

# TOWARDS A TALE OF TWO CITIES: WEST JERUSALEM AND INTERNATIONAL LAW IN 21ST CENTURY

*İki Şehrin Hikayesine Doğru: 21. Yüzyılda Batı Kudüs ve Uluslararası Hukuk*

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## Abstract

This article aims at analysing the long-standing debate on Jerusalem rekindled by the decision on relocation of U.S. Embassy while taking into account the legal framework behind the division of Jerusalem into East and West sectors. Recent state practices through international organisations such as UN and OIC imply that the idea of corpus separatum (independent and international city) is abandoned in order to secure two-state solution based on 1967 borders. Noting that no firm and persistent objection have been raised for the status of West Jerusalem, potential legal ramifications of the stances that states take on the future of West Jerusalem will be evaluated herein from an international law perspective in the light of Judgments of International Court of Justice and UN and OIC Resolutions.

**Keywords:** West Jerusalem, International Law, International Organisations, State Practice, Persistent Objection

## Özet

Bu makale ABD büyükelçilik kararı ile yeniden alevlenen Kudüs tartışmasına Doğu Kudüs ve Batı Kudüs ayrılığının hukuki zemini üzerinden bakmaya çalışacaktır. Devletlerin BM ve İİT gibi uluslararası örgütler bünyesinde son yıllarda ortaya koyduğu pratik, 1967 sınırları çerçevesinde öngörülen iki devletli çözümü temin etmek için corpus separatum (bağımsız ve uluslararası şehir) fikrinin terk edildiğini işaret etmektedir. Ayrıca belirtmek gerekir ki Batı Kudüs'ün statüsü hakkında da kararlı ve ısrarlı bir itiraz söz konusu değildir. Bu anlamda çalışmada, Uluslararası Adalet Divanı kararları ile BM ve İİT kararları ışığında, devletlerin tutumunun özellikle Batı Kudüs'ün geleceği açısından ortaya çıkaracağı muhtemel neticeler uluslararası hukuk perspektifinden ele alınacaktır.

**Anahtar Kelimeler:** Batı Kudüs, Uluslararası Hukuk, Uluslararası Örgütler, Devlet Pratiği, İsrarlı İtiraz

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**INTRODUCTION**

Palestinian territories have yielded a laboratory for international law as of 1917. The most critical one among the conflicts between Palestine and Israel arises out of their disagreement on Jerusalem. The city of Jerusalem intended to be designed as a *corpus separatum* in accordance with Resolution 181 adopted in 1947 by United Nations General Assembly (UNGA) has never attained this status because of the *de facto* partition taking place in 1948. Israel proclaimed West Jerusalem as its capital in 1950 and has continued to use as its capital since then, and afterwards took control of entire Jerusalem after occupying East Jerusalem in the Six-Day War of 1967. Proclamation of the whole of Jerusalem as the capital of Israel in 1980 caused United Nations Security Council (UNSC) to pass Resolution 478 ordering the embassies of other states be moved out of Jerusalem. U.S. President Trump's decision of 2017 to relocate the U.S Embassy to Jerusalem and his announcement of the "Deal of Century" in 2020, both of which are construed as the unilateral declaration of the intention that Israel must legally take hold of the currently *de facto* controlled Jerusalem under occupation of Israel, reignited the debates on the status of Jerusalem.

Although a great majority of states have objected to this situation, a complicated picture turns out in consequence of examination of United Nations' (UN) principal resolutions and political attitudes of states. Despite the fact that U.S. and Israel claim the sole ownership of Jerusalem to belong to Israel, the general outcome reveals the impression that Jerusalem is substantially deemed to be divided. Recent UN Resolutions and The Organisation of Islamic Cooperation (OIC) declarations draw remarkable attention in terms of putting an emphasis on the facts that East Jerusalem is the capital of Palestine and Israel is required to withdraw from East Jerusalem as per 1967 boundaries. No persistent objection or protest has been aroused on West Jerusalem lately. USA and Israel expect this silent situation about West Jerusalem to be likewise simulated about East Jerusalem as is observed in "Deal of Century". Lack of persistent objection might have been resulted in considering of the "facts should become law" policy of Israel about the status of West Jerusalem to be successful in international law. Nevertheless, the practice of states indicates that a partitioned city is likely to emerge, based on 1967 borders, when considering history of the state practices demonstrated through international organisations. However, Israel has conducted its "facts should become law" policy in some parts of occupied territories inclusive of East Jerusalem since 1967. Therefore, states must be cautious while persistently objecting to Israel's annexation policy.

