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Report

Trump's Plan to Move the US Embassy to Jerusalem:

A discussion of International Humanitarian Law and International
Diplomatic Law

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The international community has continually rejected and condemned the Israeli occupation, with repeated emphasis on Jerusalem [Reuters]

Abstract

This paper examines Israel's annexation of East Jerusalem and its expanded municipal boundaries of the occupied territory of the de jure State of Palestine and its admissibility under International Humanitarian Law. The second part of this paper explores States settled practice in relation to not establishing or maintaining diplomatic missions in Jerusalem and endeavours to ponder the legal consequences arising from the potential relocation of the United States Embassy from Tel Aviv to Jerusalem.

Introduction

In the aftermath of the 1948 Arab–Israeli War, West Jerusalem fell under Israeli control and East Jerusalem—which includes the Old City—came under Jordanian authority. The de facto division of the city was formalized in the Armistice Agreement of 3 April 1949.⁽¹⁾ Prime Minister David Ben-Gurion stated, tellingly enough, that “Jerusalem is within the bounds of the Jewish Government (to my regret, without the Old City for the moment).”⁽²⁾

In the following years, Israeli control steadily expanded and solidified. Before the end of 1949, Israel moved the Knesset, the Supreme Court, and most of its ministries to West Jerusalem, and in January 1950 Israel proclaimed West Jerusalem as its capital.⁽³⁾ In July 1953, Israel moved its Ministry of Foreign Affairs to the part of the city it controlled.⁽⁴⁾ The stage was set for further expansion, and in 1967 Israel annexed East Jerusalem and significantly expanded Jerusalem's municipal boundaries, incorporating lands from other occupied areas of the West Bank, which were consequently annexed. Israel, through gradual expansion, sought to change the political, geographic, economic, social, cultural, and legal status of Jerusalem through its internal laws and practices.

The prohibition on annexation of an occupied territory is rooted in the laws and customs of war known also as International Humanitarian Law. The annexation of East Jerusalem and its expanded municipal boundaries further gave rise to State responsibility law and international diplomatic law. The issue of the relocation of the US embassy in Israel from Tel Aviv to Jerusalem was taken on board again by Donald Trump, who like other presidents before him, pledged to implement the relocation. Though he has relatively tempered his stance since coming to office, he has not reversed his pledge. This paper examines the international legal implications for such a move in light of the status of Jerusalem under international law.

Annexation of an occupied territory

The Israeli parliament, known in Hebrew as the Knesset, has passed numerous laws to annex parts of the occupied territory—the de jure State of Palestine—that encompassed civilian settlements and settlers in and around East Jerusalem.

The Knesset passed three laws in June 1967: The Law and Administration Ordinance (Amendment no.11), the Municipalities Ordinance (Amendment no.6), and the Protection of the Holy Places Law.⁽⁵⁾ The first and second laws existed previously and were subject to amendments effected in 1967. Amendment number 6 empowered the Minister of Interior to enlarge municipal boundaries while amendment number 11 extended the Israeli laws, jurisdiction and administration to any area designated by the government as 'Land of Israel'.⁽⁶⁾ The unilateral de facto annexation of Jerusalem impacted all aspects of life in the city. The measures to unify Jerusalem included extending bus routes, sewage drains, water supplies, sanitation services, electricity, and telephone lines.⁽⁷⁾ In addition, Israel abolished the Jordanian Dinar currency, which was the legal tender in the West Bank before the Six-Day War, and dissolved the elected Municipal Council of East Jerusalem in 1967.⁽⁸⁾

These maneuvers by Israeli authorities faced pushback from the international community. UN General Assembly resolution 2253 (ES-V) of 4 July 1967 "Calls upon Israel to rescind all measures already taken and to desist forthwith from taking any action which would alter the status of Jerusalem."⁽⁹⁾ In addition, UN Security Council Resolution 252 of 21 May 1968 "Considers that all legislative and administrative measures and actions taken by Israel, including expropriation of land and properties thereon, which tend to change the legal status of Jerusalem, are invalid and cannot change that status."⁽¹⁰⁾

