

Executive Summary

- The UN Partition Resolution (General Assembly Resolution 181) proposed that Jerusalem be established as a corpus separatum under an international regime to be administered by the United Nations. Despite the outbreak of hostilities in 1948-49 the United Nations made several attempts to establish the international regime before giving up in 1951. But the proposal remains “on the table” in the sense that it remains one option in future negotiations on the status of the Jerusalem.
- Israel’s measures to integrate West Jerusalem into Israel and the measures taken by Israel following the June 1967 war to assert sovereignty over the whole of Jerusalem have been repeatedly condemned by the United Nations and are of no legal effect.
- Sovereignty over the former mandated territory of Palestine was not transferred to the Mandatory Power during the Mandate but remained in abeyance. Sovereignty over that part of Palestine that became the State of Israel, with the exception of West Jerusalem, passed to Israel. Sovereignty over the remaining mandated territory of Palestine remains in abeyance to be exercised by the Palestinian people once they have achieved self-determination.
- Israel’s occupation of West Jerusalem since 1948 has not been recognised de jure, although most states recognise Israel’s de facto authority over West Jerusalem. The 1949 Israel – Jordan General Armistice Agreement endorsed the de facto division of the City but did not affect the legal status of the City.
- Israel is in belligerent occupation of East Jerusalem. Under international law belligerent occupation cannot confer title. Furthermore, the principle of inadmissibility of acquisition of title through force applies and East Jerusalem is included among the territories occupied in the June 1967 war from which Israel must withdraw in accordance with UN Security Council Resolution 242.
- It is accepted by the international community that Jerusalem does have a separate legal status from Israel and the rest of the Occupied Territories. The precise nature of that status remains to be settled in the context of a final peace settlement, or failing that, by the United Nations. In the meantime sovereignty over the City remains in abeyance.
- Palestine has a valid claim to sovereignty over the City based on the fact that under the Ottomans and during the British Mandate, Jerusalem was an integral part of the territory of Palestine and was its administrative capital. Until Jewish immigration altered the demographic structure of the City, the majority of its inhabitants were of Arab origin. Although sovereignty is in abeyance, it will be revived and vest in the Palestinian State once that state achieves recognition as a sovereign state.
- The Israeli claim to sovereignty over Jerusalem has no substance. It has no basis in non-binding UN General Assembly Resolution 181 since the resolution never envisaged that Jerusalem would form part of the proposed Jewish State, but a corpus separatum subject to an international regime. Nor can the Israeli claim that it acted in self-defence in 1948 and 1967 form the basis for a claim to title.

- A legal regime dating from the time of the Ottomans, known as the “Status Quo” governs the Holy Places located in the Old City. Successive occupiers have undertaken to uphold the regime and the regime has acquired the status of an international legal obligation binding on existing and future occupiers of that part of the City.
- The Interim Agreement did not affect the legal status of Jerusalem.

Introduction

1. This report addresses the status of Jerusalem under international law.
2. Jerusalem (Al-Quds in Arabic) has a deep religious significance for Judaism, Christianity and Islam. One of the oldest cities in the world, Jerusalem has been at the crossroads of cultures and civilisations throughout history. Since antiquity, different peoples and groups have fought innumerable battles for control over it. Since the nineteenth century, the city has been the object of conflicting claims by Jews and Palestinian Arabs. These claims have acquired a political and territorial dimension in addition to the religious one, since both peoples claim that the city embodies their national identity and right to self-determination. However, Jerusalem’s religious and historical significance should not be allowed to color the legal arguments as to the status of the city in international law.