Jerusalem which houses numerous holy places cherished by Islam, Christianity and Judaism was once a province with a special status directly

governed by the Sublime Porte (*Bab-ı Ali*) in Istanbul during the reign of Ottoman Empire.<sup>1</sup> Having been captured by the United Kingdom (UK) towards the end of World War I, the city was granted as a mandate to the UK according to the League of Nations Mandate System. Meanwhile, pursuant to categorisation specified in Article 22 of the Covenant of the League of Nations, the regions conceded by the Turkish Empire cover the most developed areas.<sup>2</sup> The Mandatory Power was vested with the authority to give advice and guide on administrative issues until the Palestine became a self-reliant independent state.<sup>3</sup> Jerusalem used to be recognised as the capital of Palestine throughout the British Mandate between 1922 and 1948.<sup>4</sup> Nevertheless, the British Government promised a National Home to the Jewish Community in the Palestinian region under the Balfour Declaration of 1917<sup>5</sup>. To this end, after becoming a Mandatory Power, it transferred Jews to the region, thereby leading to change of the demographic structure thereof. In this respect, the Peel Commission report, which was drawn up under the leadership of the United Kingdom and proposed a partition plan, incorporated such views that the Palestinian territories should be divided.<sup>6</sup>

Consequently, the Partition Plan was approved by the United Nations General Assembly in Resolution 181 in 1947. However, this Plan could not be implemented. The intensifying conflicts that broke out while the United Kingdom relinquished its Mandate ended up in *de facto* division of Jerusalem into East Jerusalem (occupied by Jordan) and West Jerusalem (occupied by Israel).<sup>7</sup> The series of events taking place since 1948 led to uncertainty of legal status of Jerusalem. U.S. President Donald Trump's

<sup>1</sup> Mordecai Lee, 'Governing the Holy Land: Public Administration in Ottoman Palestine, 1516-1918', *Digest of Middle East Studies*, Vol. 9(1), 2000, p.6.

<sup>2</sup> Berdal Aral, 'Oslo Peace Process as a Rebuttal of Palestinian Self-Determination', *Ortadoğu Etiütleri / Middle Eastern Studies*, Vol.10, No.1, 2018, p.11.

<sup>3</sup> 'Certain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the Mandatory'. The Covenant of the League of Nations, art.22. [https://avalon.law.yale.edu/20th\\_century/leagcov.asp#art22](https://avalon.law.yale.edu/20th_century/leagcov.asp#art22) (retrieved 06.05.2021).

<sup>4</sup> Ruth Kark and Michal Oren-Nordheim, 'Colonial Cities in Palestine? Jerusalem under the British Mandate', *Israel Affairs*, Vol.3/2, 1996, p.50.

<sup>5</sup> The Balfour Declaration, November 1917. <http://www.balfourproject.org/wp-content/uploads/2016/11/The-Balfour-Declaration.pdf> (retrieved 06.05.2021).

<sup>6</sup> Penny Sinanoglou, 'British Plans for the Partition of Palestine, 1929-1938', *The Historical Journal*, Vol.52/1, 2009, p.131.