The Israeli Knesset further enacted a basic law in 1980 entitled Jerusalem, Capital of Israel which asserted that "(1) Jerusalem, complete and united, is the capital of Israel. (2) Jerusalem is the seat of the President of the State, the Knesset, the Government and

the Supreme Court.”(11) In response, the Security Council issued Resolution 478 on 20 August 1980 that

Affirms that the enactment of the “basic law” by Israel 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 June 1967, including Jerusalem. Determines that all legislative and administrative measures and actions taken by Israel, the occupying Power, which have altered or purport to alter the character and status of the Holy City of Jerusalem, and in particular the recent “basic law” on Jerusalem, are null and void and must be rescinded forthwith.(12)

The introduction of Israeli laws in East Jerusalem, the annexation of occupied territory, the establishment of settlements together aim to create fait accompli on the ground so as to alter the political, geographic, economic, social, cultural, and legal status of Jerusalem. The European Council Venice declaration of June 1980 affirmed the illegality of the Israeli settlements under international law, their obstruction to peace, and the non-acceptance of any unilateral initiatives that alter the status of Jerusalem.(13)

The conduct of annexation of an occupied territory in part or in whole is considered a violation of the laws and customs of war. For example, during the Second World War, Nazi Germany annexed several occupied territories, notably in Poland, where the Nazis then introduced their own laws and transferred civilian populations thereto. When the issue came before the Military Tribunal at Nuremberg in the RuSHA Case, the ruling found that “Any purported annexation of territories of a foreign nation, occurring during the time of war...we held to be invalid and ineffective. Such territory never became a part of the Reich but merely remained under German military control by virtue of belligerent occupancy.”(14) The Law Reports of Trials of War Criminals, prepared by the United Nations War Crimes Commission, provided that “the occupant has no right either to annex the whole or part of the territory...The occupant has further no right to introduce its own law, or to make changes in the laws of the land, or in the administration, other than those which are temporarily necessitated by his military interest.”(15) Furthermore, Article 47 in the Fourth Geneva Convention provides that

Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory... nor by any annexation by the latter of the whole or part of the occupied territory.(16)

The Fourth Geneva Convention remains to be applicable in the de facto annexed East Jerusalem and its expanded municipal boundaries. The Commentary on the Fourth Geneva Convention elucidates on Article 47: "As long as hostilities continue the Occupying Power cannot therefore annex the occupied territory... An Occupying Power continues to be bound to apply the Convention as a whole even when, in disregard of the rules of international law, it claims... to have annexed all or part of an occupied territory."⁽¹⁷⁾

The Israeli construction of the separation wall and its associated régime in the occupied territory of the de jure State of Palestine including in and around East Jerusalem is another recent measure of annexation. In the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory advisory opinion of 2004, the International Court of Justice (ICJ) provided that "the construction of the wall and its associated régime create a "fait accompli" on the ground that could well become permanent, in which case, and notwithstanding the formal characterization of the wall by Israel, it would be tantamount to de facto annexation."⁽¹⁸⁾

Status of diplomatic missions in occupied and annexed territory

Security Council Resolution 478 of 20 August 1980 further called upon "Those States that have established diplomatic missions at Jerusalem to withdraw such missions from the Holy City."⁽¹⁹⁾ General Assembly resolution 35/169E of 15 December 1980 demanded Israel to comply with United Nations resolutions such as Security Council Resolution 478, and further rejected Israel's declaration of Jerusalem as its capital.⁽²⁰⁾ Chile, Ecuador, and Venezuela withdrew their diplomatic missions from Jerusalem prior to the adoption of Security Council Resolution 478 (1980).⁽²¹⁾ El Salvador, Costa Rica, Panama, Colombia, Haiti, Bolivia, Netherlands, Guatemala, Dominican Republic, and Uruguay withdrew their embassies to comply with the foregoing resolution.⁽²²⁾ El Salvador and Costa Rica moved their embassies back to West Jerusalem in 1984.⁽²³⁾ General Assembly 40/168 of 16 December 1985 "Deplores the transfer by some States of their diplomatic missions to Jerusalem in violation of Security Council resolution 478 (1980) and their refusal to comply with the provisions of that resolution."⁽²⁴⁾ El Salvador and Costa Rica then decided to withdraw their embassies from Jerusalem in 2006. Since that time, no State maintains an embassy in Jerusalem, which signifies non-recognition of Israel's de facto occupation and annexation. States accept the legal obligation not to establish or maintain embassies in Jerusalem, thus amounting to demonstrable respect for customary international law.