History

1. For four hundred years until the First World War, Palestine was a part of the Ottoman Empire. Following the defeat of that empire, Palestine was placed in 1922 under a League of Nations Mandate with the United Kingdom as mandatory power. Jerusalem during the period of the Mandate was an integral part of the territory of Palestine and was the seat of administration of the territory. The Mandate gave effect to the Balfour Declaration of 1917 that supported the establishment in Palestine of a “national home” for the Jewish people. The Mandate did not contain any specific provisions relating to Jerusalem, although Articles 13 and 14 of the Mandate did contain provisions on the Holy Places. Under Article 13, the United Kingdom assumed full responsibility for the Holy Places, including preserving “existing rights”, “securing free access” and “free exercise of worship”, except with regard to the management of purely Muslim sacred shrines, the immunity of which was guaranteed by the Mandate. Article 14 of the mandate provided for the establishment of a special commission “to study, define and determine the rights and claims in connection with the Holy Places and the rights and claims relating to the different religious communities in Palestine”. In view of the difficulties in establishing representation by all religious communities, the commission was never established and responsibility for the Holy Places remained with the mandatory power that continued the Ottoman Status Quo governing relations among the various communities.
2. The increase in Jewish immigration to Palestine caused growing tensions between the two communities and Jerusalem became a flashpoint of conflict (in 1929 there was a serious outbreak of violence over access to the Wailing Wall). The security situation continued to deteriorate. After the Palestinian rising in 1936 that began in protest against increased Jewish immigration, the United Kingdom constituted the Palestinian Royal Commission. The Commission concluded that the Mandate was unworkable and recommended that it be terminated. It also proposed the partition of Palestine into an Arab State and a Jewish State. The Commission held the Holy Places to be “a sacred trust of civilization” and proposed that a Jerusalem-Bethlehem enclave encompassing all the Holy Places, with a corridor to the sea terminating at Jaffa, remain under British trusteeship under a new League of Nations Mandate. This first plan for partition was superseded by political and military events. After the Second World War the United Kingdom declared that it was unable to resolve the problem in Palestine and brought the problem to the United Nations.

3. When the matter came before the United Nations in 1947, the General Assembly appointed a Special Committee on Palestine. The Committee unanimously recommended that the sacred character of the Holy Places be guaranteed and that access to the Holy Places be ensured "in accordance with existing rights". The Committee submitted two alternative plans for Palestine. The minority plan envisioned the establishment of a unified federal state in Palestine with Jerusalem as its capital with separate municipalities for the Jewish and Arab sectors. It also recommended the creation of a permanent international regime for the protection and supervision of the Holy Places in Jerusalem and elsewhere. The majority plan recommended the partition of Palestine into an Arab State and a Jewish State, and the territorial internationalisation of the Jerusalem area as an enclave in the Arab State. It was the latter plan that was approved by the General Assembly in Resolution 181. The Resolution terminated the Mandate. It proposed the establishment of Arab and Jewish states in the territory of Palestine and delineated the boundaries of the two states.

Jerusalem was not included within the boundaries of the two states. Instead a special regime was proposed for Jerusalem. The Resolution provided:

"The City of Jerusalem shall be established as a corpus separatum under a special international regime and shall be administered by the United Nations. The Trusteeship Council shall be designated to discharge the responsibilities of the Administering Authority on behalf of the United Nations".

The boundaries of the city were defined as including "the present municipality of Jerusalem plus the surrounding villages and towns, the most eastern of which shall be Abu Dis; the most southern, Bethlehem; the most western, Ein Karim (including also the built-up area of Motsa); and the most northern Shu'fat". The Assembly requested the Council to elaborate a statute for the city providing for the appointment of a Governor and administrative staff, a Legislature, an independent judiciary, citizenship, and a regime governing the Holy Places and religious buildings and sites.

The Partition Plan and the international regime for Jerusalem never materialised. After some initial hesitation, the Zionists declared their willingness to accept the Partition Plan. The Arab League rejected the partition arguing that the United Nations, particularly with a non-binding General Assembly Resolution, had no right to allocate 55% of Palestine to a Jewish state when Jews, most of whom were recent immigrants, represented only a third of the population and owned less than 7% of the land.

Hostilities broke out in 1948-49 and Israel occupied West Jerusalem and Jordan occupied East Jerusalem. The Israel-Jordan General Armistice Agreement of 3 April 1949 effectively formalised the de facto division of the city.

