Jerusalem and International Law

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Abstract

Jerusalem is part of the territory of Palestine. Palestine was constituted as a state at the Versailles conference, which resolved territorial issues in the aftermath of the Great War. A portion of the territory of Palestine became the state of Israel, by secession from Palestine, in 1948. Jerusalem has not been recognized as part of Israel's territory. Hence, Jerusalem (east and west) remains territory of Palestine.

Jerusalem as part of Palestine

In 1919 the states forming a League of Nations provided in their founding treaty, the Covenant of the League of Nations, for the disposition of Turkey's territories in the Arab world. Under the Covenant, these territories became states that were to be administered temporarily by either France or Great Britain, pending their independence. These territories were organized as states that would be brought to independence over time, but which were conceived as states even prior to attaining independence.

The Treaty of Sèvres, the first, though ultimately unsuccessful, effort at a treaty to provide for Turkey's Arab territories, made clear that these territories were states. It referred to the "states" detached from Turkey in its provisions on citizenship, on Turkish assets, and the Turkish public debt.
The Treaty of Lausanne, which replaced the Treaty of Sèvres, also reflected an understanding that Palestine was a state. The Ottoman Arab territories were characterized as states. Article 30 of the Treaty of Lausanne required Palestine to treat Ottoman nationals inhabiting Palestine as nationals of Palestine. Article 30, like the comparable provision of the Treaty of Sèvres, referred to the Ottoman Arab territories as "states" being detached from the Ottoman Empire.

The understanding that Palestine was a state was shared by the governments of the interwar period. Jan Smuts, the member of Britain’s Imperial War Cabinet who wrote the outline for the League Covenant, including a provision on mandates, referred in his plan for the Covenant to the mandates as "not completely independent states." Sir Herbert Samuel, Britain’s High Commissioner in Palestine, referred to Palestine as a state. So too did Norman Bentwich, Palestine’s Attorney General. The Chair of the Permanent Mandates Commission, Pierre Orts, called Palestine a state.

Until Jewish migration began from Europe to Palestine in the nineteenth century, the population of Palestine, including Jerusalem, was overwhelmingly Arab. Migrating Jews settled disproportionately in urban areas, and by 1900 they made up half of Jerusalem’s population, even though they were only ten per cent in Palestine as a whole.¹ During Great Britain’s tenure as mandatory, Jewish migration from Europe gave Jews a majority in Jerusalem, although Arabs continued to own most of the land.²

Population figures and land ownership figures are not ultimately dispositive of legal status, however. The status of Palestine in the interwar period is examined in detail in the author’s book, THE
Statehood of Palestine: International Law in the Middle East Conflict (Cambridge University Press, 2010).

Jerusalem after 1948

In 1948, a National Council (Hebrew va’ad leumi), represented internationally by the Jewish Agency for Palestine, declared statehood in Palestine, and its affiliated military units managed to gain control of much of its territory. The state it declared, which it named Israel, was admitted to membership in the United Nations in 1949. The relationship of Jerusalem to this state was problematic. The UN General Assembly, by Resolution 181 of 29 November 1947 had suggested that Jerusalem be part of neither a Jewish nor an Arab state in Palestine, but rather a corpus separatum, to be administered by the U.N. Trusteeship Council. The military units that came to be called the Israel Defense Force took control of the western sector of Jerusalem in 1948.

Consistent with the General Assembly’s proposal, Israel made no claim of sovereignty over any part of Jerusalem. The question of whether Israel had any claim to Jerusalem was specifically raised in the UN General Assembly, when Israel applied for UN membership. A meeting was held of the General Assembly at Lake Success, New York, on May 6, 1949, at 2:30 p.m. at which Foreign Minister Abba Eban was questioned about a number of Israel’s policies and positions, to determine if it qualified as a “peace-loving state,” a requirement for UN membership. The meeting is recorded as UN Document A/AC.24/SR.47.
The Belgian representative, Mr. Nisot, posed to Eban the following question:

Could the representative of Israel tell us whether, if Israel were admitted to membership in the United Nations, it would agree to co-operate subsequently with the General Assembly in settling the question of Jerusalem and the refugee problem or whether, on the contrary, it would invoke Article 2, paragraph 7 of the Charter which deals with the domestic jurisdiction of States?