The force of customary international law

The two elements of customary international law are State practice and opinio juris sive necessitates. The prohibition on establishing or maintaining embassies in Jerusalem is a settled practice, and the fact that States refrain from locating their embassies in

Jerusalem is evidence of a belief that it is a legal obligation. It is a legal obligation imposed by customary international law on all States diplomatically represented in Israel supported by United Nations resolutions in particular Security Council Resolution 478. In the North Sea Continental Shelf, the ICJ held that

Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation.(25)

Yet, the establishment of embassies in the occupied section of Jerusalem would be legal if the sending State presents the credentials of the heads of missions to the *de jure* State of Palestine and not to Israel, the Occupying Power.(26) The *de jure* State of Palestine could and should invite third States to establish embassies in its occupied capital where the heads of diplomatic missions will have to present their credentials to the President or Government of Palestine in line with Article 14 of the Vienna Convention on Diplomatic Relations of 1961. Third States diplomatic or consular relations with Israel do not signify any recognition of Israel's *de facto* sovereignty over East Jerusalem or the expanded municipal boundaries of the city located in the occupied territory of the *de jure* State of Palestine. In the Legal Consequences for States of the continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) advisory opinion, the ICJ pronounced that

Member States, in compliance with the duty of non-recognition imposed by paragraphs 2 and 5 of resolution 276 (1970), are under obligation to abstain from sending diplomatic or special missions to South Africa including in their jurisdiction the Territory of Namibia, to abstain from sending consular agents to Namibia, and to withdraw any such agents already there. They should also make it clear to the South African authorities that the maintenance of diplomatic or consular relations with South Africa does not imply any recognition of its authority with regard to Namibia.(27)

The question of the US embassy

The United States maintains its embassy in Tel Aviv even though the US Congress enacted the Jerusalem Embassy Act of 1995. The Jerusalem Embassy Act recognizes Jerusalem as the capital of Israel and directed that the US embassy should relocate to Jerusalem no later than 31 May 1999.(28) Written into the law, however, was an escape clause: the relocation could be suspended for six months if the US president deems it necessary in order to "protect the national security interests of the United States."(29)

Indeed, this clause has been invoked repeatedly since 1995 by presidents Bill Clinton, George W. Bush, and Barack Obama.

The Jerusalem Embassy Act runs contrary to the United States former position on East Jerusalem. The US permanent representative to the UN, Ambassador Yost, stated to the Security Council in July 1969 that "the United States considers that the part of Jerusalem that came under the control of Israel in the June 1967 war, like the other areas occupied by Israel, is occupied territory."⁽³⁰⁾ Presumably the US would relocate its embassy to West Jerusalem, which was not seized in 1967 and which international law does not consider it to be an occupied territory, it will still be considered an internationally wrongful act. By its annexation of the occupied section of Jerusalem, Israel aimed at the de facto unification of the whole city and thus moving the US embassy to any part of the city would explicitly or implicitly approve the de facto illegal unification measures. In addition, States settled practice is carried out in a consistent manner to not establish or maintain embassies in Jerusalem which was de facto unified and declared as 'complete and united' the capital of Israel.

