 26/12/1949 the Israeli government declared that Jerusalem is the capital of Israel and part of it. The Knesset endorsed the decision (25) and it later issued another decision, dated
23/1/1950 stating on moving the capital of Israel from Tel Aviv to Jerusalem including its western part as a de facto policy (26). However, the UN and the whole international community did not acknowledge that due to its violation to the provision of international law, the partition plan and its annexed decisions (27).

As for the eastern part of the city, it fell under the Jordanian control after signing a truce agreement with Israel in Rhodes on 3/4/1949 to terminate the belligerent operations between them (28).

In the end of 1948 a series of popular meetings were held between them at Jericho conference, dated 1/12/1948 which was attended by a number of Palestinian figures, Ramallah conference, dated 27/12/1948 and Nablus conference on the same date. Unity between the West Bank and Jerusalem was declared in these conferences. Accordingly, Jordan officially declared in 24/10/1950 annexing the West Bank and Eastern Jerusalem. Pakistan and Britain were the only two states that acknowledged that. Moreover, Britain announced that the joint defence agreement with Jordan over the West Bank and Jerusalem was effective (29). Jerusalem remained under the Jordanian rule till 7/6/1967 when the war erupted. Hence, the Israeli annexing of the Western part of the city was against international law, because it was not based on the public satisfaction of the Palestinian people, who were the holder of the legitimate sovereignty of Palestine. Israel succeeded in that by the use of force, which means it does not enjoy the legal control over Arab Jerusalem. It only has the real dominance (30), as the occupation forces. Thus, rules and provisions of the law of occupation apply on Israel, and this is what I am going to elaborate on in Chapter two herein.
Chapter Three
The Legal Status of the City of Jerusalem
After 1967

After June 1967 war, when Israel occupied the West Bank and Eastern Jerusalem Jerusalem was under the Jordanian rule. Since the very first day of its occupation, the Israeli forces have been taking a series of measures to annex the holy city to western Jerusalem, under the pretext of 'unifying' the city (31). It has been using a host of illusive pretexts and excuses to legitimize its acts and keep the city under its dominance (32). It is noteworthy that the Israeli government did not use the word 'annex' in any of its laws or decrees issued to 'unify' the city. An example on that is the Knesset's decision, dated 27/6/1967 amending the judicial authority law 1948 by adding article (11b), which aims to include the regulations of the areas that were under the Arab Jerusalem municipality before war (33). Meanwhile, the Knesset adopted another amendment to the Israeli municipalities law no. 6/67 to offer the Israeli minister of interior a mandate to declare the expansion of Jerusalem’s municipality zone by annexing new areas (34). In 26/6/1967 the Israeli minister of interior held a census for Jerusalem city inhabitants and gave them Israeli identity cards. These measures were followed by an annulment of Jordanian laws and courts and affiliating them to the Israeli courts, in addition to shutting Western banks in the city and imposing taxes on its residents (35).

These Israeli measures were followed with a series of legislative acts and events aiming to wipe out the Arab nature of the city, imposing the Jewish nature and putting the whole world in front of a de facto situation (36).
The Israeli government added more measures by taking a crucial step to emphasize to the world its intention to annex eastern Jerusalem by issuing a statute (or a constitutional text and it called it 1980 Statute of Jerusalem, the capital of Israel) in 30/7/1980. Article (1) stated that ‘the full and unified Jerusalem is the capital of Israel’, which means that it is part and parcel of western Jerusalem which it annexed in 1948 (37).

In response to this decision, the Security Council issued resolution 478, dated 20/8/1980 which considered the Israeli measure null and void and in violation to the international law (38). It further called on countries that have diplomatic missions in Jerusalem to withdraw its missions from the city. In response to this resolution, 13 countries responded (39).

It is noted that the UN Security Council and General Assembly had the tradition of tying between eastern Jerusalem and the other Arab territories occupied since 1967 war in all their resolutions. They also considered the Israeli existence in Jerusalem as an occupying state in occupied territories that should pull out (40).