4. Despite the hostilities, the United Nations did not give up the objective of internationalisation of the Jerusalem area. In April 1948 the Trusteeship Council prepared a draft statute for the planned separate international entity. The General Assembly in Resolution 194 established a three-member Conciliation Commission for Palestine. The Commission resolved inter alia that “the Jerusalem area, including the present municipality of Jerusalem plus the surrounding villages and towns...should be accorded special and separate treatment from the rest of Palestine and should be placed under effective United Nations control”. The General Assembly instructed the Commission to come up with detailed proposals for a permanent international regime for the Jerusalem area and recommendations concerning the Holy Places. In its periodic reports to the General Assembly, the Commission reported that the Arab delegations were in general prepared to accept the principle of an international regime for Jerusalem, subject to United Nations guarantees regarding its stability and permanence. Israel was unable to accept this, although it accepted an international regime for, or international control of, the Holy Places. Nevertheless in April 1950, the Council adopted a detailed Statute for the City of Jerusalem based on the provisions contained in Resolution 181. Neither side indicated that they were prepared to accept the proposed Statute. Following a final effort to mediate between the parties in 1951 the Commission concluded that the parties’ unwillingness to implement the relevant resolutions and the changes that had taken place on the ground made it impossible to proceed towards a settlement. Nevertheless, the proposal remains “on the table”, in the sense that the proposal, or something like it, remains an option for the negotiations on the future status of the City.
5. In the meantime, Israel took a number of measures designed to integrate West Jerusalem into Israel. In September 1948, the Supreme Court was established in Jerusalem and in February 1949 the Knesset met in the city. This was followed by the establishment of a number of Ministries and public services in the City. In 1950 Jerusalem was proclaimed as the capital of Israel. East Jerusalem was occupied by Israel in the June 1967 war and Israel has adopted a number of measures to unite the two parts of the city, including the enactment of a law in 1967 applying Israeli civilian law to East Jerusalem.¹ In 1980 Israel enacted a ‘basic law’, which while not formally annexing East Jerusalem, in practice amounted to annexation by declaring the united city to be the capital of Israel and the seat of the major institutions of state. This action was firmly condemned by the Security Council and General Assembly. The Security Council in Resolution 478 censured in the strongest terms the enactment of the Israeli legislation and affirmed that it “constitutes a violation of international law and does not affect the continued application of the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949, in the Palestinian and other Arab territories occupied since 1967, including Jerusalem”. The Council decided “not to recognise the “basic law” and such other actions by Israel that, as a result of this law, seek to alter the character and status of Jerusalem”, and called upon all Member States to accept its decision and upon Member States that had established diplomatic missions at Jerusalem to withdraw them. This resolution, subsequently reaffirmed with similar wording, continues to embody the position of the United Nations and of most Governments on the status of Jerusalem.

The Current Status of Jerusalem in International Law

1. Consideration of the legal status of Jerusalem cannot be divorced from consideration of the status of Palestine as a whole. Prior to the Mandate, sovereignty over Palestine, including Jerusalem, vested in the Ottomans. The Mandate did not transfer sovereignty to the Mandatory Power, nor was sovereignty transferred to the League of Nations.

During the time of the Mandate sovereignty was in effect in abeyance. That situation remained until the establishment of the State of Israel and her recognition as a state by the international community and her admission to the United Nations in 1949. Although recognition of Israel implied recognition of Israeli sovereignty over some area of territory in the former mandated territory of Palestine, since possession of territory is one of the criteria for statehood, it did not imply recognition of Israeli sovereignty over all the territory claimed by Israel. In particular, it did not imply recognition of the 1949 Armistice boundary lines or sovereignty over West Jerusalem.

2. The fact that sovereignty is in abeyance over the remainder of the former mandated territory of Palestine does not of course mean that there is no one entitled to that sovereignty. Since Palestine's provisional independence was recognised in the League of Nations Mandate and the right of self-determination of the Palestinian people has been recognised, the "unit of self-determination" comprises that area of territory. Sovereignty therefore vests in the Palestinian people to be exercised when they achieve their independence. In the Western Sahara case, Judge McNair in his separate opinion said: "Sovereignty over a mandated territory is in abeyance; if and when the inhabitants of the Territory obtain recognition as an independent state...sovereignty will revive and rest in the new state".²
3. With regard to Jerusalem, Israel's occupation of West Jerusalem in 1948 has not been recognised de jure. The reason for this is that to do so would be inconsistent with the concept of Jerusalem as a corpus separatum. Thus at present there are no states that maintain embassies in Jerusalem.³ Some states maintain consular posts in Jerusalem; though such posts are based on the city's international status, and no exequatur or other authority for its establishment is sought or obtained from Israel. Most states, including the United Kingdom, regard Israel as exercising only de facto authority over West Jerusalem. Although the 1949 Israel-Jordan General Armistice Agreement endorsed the de facto division of the City, it did not affect the legal status of Jerusalem. In particular, Article II expressly provided that the Agreement should not confer any political or military advantage, that it should not prejudice the rights, claims or positions of either party and that it was dictated exclusively by military considerations.
4. As regards East Jerusalem, prior to the June 1967 war, that part of the City was generally recognised as under the de facto administration of Jordan. Israel's occupation of East Jerusalem in the June 1967 war did not confer any title. This is because of
 1. The well-established rule of international law that belligerent occupation cannot confer title⁴ and
 2. The principle of the inadmissibility of acquisition of territory by force and the requirement that Israel should withdraw from (the) territories occupied by it in the June 1967 war as laid down in Security Council Resolution 242. Accordingly sovereignty over East Jerusalem, like the remainder of Palestine, remains in abeyance.