Like the 1980 Israeli law, Jerusalem, Capital of Israel, the Jerusalem Embassy Act is an internationally wrongful act. Article 2 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts mentions the elements of an internationally wrongful act of a State: "There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation."⁽³¹⁾

Furthermore, "the conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions."⁽³²⁾ The aforesaid articles are a genuine codification of customary international law, which have a binding force. Hence, the conduct of the Knesset and the US Congress constitute a breach of international obligations, namely that East Jerusalem including its expanded municipal boundaries is an occupied territory and that States must not locate their embassies in Jerusalem. The internationally wrongful acts of the passage of the foregoing legislations invoke legal consequences including adequate reparation that involves juridical restitution.⁽³³⁾ The three customary forms of reparation are: restitution, compensation and satisfaction. Article 34 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts provides that "Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination."⁽³⁴⁾ The Commentary on the Draft Articles on the Responsibility of States for Internationally Wrongful Acts mentions that:

The term “juridical restitution” is sometimes used where restitution requires or involves the modification of a legal situation either within the legal system of the responsible State or in its legal relations with the injured State. Such cases include the revocation, annulment or amendment of a constitutional or legislative provision enacted in violation of a rule of international law.(35)

Relocation under Trump

In his address to the American Israel Public Affairs Committee (AIPAC) in March 2016, Donald Trump stated that “We will move the American Embassy to the eternal capital of the Jewish people, Jerusalem...” In February 2017 Trump stated that his administration is looking at the issue of relocating the US embassy to Jerusalem with “great care”. If the administration of President Donald Trump implements the Jerusalem Embassy Act and relocates the US embassy to Jerusalem it will be an internationally wrongful act of the executive organ of the United States that will face legal consequences including adequate reparation. If the relocation occurs, the UN General Assembly could also issue a resolution deploring such conduct as it has done with previous resolutions on this matter. The General Assembly could also request an advisory opinion from the ICJ on the legal consequences arising from the conduct of transferring States embassies to Jerusalem

The fact that one or more State would violate this international obligation does not mean a formulation of a new rule but rather a violation of this customary international law. This is formulated clearly in the case *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, where the ICJ stated that “the conduct of States should in general be consistent with such a rule; and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of...a new rule.”(36)

The question of consulates

While no State currently locates its embassy in Jerusalem, several states have a consulate in the city. The establishment and the presence of consular posts in Jerusalem exclude any recognition of Israel’s de facto sovereignty. “These consuls, already resident in the city during Mandatory times, did not recognize Israeli and Jordanian rule of the city—only de facto control by these States.”(37) The consuls in Jerusalem do not receive accreditation from the President of Israel.(38) In sum, the presence of consular posts in Jerusalem does not imply any recognition of Israel sovereignty.

Conclusion

For decades Israel has taken extensive measures to exert control over East Jerusalem, including introducing its own laws, annexing land, constructing a separation wall, and

creating populated settlements. All these measures are incompatible with the laws and customs of war and aim at creating a *fait accompli* on the ground so as to alter the political, geographic, economic, social, cultural, and legal status of Jerusalem.

Currently no foreign state, which is diplomatically represented in Israel, has an embassy in Jerusalem. The prohibition on establishing or maintaining embassies in Jerusalem is a settled practice carried out by States as an evidence of a belief that it is obligatory by the existence of a rule requiring it. The existence of this customary international law is supported by numerous United Nations resolutions, in particular Security Council Resolution 478. The passage of Jerusalem, Capital of Israel by the Knesset and the Jerusalem Embassy Act by the US Congress are internationally wrongful acts of the legislatures and require, *inter alia*, juridical restitution.

If the Trump administration implements the Jerusalem Embassy Act and relocates the US embassy from Tel Aviv to Jerusalem it will be an internationally wrongful act that will invoke legal consequences including adequate reparation. In this event, the General Assembly will have to issue a resolution that deplores any conduct of transferring diplomatic missions to Jerusalem like it has done in the past and could further request an advisory opinion from the ICJ.

Foreign States that have diplomatic relations with Israel must exclude any recognition of Israel's *de facto* sovereignty over the annexed and occupied section of Jerusalem. In the meantime, the *de jure* State of Palestine should invite foreign States to establish embassies in its occupied capital where the heads of diplomatic missions will have to present their credentials to the President and Government of Palestine in line with international diplomatic law.

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