Article 2, paragraph 7 of the Charter reserves to states those issues that are matters of domestic jurisdiction. Thus, Nisot was asking Eban if the status of Jerusalem was a matter that fell under domestic Israeli law. In his response as relates to Jerusalem, Eban answered as follows:

The government of Israel will co-operate with the Assembly in seeking a solution to those problems. Once again, I do not wish rashly to commit myself to legal theories, being perhaps the least juridically versed of any present, but I do not think that Article 2, paragraph 7, of the Charter, which relates to domestic jurisdiction, could possibly affect the Jerusalem problem, since the legal status of Jerusalem is different from that of the territory in which Israel is sovereign.

Eban was saying that Israel did not consider Jerusalem to be part of its territory. Jerusalem, he was saying, was not in the same status as the other territory that the Israel Defense Force had by then occupied. Despite the fact that west Jerusalem was under IDF control, Israel was making no claim to any part of Jerusalem as a matter of sovereignty.

Once Israel was safely admitted to UN membership, as it was in May 1949, it reneged on Eban’s statement that Israel did not regard the
status of Jerusalem as a domestic matter. In 1950 Israel's parliament declared west Jerusalem to be Israel's capital,\(^3\) impliedly claiming sovereignty. This claim flew in the face of the position reflect in Resolution 181 that Jerusalem should be internationalized. This claim was directly contrary to the commitment Eban had given the General Assembly that Israel would cooperate with the UN in resolving Jerusalem's status.

The Knesset's action was not regarded as lawful by other states. States that recognized Israel did not recognize sovereignty for Israel over either the western or eastern sector of Jerusalem. When governmental offices of the new state of Israel were relocated to Jerusalem, and Jerusalem began to function as an administrative capital, most states declined to locate their embassies there. A few states that located embassies in Jerusalem subsequently moved them to Tel Aviv.

Consulates in a foreign state are normally subordinated to the sending state's embassy in the state's capital city. States declined to subordinate their consular missions in Jerusalem to their embassies in Tel Aviv – to avoid giving the appearance that Jerusalem was lawfully part of Israel. The United Kingdom, for example, maintains a consulate-general in Jerusalem that does not report to the U.K. embassy in Tel Aviv.

Normally as well, a sending state presents credential for a new consul to the government of the receiving state. The United Kingdom pointedly presents no credentials to the Government of Israel for the appointment of its consuls-general in Jerusalem.\(^4\)
The United States maintains a consulate-general in Jerusalem, located in the eastern sector of the city, but with jurisdiction over the entirety of the city, including west Jerusalem, where it maintains a consular office. The consulate-general reports directly to the Department of State in Washington, rather than to the U.S. embassy in Tel Aviv.\(^5\)

*Jerusalem after 1967*

When Israel occupied east Jerusalem in 1967, its parliament legislated that "the law, jurisdiction and administration of the state" of Israel "shall extend to any area of Eretz Israel\(^6\) designated by the Government by order."\(^7\) The parliament authorized the minister of the interior to extend the boundaries of any municipality to include any area designated by government order,\(^8\) and the minister expanded the borders of east Jerusalem to include a substantial sector of West Bank territory to the north and east.\(^9\) The government then merged east Jerusalem with west Jerusalem to form a single administrative entity.\(^10\)

Israel was careful to specify that these enactments did not amount to a claim of sovereignty over east Jerusalem. It told the United Nations:

The [legislative] measures adopted relate to the integration of Jerusalem in the administrative and municipal spheres, and furnish a legal basis for the protection of the Holy Places of Jerusalem.\(^11\)

The United Nations, however, viewed the legislative measures as a disguised annexation, despite Israel's protestations to the contrary. On that basis, the U.N. condemned Israel for a *de facto* annexation.\(^12\)
In 1980 Israel came closer to claiming sovereignty over east Jerusalem when the Knesset declared by statute that "Jerusalem, complete and united" was "the capital of Israel." This enactment did not mention the term "sovereignty" and did not use the term "annex." By implication, however, this enactment claimed sovereignty over east Jerusalem, since it would make little sense to have a capital in territory not under the state's sovereignty. An Israeli court has held that the 1980 legislation was intended to and did put east Jerusalem under Israel's sovereignty, as a matter of Israel's domestic law. The United Nations found the 1980 law to be unlawful, on the same basis as it had found the 1967 legislation unlawful.