Does that mean that the Israeli presence in Western Jerusalem legitimate? Unfortunately, some people adopted that with reference to Security Council resolution 242/1967 which only dealt with the withdrawal from the ‘territories’ occupied in 1967: “This means from their own perspective- that it is an implicit acknowledgment of Israel’s sovereignty over the territories occupied after 1948. They added also that since the resolution had been confined to calling for the Israeli withdrawal from the Palestinian and Arab occupied territories since 1967, then the Israeli presence in western Jerusalem became acknowledged at the international level upon adopting this resolution (41).
However, we cannot succumb to this point of view, because the Israeli occupation of Arab Jerusalem in 1948 had been done through a series of massacres and atrocious acts against the Palestinian civilians (42) such as Deir Yassin and others. The presence of Israel there for more than 50 years cannot give it legitimacy, on basis of statute of limitation in relation to provision of international law. It rather offers it a actual sovereignty over it. Moreover, some of the countries concerned with the fate of Jerusalem such as the Vatican still insist on internationalizing the city as a means to solve its problem and to ensure the access of the three revealed religions to their holy places (43).

Some specialists on the issue of Jerusalem added that if the city (with its two parts) was not internationalized, then its legal status would not be decided. To prove that, a very few number of states had opened their embassies in western Jerusalem and most of them kept their embassies in Tel Aviv. Some of them also opened two consuls, one in western Jerusalem and one in eastern Jerusalem. This proves that these states believe that the issue of western and eastern Jerusalem has not been solved (44).

In addition to that, the sovereignty over Jerusalem with its two parts is for the Palestinian people who have been settling there for hundreds of years, bearing in mind that it had been occupied by the armed forces. According to the established provision of the international law, it is not allowed to acquire territories through war and it is not allowed to reap the fruits of aggression. This principle had been accepted internationally in the international conference of the American States in 1890. It had been re-emphasized in Buenos Aires 1936, Panama declaration 1938 and Bogota document of American States Organization 1948, in addition to the fact
that it had been accepted in the peaceful settlements following World War I (45).

The principle of prohibiting the acquisition of territories through war is considered a result of the commitment articulated in 2/4 of the UN Charter 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations (46).

The UN General Assembly issued a number of resolutions that emphasized the principle of prohibiting the acquisition of territories by force like for instance resolutions (XXV) 2628, dated 4/11/1970, (XXVI) 2799, dated 13/12/1971 and (XXVII) 2949 dated 8/12/1972 (47).

In general the issue of Jerusalem - its two parts - is considered part and parcel of the Palestinian issue. Any solution to it cannot be done except within a framework of a comprehensive solution to the Palestinian issue. It should be based on the established principles of international law, rules of justice and on top of them the right to self-determination and that the fruits of any occupation are null and void (48).
هوامش الفصل الأول