<sup>7</sup> UNGA Resolution 181, 29 November 1947, p.132 et. seq. [https://undocs.org/A/RES/181\(II\)](https://undocs.org/A/RES/181(II)) (retrieved 06.05.2021).

announcement about relocating to Jerusalem its embassy for Israel drew the attention of the whole world to the issue of Jerusalem.<sup>8</sup>

The Organisation of Islamic Cooperation held an extraordinary meeting in Istanbul on 13 December, 2017 and shortly afterwards, published the ‘Istanbul Declaration’ which emphasized that the decision of USA on relocation of its embassy was illegal according to Resolution 478 of UNSC<sup>9</sup> and further reiterated that all sorts of attempts and practices of Israel with a view to exploiting Jerusalem were rendered null and void. Additionally, two-state solution was admitted in the Declaration with further reaffirmation that the borders of Sovereign Palestine would be as agreed on June 4, 1967. OIC proclaimed the East Jerusalem as the occupied capital of Palestine and called for recognition thereof by other states.<sup>10</sup> The given declaration of OIC did not include any statement with regard to status of West Jerusalem. In this respect, endorsement of two-state solution, recognition of the borders of Palestine as agreed on June 4, 1967 and proclamation of East Jerusalem as the capital gave such an impression that OIC states admitted the *de facto* situation brought about by the Armistice Agreement of 1949.

On the other hand, the United Nations Security Council convened on 18 December 2017 to vote on rescission and rendering illegal of the decision of the USA which recognized Jerusalem as the capital of Israel, but failed to pass a resolution due to *14 votes in favour* and *1 vote* against (vetoed by the USA). So eyes focused on the UN General Assembly. UNGA held an extraordinary meeting on 21 December, 2017 and passed a resolution with 129 votes in favour, 9 votes against and 35 abstentions. Resolution 10/19 adopted in this Emergency Session of UNGA on 22 December, 2017 stated that all kinds of actions likely to damage or preclude two-state solution must be avoided, and moreover, highlighted that states must refrain from locating their embassies in Jerusalem by reminding the UNSC Resolution 478. Furthermore, UNGA “stressed

<sup>8</sup> Israel’s new ‘nation-state law’ of 2018 which affirms disregarding of Palestinian right to self-determination has nourished the controversy. Muhammed Hüseyin Mercan, ‘Reconsidering the Palestine Issue in the Shade of Israel’s Expanding Sovereignty Claim’, *New Middle Eastern Studies*, Vol.8(2), 2018, pp.77-78.

<sup>9</sup> UNSC Resolution 478, 20 August 1980, para.5.3. <http://unscr.com/en/resolutions/doc/478> (retrieved 06.05.2021).

<sup>10</sup> OIC, Final Communiqué of the Extraordinary Islamic Summit Conference to Consider the Situation in Wake of US Administration’s Recognition of the City of Al-Quds Al-Sharif as the So-Called Capital of Israel, the Occupying Power, and Transfer of the US Embassy to Al-Quds. Istanbul, Republic of Turkey, 13 December 2017, OIC/EX-CFM/2017/PAL/FC, para. 1-2-3-5-8. <https://www.oic-oci.org/docdown/?docID=1699&refID=1073> (retrieved 06.05.2021).

that Jerusalem is a final status issue to be resolved through negotiations in line with relevant United Nations resolutions”.<sup>11</sup> OIC states putting their signatures to the Istanbul Declaration voted in favour of Resolution 10/19 of UNGA. This chaotic scene is in fact the outcome of aggravation of wide divergences of opinions about long-standing controversial status of Jerusalem. This study will analyse the status of Jerusalem, investigate into causes of current chaos from an international law perspective and, to this end, will focus on UN Resolutions and state practice.

### I. U.S. Decision of Recognition and Jerusalem Embassy Act of 1995

It is not a new agenda for USA to recognise Jerusalem as the capital of Israel. The U.S. Congress enacted in 1995 the ‘Jerusalem Embassy Act’ which ordered relocation of the U.S Embassy in Israel from Tel-Aviv to Jerusalem. Noting that each sovereign nation is authorised to designate its own capital, and that Jerusalem has been used as the capital of Israel since 1950, and that Jerusalem has been administered as a united and undivided city by Israel since 1967, the Jerusalem Embassy Act therefore stipulated that USA would recognise Jerusalem as the capital of Israel and move its Embassy to Jerusalem based on the above-cited grounds.<sup>12</sup>