5. The next question that needs to be considered is whether Jerusalem has a status different from that of the Occupied Territories and Israel. Although the UN Partition Plan proposed that Jerusalem should have the status of a corpus separatum under a special regime to be administered by the UN, that regime never came into effect. However, it is clear from the history of United Nations' efforts to internationalise the City following the rejection of the Partition Plan that the concept of a corpus separatum under an international regime for the City lived on. (It should also be noted that, prior to the de facto occupation of East Jerusalem by Jordan in 1950, the Arabs also accepted the principle of an international regime for Jerusalem). Although the proposals for Jerusalem in the UN Partition Plan were recommendations only and are therefore not legally binding, there does appear to be a wide measure of agreement that Jerusalem should continue to be regarded as a corpus separatum (i.e. territory that is legally distinct from Israel and the rest of the Occupied Territories), even though the precise nature of the regime that will apply to the City has not been agreed. It is for this reason that states have not recognised Israel's claim to sovereignty over West Jerusalem and have not established embassies there. The UN General Assembly and Security Council Resolutions subsequent to General Assembly Resolution 181 speak rather vaguely of the "status of Jerusalem" without defining precisely what that status is. In most cases the term is used in the context of condemning Israeli actions tending to assert Israeli sovereignty over the city and the intention is to ensure that the status quo (whatever that may be) is not altered. Nevertheless the phrase must be interpreted in the historical context, in particular the efforts of the United Nations to establish an international regime for the City and the widespread acceptance of the corpus separatum concept.
6. The international community decisively rejects Israeli claims to sovereignty over the City (East and West). Nor is it accepted that there is currently any other Power that has sovereignty over the city.

Sovereignty is in abeyance. There also appears to be a consensus that Jerusalem does have a status separate from Israel and the rest of the Occupied Territories. The unsuccessful efforts of the United Nations to broker a solution specific to Jerusalem, the widespread acceptance of the corpus separatum concept, and the references in successive UN Resolutions to the "status of Jerusalem" and to the "Palestinian and Arab territories occupied by Israel since 1967, including Jerusalem" testify to that. The precise nature of that status is undetermined. The legal regime that will apply to Jerusalem is a matter that will need to be settled in the context of the final peace settlement, as agreed between the two sides in the Declaration of Principles and in the Interim Agreement. Whether the regime will take the form of a divided city with each side having sovereignty over its respective half, a condominium, an international regime as envisaged in the original Partition Plan, or some other solution, is a matter for negotiation.

The Palestinian Position Regarding Sovereignty over the City

1. The Palestinian position is that Jerusalem should be the capital of the State of Palestine. The Declaration of Independence adopted by the Palestine National Council in 1988 declared “the establishment of the State of Palestine in the land of Palestine with its capital at Jerusalem”. In the Palestinian view, that claim necessarily involved an assertion of sovereignty over the City. The Palestinian position has received overwhelming support from the Arab and Non-Aligned countries.

The Sixth Conference of Heads of State or Government of Non-Aligned countries affirmed a number of basic principles for a comprehensive solution of the Arab-Israeli conflict, including that “the City of Jerusalem is an integral part of occupied Palestine. It must be evacuated in its entirety and restored unconditionally to Arab sovereignty”. The Third Islamic summit conference “the Palestine and Al-Quds al-Sharif session” held in Mecca in January 1981, stressed “the determination of the Palestinian people to maintain their eternal right to the Holy City of Al-Quds as the capital of their homeland Palestine, and the insistence of Muslim Governments and peoples alike on their eternal right to the Holy City of Al-Quds, in view of the permanent political, religious, cultural and historical importance of Al-Quds to all Muslims”, and affirmed “the commitment of Islamic States to liberate Al-Quds to become the capital of the independent Palestinian State, and to reject any situation which might infringe on the Arab right to full sovereignty over Al-Quds”. In their declaration adopted at Fez, Morocco, in September 1982,