1- انظر عارف العارف، المفصل في تاريخ القدس، مطبعة المعارف سنة 1961م، ص 2، وإن كان البعض بري، فإن القدس قد برزت حوالي عام 2500 قبل الميلاد، انظر ماجوير كيب، تهويد القدس، الخطوات الإسرائيلية للاستيلاء على القدس، دار الأفاق الجديدة، بيروت، بالاشتراك مع مركز الدراسات الغربية، ط 1، سنة 1981م، ص 11.
2- شعبان إبراهيم، الحق العربي في القدس، بهت منشور في كتاب القدس عاصمة فلسطين، مجلة شؤون نموذجية، مجلة فصلية تغطي شؤون التنمية الفلسطينية، تصدر عن الملتقى الفكري العربي، القدس، المجلد الخامس، العدد الثاني والثالث شتاء 1995، ص 41.
3- العابدين محمود، قدسنا، معهد البحوث والدراسات العربية، القاهرة، سنة 1982م ص 2، ويري البعض براً اسم "مونتانا" هو أول اسم معروف للقدس، وهذه الكلمة سامية أرامية تعني الشمعة أو النور، ففي التاريخ والقدس هذا المنشور في كتاب القدس، دراسات فلسطينية، إسلامية ومسحية، إعداد جريس خوري وأخرين، إصدار مركز اللفة للدراسات الدينية والتراثية في الأرض المقدسة القدس، ط 1، سنة 1996م، ص 185.
4- د. أبو جابر إبراهيم، القدس في دائرة الحدث، الجزء الأول، مركز الدراسات المعاصرة، أم الفحم 1996م/1416هـ، ص 30-31.
5- نجم رائف، "المشهد العربي في التاريخ، بهت منشور في كتاب القدس، دراسات فلسطينية، إسلامية ومسحية، ص 192.
6- الأمير بن طلال الحسن، "دراسة قانونية" ولجمان، لجنة النشر عمان، الأردن سنة 1980م، ص 8، وقد جاء في بعض المصادر الأخرى بأن اليهود قد عادوا إلى القدس مع قورش ملك القدس عام 539م، كما أن عهد الذين حرووا من السنوي 5000 ألف، انظر فرانكل. هر في العصر البرونزي، منشور في كتاب القدس في التاريخ، ترجمة وتحرير الطبعة الإنجليزية للدكتور العملي، كمال جميل، منشورات الجامعة الأردنية (عمادة البحث العلمي) 2/92 عمان، الأردن، 1413هـ/1992م، ص 80-88.
7- نوافل أحمد سعيد، القدس بين التهويده والأمم المتحدة ومشاريع السلام، بهت منشور في مجلة المستقبل العربي، السنة الثالثة، العدد الرابع والسادس، أبريل 1985م، ص 26.
8- لقد تعددت الروايات حول فتح بيت المقدس بين 15هـ 636م، أو 16هـ 637هـ، أو 17هـ 638م، ولكن الملتزم للنظر في معاهدة الصلح مع أهل بيت المقدس أنها تضمنت شروط تسليم القدس,
وما فيها من حقوق وواجبات توحى بتعاملها معاملة تنمذ عن بقية مدن بلاد الشام، وبخاصة تلك البنود التي تؤكد فيها عروبة هذه المدينة، وبإخراج اليهود منها كما جاء في نص العهد العمرية في أبو جابر إبراهيم، الخلفية التاريخية للصراع حول القدس دراسات عربية منشورة في كتاب قضايا القدس مستقلها في القرن الحادي والعشرين، إبراهيم أبو جابر وأخرى مركز دراسات الشرق الأوسط، دراسات 24، عمán، الأردن، ط، ص. 33.

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18 - شاكر، طاهر، مفاضلات التنمية النهائية والدولة الفلسطينية، الآمال والتحديات، دار الشرق، القاهرة، ط 1، 1999م، ص. 90.
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23- أبو بكر، نزار، الوضع القانوني لمدينة القدس، ص 35.
25- شبيب، إبراهيم محمد، الحق العربي في القدس، ص 271.
26- نوؤل، أحمد سعيد، القدس ومشاريع التسوية، ص 249.
27- ماجوبار، كيث، تهويد القدس، ص 18.
28- هنداوي، حسام أحمد محمد، الوضع القانوني لمدينة القدس، دراسة تطبيقيّة لواقع الاحتلال الإسرائيلي في ضوء أحكام القانون الدولي، دار النهضة العربية، القاهرة، (بلا ت) ص 110.
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32- سوف يتم عرض هذه الحجج وتفتيلها في الفصل الثاني من هذا الكتاب.
33-窜: حلمي، أسامة، " ضم القدس إلى إسرائيل " على حقوق ووضع سكانها العرب، الجمعية الفلسطينية الأكاديمية للشؤون الدولية، ط 1، أيلول 1990م، ص 7.
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40- هنداوي، حسام أحمد محمد، الوضع القانوني لمدينة القدس، ص 154.
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42- هنداوي، حسام أحمد محمد، الوضع القانوني لمدينة القدس، ص 154.
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44- حلبى، أسامة، مسألة القدس في ضوء الاتفاقات الفلسطينية الإسرائيلية، مجلة الدراسات الفلسطينية، ص 107.
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48- شعبان إبراهيم محمد، الحق العربي في القدس، ص 279.
Part Two
The Law of Occupation and Partition of Jerusalem