Even though the same Act envisions establishment of US Embassy in Jerusalem no later than May 31, 1999, this relocation has been constantly postponed by then-current presidents since the given date. In this respect, Donald Trump’s announcement as to recognition of Jerusalem as the capital of Israel or transfer of US Embassy to Jerusalem solely has meant to implement the existing Act of 1995. Nevertheless, the Act itself constitutes a violation of International Law. Because pursuant to customary international law rules with regards to the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), if and when states enact laws contrary to international law or their government representatives violate international law, then international responsibility arises.<sup>13</sup>

Both the Act of 1995 adopted by the U.S. Congress and the U.S.

<sup>11</sup> UNGA Resolution 10/19, Status of Jerusalem, Tenth Emergency Session, A/RES/ES-10/19, 22.12.2017, para.4. <https://undocs.org/en/A/RES/ES-10/19> (retrieved 06.05.2021).

<sup>12</sup> Jerusalem Embassy Act of 1995, Public Law 104-45, 104th Congress, 8 November 1995, p.1-2. <https://www.congress.gov/104/plaws/publ45/PLAW-104publ45.pdf> (retrieved 06.05.2021).

<sup>13</sup> Responsibility of States for Internationally Wrongful Acts, A/56/49(Vol. I)/Corr.4., art.4-5. [https://legal.un.org/ilc/texts/instruments/english/draft\\_articles/9\\_6\\_2001.pdf](https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf) (retrieved 06.05.2021).

President's proclamation of Jerusalem as the capital of Israel in reliance upon this Act are against the international law rules explicitly set down in UN Resolutions. According to Kattan, the USA violated the international law through adoption of the Jerusalem Embassy Act. The UN Resolutions prescribe that it is an international responsibility for each state not to recognise the *de facto* status of occupied East Jerusalem and not to establish any Embassy in Jerusalem without determination of final status of Jerusalem.<sup>14</sup> It seems Biden Administration is not interested in relocating US embassy to Tel Aviv again. Therefore, controversy over Trump's move may be deepened in future and several other states may follow US.

## II. Roots of Division into East and West Jerusalem

In Resolution 181 passed in 1947, UN General Assembly rendered a decision in favour of dividing the Palestine territories between Israel and Palestine and also founding of two separate states.<sup>15</sup> UN Partition Plan was accepted by the Jewish Agency while the Arab States showed reaction thereto with the assertion that Palestinians' right to self-determination is completely disregarded.<sup>16</sup> While this matter was hotly discussed, the United Kingdom announced that it would withdraw its military forces from the region. Meanwhile, one day before the termination of British Mandate, the Jewish Agency which gathered in Tel Aviv under the leadership of David Ben Gurion formally proclaimed establishment of State of Israel on May 14, 1948.<sup>17</sup>

The issue of Jerusalem has remained unresolved up until today since the UN Partition Plan of 1947. In accordance with the Plan suggested in Resolution 181, Jerusalem would not belong to either party and would attain an independent international status (*corpus separatum*). In fact, Golani argues that Jewish Movement, before even the introduction of UN Partition Plan, advocated Jerusalem to be partitioned as West and East between Jews and Arabs respectively. However, as for the Holy Places in the Eastern sector, they envisioned an international management. Although they did not insist on their plan to be accepted in order not

<sup>14</sup> Victor Kattan, 'Why U.S. Recognition of Jerusalem Could Be Contrary to International Law', *Journal of Palestine Studies*, Vol. 47, No. 3, 2018, p.85.

<sup>15</sup> UNGA Resolution 181, 29 November 1947, p.132 et. seq. [https://undocs.org/A/RES/181\(II\)](https://undocs.org/A/RES/181(II)) (retrieved 06.05.2021).

<sup>16</sup> Iain Scobbie and Sarah Hibbin, 'The Israel Palestine Conflict in International Law: Territorial Issues', *The U.S./Middle East Project*, SOAS, 2009, p.53.