In 1990, Israel for the first time told the United Nations that east Jerusalem is under Israeli sovereignty. After a shooting incident in east Jerusalem in which Israeli police killed seventeen Palestinians, the Security Council, asked the U.N. Secretary-General to propose appropriate measures in response. The Secretary-General proposed sending investigators, but Israel objected, saying

Jerusalem is not, in any part, "occupied territory"; it is the sovereign capital of the State of Israel. Therefore, there is no room for any involvement on the part of the United Nations in any matter relating to Jerusalem.

In a follow-up resolution, the Security Council expressed "alarm" at Israel's view that east Jerusalem was not occupied territory.

This position represented a complete repudiation of the commitment Israel gave to the United Nations in 1949 that Jerusalem was not a domestic issue for Israel. Having reneged with regard to west Jerusalem in 1950, Israel now reneged with regard to east Jerusalem as well.
Jerusalem today

The Government of Israel never spelled out a legal basis for its claim to Jerusalem, either to the western sector or the eastern. When a Jewish state was declared in 1948, its founding document cited the 1947 General Assembly resolution as a legal base for the sovereignty of a state to be called Israel. Since, however, the General Assembly's proposal would not have put Jerusalem in the proposed Jewish state, the resolution provided no basis for a claim by Israel to Jerusalem. To date, Israel has not publicly stated an argument for its claim to Jerusalem, east or west, mentioning only an historic connection based on a Hebrew presence in the area of the city in ancient times, and a Jewish presence in more recent times.

Despite Israel's de facto control of west Jerusalem since 1948, the position of the international community remains that its status is unresolved. The issue came before a court in Canada in when a Canadian national born in west Jerusalem demanded that the Government of Canada write "Jerusalem, Israel" in the box on his Canadian passport that calls for place of birth. Normally the name of the state of birth is inserted. The Canadian government, however, inserted "Jerusalem" in the man's passport, omitting the name of any state. This was in keeping with the Canadian government's position that the status of Jerusalem is undetermined.

The man sued in court, to demand that the word "Israel" be inserted. The court refused to order the Government to insert "Israel," however. The court found that the international community, along with the Government of Canada, does not regard west Jerusalem as being under Israel's sovereignty.
The future of Jerusalem's status

Jerusalem was part of Palestine when Palestine became a state in the 1920s. Israel has taken control of territory in Palestine – first in 1948, and later in 1967. Jerusalem is not regarded as appertaining to Israel. Palestine’s statehood was not extinguished after 1948, despite the split of its territory. Jordan and Egypt assumed administration of the sectors of Palestine that did not fall under the control of the new state of Israel in 1948. Jerusalem was one sector of Palestine territory whose status the international community regarded as failing to come under the lawful authority of Israel. As the Canadian court affirmed, Jerusalem is not part of Israel.

Palestine continues to be a state at the present time, as recognized by the main organs of the United Nations and by the states of the international community. Jerusalem – in its entirety -- is a part of that state. Given that Palestine is a state and that Jerusalem is not part of Israel, the only logical conclusion is that Jerusalem is part of Palestine. The corpus separatum proposal of 1947 was never implemented. That being the case, Jerusalem logically remains a part of the territory that was Palestine during the mandate era.

Jerusalem’s status remains to be clarified at the international level, however, along with all issues of territory relating to Palestine. The bilateral approach to negotiations that began with the Madrid conference in 1991 leaves the matter to be resolved between Israel and Palestine, sitting together. That approach jeopardizes a result that is in keeping with international law, because it sets Jerusalem as one issue among many, hence subject to being resolved in a particular fashion in return for concessions on other issues. That
approach also allows a resolution to turn on the power relationship between the two parties, rather than on the norms of law that are accepted in the international community as regards territorial matters.

A more proper approach to negotiation was proposed by the General Assembly in the 1980s, namely, an international peace conference that would be committed to following international law in resolving all issues relating to Israel and Palestine. At the present stage, it is critical that the international community ensure that a resolution of the status of Jerusalem.

NOTES


5. Ibid. at 100.

6. The term "Eretz Israel" [Land of Israel] means the territory of mandate Palestine, which includes the West Bank.


19. Declaration of the Establishment of the State of Israel, 1 Laws of the State of Israel 3 (1948).