Introduction

1. The West Bank, Gaza strip and Jerusalem are occupied territories that should fall under the law of occupation because Israel had occupied them since its aggression in 1967 through the illegitimate use of force against Jordan, Egypt and Syria. These acts were threatening to territorial integrity in these countries in violation to article 2/4 of the UN Charter which prohibited the threat or use of force against the territorial integrity of any UN member state in the region. Since the Israeli occupation was a result of an illegitimate war, then the continuation of its occupation to these territories until now is also considered illegitimate (1). Although the UN, supported by the majority of countries believe that the West Bank, Gaza Strip and Jerusalem are occupied territories under the law of occupation, Israel has been refusing that since its occupation to these territories in December 1967. It further called the West Bank Judea and Samaria in a bid to uphold its religious and historical claims on its territories. Later in February 1968 the Israeli minister of interior issued a decision stating that Israel did not anymore consider the West Bank and Gaza Strip as territories affiliated to the enemy. It considered itself the established authority to administer the region rather than occupy it (2). Then it started to give these places different names such as: ‘The liberated areas’, ‘the private administrative self-autonomy areas’, etc. aiming to forge the legal situation and deny the ‘belligerent occupant’ term (3). Israeli writers, supported by some western literature tried to justify the Israeli seizure of the West Bank and maintaining it until a peace treaty
was held with the Arab countries. for example they claimed the theory of sovereignty vacuum or ‘a defence invasion’ in a bid to deny the legitimate acquisition of Jordan and Egypt over the occupied West Bank, Jerusalem and Gaza Strip (4), in addition to a series of other justifications and references that I shall examine in details in this chapter. Accordingly, I shall deal first with the general rules of belligerent occupation and how to apply them over the occupied territories including Jerusalem in chapter one. Then I shall review the Israeli claims to retain Jerusalem and the other occupied territories and I will respond to them in chapter two.

Chapter one
the General Rules of Belligerent occupation and
their application in the Arab Palestinian territories including Jerusalem

Upon the Israeli occupation of the West Bank and Gaza Strip after 1967 war, the military commander of the occupation forces in the West Bank issued a number of military orders and circulations to establish the Israeli competences of legislation, appointment and administration. These acts were in accordance to article 3 (a) of circular no. (2) concerning the authority and judicial systems, holding by that the three legislative, executive and judicial authorities. "Such measures led to additional authoritarian acts and injustices particularly that constitutions stipulate a separation among these authorities to avoid any interference in their competences, or any oppressive or authoritarian acts (6). One of the aims of this previous circulation is that the general military commander of the West Bank tried to adhere, even in form to the provision of the law of occupation. Article 2 of the said circular said that 'the laws existing in the region (i.e. the West Bank), dated 7 June 1967
remained in force, in case they did not contradict with the circular herein or any former order or changes resulting from deploying the Israeli army in the area.'

Certainly, what was stated in the previous article agreed -in principal- with what had been established in the provision of the law of occupation. The said provision should be adopted in the occupied Arab territories according to the 4th Hague Convention 1907 and 4th Geneva Convention for the protection of civilians under war which was signed in 12 August 1949. In addition to a third source which is the first additional right in Geneva conventions in 12 August 1949 related to protecting international armed conflicts signed in 1977 and the fundamental principles of human rights represented in the Universal Declaration of Human Rights. Hence, with reference to these general provision of the law of occupation, I shall deal with two issues, first, the definition and elements of belligerent occupation, second, a description of the traditional authorities offered by the international law with regards to belligerent occupation.

First: definition and elements of belligerent occupation:

The first definition of belligerent occupation in article (42) on the regulations of the 4th Hague Convention respecting laws and customs of war on land, dated 18 October 1907 stated, "Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation applies only to the territory where such authority is established, and in a position to assert itself" (7). Article 43 of the 4th Hague Convention and its affiliated instructions stated that "The authority of the legitimate power having actually passed into the hands of the occupant, the latter shall take all steps in his power to re-establish and insure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country" (8).
The previous two texts showed that the occupying force is not a legal authority, but rather the actual and temporary authority (9) that fades out when the occupation is terminated. The belligerent occupation does not lead to a transfer of sovereignty from the state the holder of legitimate sovereignty in the region to the occupying state. It rather offered the occupant limited temporary authorities to enable it to manage the region (10). An important provision established in the international law states that a state shall not use force to seize other people’s territories and thus, the occupying state shall not annex the occupied state or any part of it (11).

The three elements required to establish the belligerent state of occupation:

a- The eruption of war or an armed conflict between two states, and one of them succeeded to invade the territories of the other state and partially or fully occupy it (12).

b- Establishing a temporary actual state of foreign armed forces occupying another state’s territories and placing it under its control after the defeat of the other countries.

c- The occupation should be effective and influential (13), which means the occupation only starts when the occupying forces had managed to control the region, quell the armed resistance and manage to keep order and security after establishing a stable military administration (14). If the invader could not establish this administration, then we are not dealing with a state of belligerent occupation but rather a stage of invasion (15).