<sup>17</sup> Israeli Declaration of Independence, Issued at Tel Aviv on May 14, 1948. [https://cmes.arizona.edu/sites/cmes.arizona.edu/files/7%20Doc%20C%20Israeli%20Declaration%20of%20Independence%20Rdg\\_0.pdf](https://cmes.arizona.edu/sites/cmes.arizona.edu/files/7%20Doc%20C%20Israeli%20Declaration%20of%20Independence%20Rdg_0.pdf) (retrieved 06.05.2021).

to risk their statehood to be recognised, the status of Jerusalem in UN Partition Plan was mostly in favour of Jewish Movement. In this regard, their allegation that West Jerusalem should be a part of Jewish State was upheld even in Peel Commission hearings.<sup>18</sup>

Nevertheless, Israel occupied the West Jerusalem during the war whereas Jordan captured the East Jerusalem including Al-Aqsa Mosque and other historical places. As a result of the Armistice Agreement executed between the Arab States and Israel in 1949, the *de facto* division of Jerusalem remained same, i.e. West Jerusalem remained under the control of Israel and the East Jerusalem under the control of Jordan.<sup>19</sup> According to the Green Line, Jerusalem was divided into two parts. Haram al-Sharif, where the Al-Aqsa Mosque stands, and other historical places (Old City) were included in the East Jerusalem. On account of this *de facto* division, the UN General Assembly reminded once again the special status of Jerusalem designed and conferred as *corpus separatum* under Resolutions 194 and 303.<sup>20</sup> Other states did not raise any strong objection to the Armistice Line drawn up in 1949. This situation continued until 1967 when Six-Day War broke out between Israel and Arab States which resulted in occupation of East Jerusalem by Israel. All the territories acquired and occupied in and after 1967 were declared invalid in many UN resolutions.<sup>21</sup>

According to Cattan, the UN Security Council Resolutions 252, 452, 465 and 476 adopted after the 1967 War endorsed the status of *corpus separatum* formerly prescribed in Resolution 181. The expression of "legal status of Jerusalem" mentioned in the given resolutions was used in the meaning of *corpus separatum*.<sup>22</sup> Knesset proclaimed Jerusalem as

<sup>18</sup> Motti Golani, 'Zionism without Zion: The Jerusalem Question, 1947-1949', *Journal of Israeli History*, Vol.16(1), 1995, pp.40-41.

<sup>19</sup> Avi Shlaim, 'Britain and the Arab Israeli War of 1948', *Journal of Palestine Studies*, Vol.16, No. 4, 1987, pp. 59-60.

<sup>20</sup> UNGA Resolution 194(III), 11 December 1948, p.23, parag.7-8. [https://undocs.org/A/RES/194%20\(III\)](https://undocs.org/A/RES/194%20(III))(retrieved06.05.2021). UNGA Resolution 303, 9 December 1949, parag.1-2. <https://unispal.un.org/DPA/DPR/unispal.nsf/0/2669D6828A262EDB852560E50069738A> (retrieved 06.05.2021).

<sup>21</sup> As per Resolution 476 and 478, in particular, which condemn the adoption of Basic Law and actions of Israel in the whole Jerusalem, it has been emphasized that Israel operates as an occupying power both in the territory seized in 1967 and in Jerusalem, and therefore that Israel has to act in accordance in cognizance of this fact. UNSC Resolution 476, 30 June 1980, parag.7.3-7.5. <http://unsr.com/en/resolutions/doc/476> (retrieved 06.05.2021). UNSC Resolution 478, 20 August 1980, parag.5.3. <http://unsr.com/en/resolutions/doc/478> (retrieved 06.05.2021).

<sup>22</sup> Henry Cattan, 'The Status of Jerusalem under International Law and United Nations Resolutions', *Journal of Palestine Studies*, Vol.10, 1981, p.9.

the capital of Israel on January 23, 1950 and transferred his government offices to Jerusalem in a short period of time. Nevertheless, none of states has opened any embassy in the city of Jerusalem until 1967 because they had no desire for the then-current *de facto* division to turn into *de jure* division. Despite this approach, the support provided for the idea of *corpus separatum* tends to lessen as time passes.