Hence, we apply the law of war and not the law of belligerent occupation (16), however, to establish the idea of belligerent occupation it is not imperative to deploy the invading forces all over the occupied territories
in the region (17). If this took place, then a number of rights and duties were established for the occupant (18) to take care of the humanitarian and civilizational nature of the people in the occupied region, particularly those related to their freedoms, properties, honour and family (19). It should also restore public order, life and prosperity, similar to the situation before occupation. It shall not also change the nationality of the people or to force them to swear an oath of allegiance to it (20).

Second: traditional authorities for the belligerent occupant:
The belligerent occupation is governed by two main rules, first the occupation forces shall not annex the enemy’s region during war (21), accordingly, the occupation forces shall not annex any part of the region or dispose of it as long as war is ongoing (22). Second, the belligerent occupation zone is marked by the enemy’s region that it set out after its military defeat, and only that. Consequently, the occupation forces shall not change the prevalent laws in the region or attack people’s rights (23) and properties.

In light of the abovementioned information, the belligerent occupying authorities are defined as follows:

a- Administering the occupied region:

Article 43 of the Hague Convention holds the belligerent occupant the power of the temporary actual administration of the region under its control, through re-establishing public order and life in that region (24). However, it is imperative that the occupant’s competences concerning its administration of the region should be interpreted in a limited and narrow way (25), particularly that these authorities that have actual powers depend on their military power. In addition to that, allowing an expansive interpretation of these authorities would lead the occupant to evade its
obligations under the belligerent occupation, however the narrow interpretation is in synchrony with the exceptional nature of this law (26).

b- The legislative competence of the occupied region:
Issuing the legislation, amending it, abrogating it and halting it function are some of the sovereign acts held by the sovereign state in the region and they are not transferred to the occupant state. The occupant shall not practice any legislative competence except in the narrowest zone possible. This is clear in article 43 of the Hague Convention which only offered the occupying forces temporary, limited and necessary competences to insure public order (27), or safety requirements according to the military necessity. It shall not issue any kind of legislation, regardless of its content (28) or timing and it shall not change or amend the legislative, judicial, social or economic status. If such (inadmissible) practice took place, then the occupant should take care of people's interests under occupation. Article 42 of the Hague Convention indicated that the occupant should respect prevalent laws in the said region under occupation unless it is impossible (29). However, this respect cannot be interpreted as a permission to the occupant to run any changes it wants in the prevalent laws and legislation in the said region, because this is considered an illegal seizure of the rights of sovereignty (30). Moreover, the occupant is only committed to the prevalent legislation at the time of occupation, accordingly, it is not committed to what is issued by the state of sovereignty over this region after its occupation (31).

Article 64 of 4th Geneva Convention supported this idea and it stated the following:
'The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle
to the application of the present Convention. Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws. The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfill its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them (32).

Jurisprudence criticized this text because of the ambiguity and the expansive scope of the powers mandated to the state and the management of the military and civil occupation in this respect (33). Jurisprudence also believed that the exceptional competences mandated to the occupant according to the Hague regulations and 4th Geneva Convention only meant to admit a very narrow and limited number of exceptional powers necessary to maintain public order and to ensure the flow of life in the occupied region. Thus, these orders issued by the belligerent occupant are not considered a legislation and are not merged within the region’s legislation (34).

c- The legal jurisprudence in the occupied region:

The invader should respect laws prevalent in the occupied region according to article 43 of the Hague regulations, unless it is necessary to do so (35). The term laws includes all laws in force in the occupied region when the occupation took place including the constitution, legislation and orders, and temporary and emergency laws (36). The occupying forces can obstruct or abrogate prevalent laws in the occupied region if these laws incited inhabitants to resist occupation
(37). They can do the same also if the abrogation addresses the interests of inhabitants in the occupied region, such as racial discrimination laws or abrogation of capital sentence or if this abrogation is required by a military necessity, i.e. if the issue is related to the security of the occupying forces and its lines of communication (38).

In conclusion, we shall indicate that there is no contradiction between the Hague agreement 1907 and 4th Geneva Convention 1949. On the contrary and according to article 154 of 4th Geneva Convention, 'In the relations between the Powers who are bound by the Hague Conventions respecting the Laws and Customs of War on Land, whether that of 29 July 1899, or that of 18 October 1907, and who are parties to the present Convention; this last Convention shall be supplementary to Sections II and III of the Regulations annexed to the above-mentioned Conventions of The Hague (39).