As for the views held by Elihu Lauterpacht and Stephen Schwebel, withdrawal of military forces by the United Kingdom in 1948 caused a vacuum in the sovereignty of the region. Right after the withdrawal, Israel took control of West Jerusalem while Jordan captured the East Jerusalem. As Jordan's occupation was deprived of a legal ground or basis, the Armistice Line of 1949 was deemed to draw temporary borders. During the outbreak of Six-Day War in 1967, Jordan's attacks constituted a breach of the Armistice Agreement of 1949 signed with Israel. This further caused Israel to construe this situation as the termination of Armistice Agreement. As a result of lawful self-defence against Jordan in the War of 1967, Israel acquired the control of East Jerusalem<sup>23</sup>. Cattan reminds that forcible acquisition of any territory is not acceptable in international law and, therefore, international community does not recognise Israel's attempts at annexing the East Jerusalem.<sup>24</sup> The author argues that the right to exercise legal sovereignty over Jerusalem without any partition into East and West belongs to Palestinians.<sup>25</sup> On the other hand, Cassese reasserts that the legal status of Jerusalem is subject to Resolution 181 adopted in 1947 and has to be designed as *corpus separatum*.<sup>26</sup>

In fact, it is impossible to share the views of Lauterpacht and Schwebel on East Jerusalem due to following reasons. Firstly, the right to self-defence can only be exercised to proportionately ward off any actual military attack as specified in Article 51 of UN Charter of 1945.<sup>27</sup> This indicates that self-defence does not legitimise appropriation of territory as it extends beyond limits of defence and results in another unlawful attack. Secondly, the argument for filling the vacuum created by withdrawal of British military forces can be reasonable to discuss for

<sup>23</sup> Elihu Lauterpacht, 'Jerusalem and the Holy Places', Anglo-Israel Association Publishing, 1968, p.47. Stephen Schwebel, 'What Weight to Conquest?' *American Journal of International Law*, Vol.64, Issue 2, 1970, p.346.

<sup>24</sup> Henry Cattan, 'Jerusalem', St. Martin's Press, 1981, p.111 et seq.

<sup>25</sup> Cattan, *Ibid*, p.64.

<sup>26</sup> Antonio Cassese, 'Legal Considerations on the International Status of Jerusalem', *The Palestine Yearbook of International Law*, Vol.3, Issue 1, 1986, pp.36.37.

<sup>27</sup> UN Charter, 1945, art.51. <https://treaties.un.org/doc/publication/ctc/uncharter.pdf> (retrieved 06.05.2021).

the conflict of 1948, but cannot a matter of discussion when the conflict of 1967 is concerned. Even though the status of Jerusalem was primarily planned as *corpus separatum*, this plan failed to be put into effect and, moreover, states have not raised a general objection, from 1949 up until now, to the effective control by Israel over West Jerusalem. In this sense, it can be claimed that Israel has the *de facto* sovereignty over West Jerusalem. *De jure* sovereignty will be actualised via an agreement to be reached through peace negotiations. Such an agreement will most probably be a kind of confirmation of the actual *de facto* situation in West Jerusalem. As a matter of fact, over the recent years, UN Resolutions, states and even ICJ Advisory Opinion on Wall of 2004 have been mostly concerned with the status of East Jerusalem.<sup>28</sup> When the current situation is assessed in the light of legal decisions, it seems improbable for Israel to establish sovereignty over East Jerusalem.

On November 15, 1988, the Palestinian Declaration of Independence was proclaimed and the UN Partition Plan enshrined in Resolution 181 was generally accepted. Notwithstanding, Jerusalem was declared as the capital of Palestine. The expression of *Arab Jerusalem* mentioned in this Declaration preserves its ambiguity because of lack of explanation therein. Most probably it refers to entire Jerusalem when other usages in the text are taken into account.<sup>29</sup> On the other hand, Israel also accepts Jerusalem as its capital and still keeps a tight grip over it. Meanwhile, it seems that majority of states have given up the idea of *corpus separatum* designed for Jerusalem and that they have admitted the borders drawn before 1967.

What is more, it seems that acceptance of two-state solution by Palestinian authorities from now on can lead to recognition of the borders drawn before 1967 as specified in UN Resolutions. Current UNSC Resolutions regard and treat as the 'occupied Palestinian territories' the regions occupied by Israel after 1967 and call for avoidance by Israel from any actions precluding or

<sup>28</sup> 'The territories situated between the Green Line and the former eastern boundary of Palestine under the Mandate were occupied by Israel in 1967 during the armed conflict between Israel and Jordan. Under customary international law, these were therefore occupied territories in which Israel had the status of occupying Power. Subsequent events in these territories, as described in paragraphs 75 to 77 above, have done nothing to alter this situation. All these territories (including East Jerusalem) remain occupied territories and Israel has continued to have the status of occupying Power'. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ, Advisory Opinion, 9 July 2004, para.78.

<sup>29</sup> Palestine National Council and Declaration of Independence of 15 November 1988. Annexed in UN Document A/43/827, S/20278, 18 November 1988. <https://unispal.un.org/UNISPAL.NSF/0/6EB54A389E2DA6C6852560DE0070E392> (retrieved 06.05.2021).

rendering the two-state solution meaningless. Resolution 2334 of UNSC can be found below as an example:

“Reaffirming the obligation of Israel, the occupying Power, to abide scrupulously by its legal obligations and responsibilities under the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, and recalling the advisory opinion rendered on 9 July 2004 by the International Court of Justice, Condemning all measures aimed at altering the demographic composition, character and status of the Palestinian Territory occupied since 1967, including East Jerusalem, including, inter alia, the construction and expansion of settlements, transfer of Israeli settlers, confiscation of land, demolition of homes and displacement of Palestinian civilians, in violation of international humanitarian law and relevant resolutions, Expressing grave concern that continuing Israeli settlement activities are dangerously imperilling the viability of the two-State solution based on the 1967 lines”<sup>30</sup>

Krystall argues that Israel started to depopulate Arab neighbourhoods in West Jerusalem from in the first place. By the end of 1949, all of West Jerusalem's Arab neighbourhoods had been settled by Israelis.<sup>31</sup> Furthermore, Israel tried to govern the city of Jerusalem as one single city as from 1967 and changed the demographic composition and management style of the city accordingly.<sup>32</sup> In this respect, UN Resolutions have stated that Israel stands and rules there only as an occupying power, and that the change by Israel of demographic composition and construction plans, expropriation of land and building settlements constitute violation of international law. Likewise, Fourth Geneva Convention grants limited powers to the Occupying Power. Nevertheless, Israel claims that Fourth Geneva Convention is inapplicable to the territories occupied in 1967 because no sovereignty has been established by any legitimate authority in this region since termination of the British Mandate in 1948. To the contrary, as Cassese highlights, UN and all the states, except for Israel, recognise the Palestinians' right to self-determination.<sup>33</sup> It is not even

<sup>30</sup> UNSC Resolution 2334, 23 December 2016, parag.3-4-5. <http://unscr.com/en/resolutions/doc/2334> (retrieved 06.05.2021).

<sup>31</sup> Nathan Krystall, 'The De-Arabization of West Jerusalem 1947-50', *Journal of Palestine Studies*, Vol. 27(2), 1998, p.5.

<sup>32</sup> John Quigley, 'Living in Legal Limbo: Israel's Settlers in Occupied Palestinian Territory', *Pace International Law Review*, Vol.10/1, 1998, p.7.