Hence, the Hague Convention is still in force and it concludes the provision stated in 4th Geneva Convention, i.e. there is no contradiction between them whatsoever, but they are rather integrated and merged (40).

We can hereby draw from the abovementioned review that the law of occupation aims to achieve two main tasks, first, to protect civilians in the occupied territories, second, to maintain the position and interests of legitimate sovereignty quelled by the invading forces (41). Thus, as we have seen, the law of occupation offers the occupation forces some competences to manage the occupied region, however, these competences do not have any impact over the legitimate sovereignty over it.

Since most of the West Bank and Gaza Strip territories are occupied territories, then the Israeli occupation forces are committed to respect
the provision and laws of the law of occupation in these territories. Accordingly, it shall not interfere in the daily life of Palestinian civilians, and it shall enable them to run and manage their matters by themselves. Meanwhile, the Israeli occupied forces shall ensure and not obstruct the natural flow of life in these territories, because the law of occupation provisions needs a balance among the interests of the civilian inhabitants who deserve protection and the right of the occupation authority to protect its forces during occupation (42).

The law of occupation prohibits the military ruling authorities from drawing legislation, except in case of necessity and in the main interests of the inhabitants. This reflects what the Israeli occupying forces have been doing in the occupied Arab territories by surpassing all the powers offered by the law of occupation. It have been interfering in all the daily matters of the Palestinian people and have been conducting itself in the occupied territories and conducting them as if it is the legitimate sovereign power in it.

Bearing in mind the abovementioned, we can conclude by examining all the laws and legislation issued by the Israeli government since June 1967 and until present over the occupied territories including Jerusalem, that they contradict the general rules of belligerent occupation. They even surpass the legislative competences in the occupied territories as mentioned previously.

Hence, all the laws and legislation related to the rights of civilians in Jerusalem, particularly Entry into Israel law 1952 and its amendments 1974, by which the Israeli Ministry of Interior was mandated to withdraw identity cards from the city’s inhabitants, depriving them of their right to citizenship and to live in their city, are all in violation to the provisions of international law, particularly the law of occupation as we shall describe in chapter three of this book.
Chapter Two

The Israeli claims in Jerusalem and the Occupied Territories and Responding to them

Israeli jurists of international law, supported by some of the Western jurisprudence, tried to justify the Israeli seizure of Jerusalem and the rest of the occupied Palestinian territories and maintaining them until Israel holds a peace treaty with the Arab countries. They referred in this respect to some claims that lack a sound legal reference, like for instance claiming the right of ‘the defence invasion’ or claiming the theory of ‘sovereignty vacuum’. American writer Schobel believed that annexation is legitimate if it resulted from the use of force in the form of self-defence, accordingly the Israeli use of force and the consequent acquisition of occupied territories is considered legitimate, because it is considered a sort of a legitimate form of self-defence by the Israeli side against the Arab attack (43). His premises were supported by the Israeli writer Shapira (44) and Australian intellect Stone, who reiterated the same idea by saying that Israel was in a state of self-defence in 1967 war, thus, it had the right to resort to the use of force to defend itself (45).

However, this claim is absolutely wrong, because even if we presumably accepted the idea of the Israeli self-defence during 1967 war, then the right of self-defence allows her to use force to deter this aggression only, but it does not allow her, by any means to keep the occupied territories. It should rather withdraw from them the moment the self-defence state comes to an end (46).

One of the common claims promulgated by the Israeli government in various events to justify its control over Jerusalem and the rest of the Palestinian territories, was the ‘sovereignty vacuum’ promoted by the
Israeli legal jurist Yehuda Blum. Since the Israeli jurist of international law and some of the Western legal jurists had heeded this theory, and tried to support it and sponsor it, then I will talk about it in details in a bid to respond to its premises.

The ‘sovereignty vacuum’:
Israel claimed a state of ‘sovereignty vacuum’ in the West Bank and Gaza Strip when it fell under the Israeli occupation to justify its position for not adopting 4th Geneva Convention 1949 over the occupied Palestinian territories. Israeli legal scholar Yehuda Blum was the first to call for that in his article published in 1968 (47). He said that Hashimite Jordan did not have a legitimate sovereignty over the West Bank (48), because it annexed its territories after invading it in 1948, under the pretext of protecting the civilians of these territories from the atrocious acts committed against them (49). Moreover, the League of Arab States did not acknowledge this annexation and did not approve it. Only two states acknowledged this situation and they are Britain and Pakistan (50). Hence, Jordan is only an occupying state (51) to these territories and it does not have any legitimate sovereignty over them, and if Israel did not object to the Jordanian act at the time, then this cannot be interpreted that it is an approval or a satisfaction by the Israeli side with the Jordanian act (52). Thus, during the period from 1948-1967 Gaza 'Strip and the West Bank were considered in a state of 'sovereignty vacuum', and since Israel was in 1967 in a legitimate state of self-defence due to the Arab aggression against her, her control over the Gaza Strip and the West Bank after war puts her in a better legal situation than Jordan and Egypt in terms of sovereignty over the two areas (53). Accordingly, the Israeli control over these territories is legal and legitimate. Later, Allan Garson refined Yehuda Blum’s words by promoting the idea of the ‘Trustee-
Occupant’ (54). He believed that the Jordanian entering to Jerusalem and the West Bank was illegal. Thus, its status is less than a sovereignty holder and more of a military occupant (5), particularly because the Jordanian entering was not due to a belligerent act, but rather upon the satisfaction and approval of the inhabitants of these territories. Thus, Jordan is considered entrusted with the West Bank as a trustee until the Palestinian issue is solved (56). Garson believed that the Israeli control over Gaza Strip and the West Bank after 1967 is legal and legitimate because it is a result of its use of the legitimate right of self-defence and it is stronger than and surpasses Jordan’s rights over these territories (57). Australian jurist Julis Stone supported the idea of the ‘sovereignty vacuum’. He believed that according to the provision of international law, Jordan did not have the right of sovereignty over the West Bank and Jerusalem. He said the same applied to Egypt which did not have any right of sovereignty over Gaza. Accordingly, the existence of the two countries on these territories before 1967, was illegitimate and since mistakes do not transform into rights, then Israel’s right over these territories are much stronger than both the Egyptian and Jordanian rights. We cannot by any means accept what Yehuda Blum, Garson and Stone said for the following reasons:

Denying the legal basis of the Jordanian acquisition of the West Bank and Egyptian acquisition of Gaza Strip and claiming that these territories suffer from a sovereignty vacuum is not true. Because sovereignty over these territories lie in the Palestinian people who live there – particularly that they are the remaining parts- in Arab hands, according to the partition plan 1947. Israel had acknowledged this resolution, thus, it had implicitly acknowledged the establishment of an Arab sovereign state within the framework of the abovementioned partition plan, which still
exists from the legal point of view, despite its actual absence. Hence, the West Bank and Gaza Strip are considered part of this sovereign state. The unity agreement between the West Bank and Jordan is legally sound, forming a unified unit of both of them, with one constitution, one Assembly of Deputies (Majlis al-Nuwaab), one. Assembly of Senators (Majlis al-Aayan) and one ministry hosting many Palestinian high post officials (58). Moreover, if Jordan had occupied the West Bank, it would have adopted a military law creating military rulers (59), and this did not take place. Consequently, the Jordanian sovereignty over the West Bank since 1948-1967 was legal, which means the Israeli occupation of these territories in 1967 is considered a military occupation that requires the establishment of the general rules of belligerent occupation, particularly 4th Geneva Convention 1949 over them and over all the other Arab territories occupied after 197 war. This premise was adopted by the international jurisprudence, with an exception of some of the Israeli literature (61), the Supreme Court of Justice (62) and the Israeli government itself (63). Thus, Israel has been subject to so many criticism because of this refusal posed by many scholars and some of them are Israelis, and some members of the international community (64).

That is why we believe that the Israeli claims to Jerusalem and the Palestinian occupied territories and its attempt to deny the idea of occupation are not true. Thus, we believe that the general rules of belligerent occupation, as mentioned earlier, and 4th Geneva Convention 1949 should be applied. This was supported by the international community, such as the International Committee of the Red Crescent. It has been doing that since the beginning of the Israeli occupation of the Arab territories 1967. It had sent a memorandum to the Israeli authorities, dated 24/5/1968 (65) indicating the correct interpretation to article 2 of the 4th Convention, calling for its automatic and imperative application in
the West Bank and Gaza Strip. However, the Israeli authorities refused the Red Crescent’s interpretation of article 2, because it meant, from the Israeli perspective, an acknowledgment of the Jordanian legitimate presence in the West Bank and the Egyptian presence in Gaza Strip and the ensuing political results (66). In addition to that, the 24th international conference of the Red Crescent, held in Manilla, Philippines from 7-14 October 1981, had emphasized in its decision the application of 4th Geneva Convention over the occupied territories (67). Moreover, the international commission of the Red Crescent underscored this same idea in its various 1973 and 1975 reports (68).

As for the Security Council, it urged the application of the 4th Geneva Convention 1949 over these territories, since the beginning of the Israeli occupation to the West Bank and Gaza Strip (69). It had also reiterated in its various resolutions the imperative need to apply them, and the first Security Council resolution that underlined that was resolution no. 271, dated 15/9/1969 about burning the Aqsa Mosque. Other resolutions ensued emphasizing the same thing, such as the unanimously adopted resolution no. 465, dated 1980: It reaffirmed that “the Protection of Civilian Persons in Time of War of 12 August 1949 is applicable to the Arab territories occupied by Israel since 1967, including Jerusalem” (70).

As for the UN General Assembly, it supported the idea of applying the 4th Geneva Convention over the occupied territories, in its resolution issued at the beginning of the Israeli occupation in 4th July 1967. In further efforts, The General Assembly requested the UN Secretary General to follow up the situation and submit a report to the Security Council in this respect (71). Other resolutions by the General Assembly followed until it issued resolutions condemning Israel for violating the provisions of this convention and human rights in the occupied Arab and Palestinian territories.
In conclusion, we may say, that applying 4th Geneva Convention 1949 over the occupied territories including Jerusalem is a must, as repeatedly established by the international community. International organizations have been supporting this idea in their various decisions, such as the European Union, the non-aligned movement members, the AU, the League of Arab States. The European Council explicitly called on Israel in its declaration about the Middle East in Dublin, dated 26/6/1990 to fulfill its obligations towards Palestinians in the territories occupied in 1967, on which 4th Geneva Convention applies (72).

The international committee of the Red Crescent – as a sponsor of applying this convention – had stressed several times that it should apply to the occupied Arab territories. The same idea was reiterated by the UN and its various organs, particularly the General Assembly and the Security Council, which stressed in several resolutions, such as 607, 1988, that 'it re-affirms that Fourth Geneva Convention referring to the protection of civilians in times of war of 12 August 1949, is applicable to Palestinian and other Arab territories'.

The same idea was re-iterated...
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Conclusion

The purpose of this study was to highlight the following points:
First: Israel as an occupant to the Palestinian territories including Jerusalem since 1967 is committed to respect the rules and provisions of the law of occupation. The most important duty therein is to ensure the course of natural life in these territories, because it does not have a legal power over them, but rather an actual and provisional power that dissipates by the end of occupation. According to the established provisions of the international law, the occupation does not transfer sovereignty from the legitimate sovereign state in the region to the occupant state, but it rather offers it provisional limited powers to enable it to manage the said region.
Second: The Arab City of Jerusalem, from the international law perspective, is part and parcel of the West Bank and the Israeli isolation of it from the West Bank in 1967 and annexation through a unilateral decision taken by the Israeli government is illegitimate and against the various resolutions related to Jerusalem issue adopted by the Security Council, such as 242, 225, 267 and General Assembly resolutions 2253, 2254 and others.
Third: the Israeli measures in Arab Jerusalem after annexation in 1967 aimed to change the demographic, cultural and civilizational features of the city. These measures prove that Israel acts as if it has the ‘absolute sovereignty’ over the city, which is against the provisions of the international humanitarian law and beyond the competences of an occupant, according to the provisions of the said law. Israel shall not change its policy towards the city of Jerusalem without lobbying it at the local, Arab and international arena. Thus, anybody interested in finding a just solution for the Arab-Israeli conflict, should not hesitate to raise the
issue of Jerusalem and the sufferings of its citizens under the dangerous violations of the Israelis. The Palestinian people abroad and inside the country should form a clear and comprehensive campaign about Jerusalem and the deportation and violations suffered by its citizens.

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