<sup>33</sup> Antonio Cassese, 'Self-Determination of Peoples: A Legal Reappraisal', Cambridge University Press, 1995, p.240.

obligatory for Palestinians to first found a state in order to acquire their right to self-determination. It is because modern international law confers the right to self-determination to the population under occupation.<sup>34</sup>

As Israel has kept the *de facto* control of the East Jerusalem for a long period of time since 1967, some states have inclined to accept the armistice line drawn before 1967. On the other hand, some other states have accepted the borders of Israel as those determined before 1967 and have recognised the West Jerusalem as the capital of Israel. For instance, the Ministry of Foreign Affairs of Russia declared through its announcement on April 6, 2017 that the West Jerusalem was the capital of Israel and the East Jerusalem would be recognised as the capital of a prospective Palestinian state.<sup>35</sup>

On the other hand, on December 13, 2017, the Organisation of Islamic Cooperation called for recognition of the East Jerusalem as the capital of Palestine, which gave the impression of implicitly accepting the West Jerusalem as a part of Israel, thus leading to ambiguity or uncertainty in its stance. In a similar vein, UN Resolutions explicitly specify that that East Jerusalem is under occupation while there is not such clarity when West Jerusalem is concerned. To put in plain words, neither the phrase of West Jerusalem nor any expression suggesting that the West Jerusalem is also under occupation has been mentioned in the resolutions. Some resolutions use the word 'Jerusalem' while others prefer 'East Jerusalem'.

Right after Israel proclaimed the whole and undivided Jerusalem as its capital through enactment of Basic Law on July 29, 1980, UNSC passed Resolution 478 with regard to breach of international law through this action by Israel and called upon member states to move embassies out of Jerusalem. UNSC accordingly:

“[2] 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; [3] 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

<sup>34</sup> Orna Ben-Naftali et al., 'Illegal Occupation: Framing the Occupied Palestinian Territory', *Berkeley Journal of International Law*, Vol.23/3, 2005, p.554.

<sup>35</sup> Foreign Ministry Statement regarding Palestinian-Israeli Settlement. <https://unispa.un.org/DPA/DPR/unispa.nsf/0/FE99331E0C3D55E8852580FF005A8806> (retrieved 06.05.2021).

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; [5] Decides not to recognize 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 calls upon: (a) All Member States to accept this decision; (b) Those States that have established diplomatic missions at Jerusalem to withdraw such missions from the Holy City".<sup>36</sup>

Thereupon, states began to transfer their embassies to Tel-Aviv. With the latest transfers of embassies of El-Salvador and Costa Rica in 2006, Jerusalem was completely cleared of embassies.

### III. *De facto* Control by Israel over West Jerusalem and State Practice

Both UN resolutions and state practices clearly demonstrate that East Jerusalem is accepted to be under occupation and this is contrary to international law. Despite this, there is a huge gap with respect to status of West Jerusalem. Israel asserts that as the withdrawal of United Kingdom left the region without any sovereign power, it has acquired the sovereign-free territory and therefore, Israel's sovereignty over the West Jerusalem is not open to question or discussion.<sup>37</sup> In Brownlie's opinion, inhabited territory cannot be regarded as *terra nullius* in case of abandonment by the existing sovereign.<sup>38</sup> Similarly, in the Advisory Opinion on Western Sahara, ICJ highlighted that Western Sahara was not *terra nullius* at the time of occupation by Spain on the grounds that that this region was inhabited by people.<sup>39</sup> The demarcation line known also as Green Line formalised through armistice agreements in 1949, which divided Jerusalem into West and East sectors, ensured that East Jerusalem and West Jerusalem remained under respective *de facto* rules of Jordan and Israel.<sup>40</sup> Even though use of West Jerusalem by Israel as its capital had formerly been objected to in the UN Resolutions and actions of Israel had been rendered null or void, no strong objection was raised

<sup>36</sup> UNSC Resolution 478, 20 August 1980, parag.5/2-3-5. <http://unscr.com/en/resolutions/doc/478> (retrieved 06.05.2021).

<sup>37</sup> John Quigley, '*Palestine and Israel: A Challenge to Justice*', Duke University Press, 1990, p.91.

<sup>38</sup> James Crawford, '*Brownlie's Principles of Public International Law*', Oxford University Press, 2012, p.228.

<sup>39</sup> ICJ, Western Sahara, Advisory Opinion of 16 October 1975, parag.81.

<sup>40</sup> Nabil Elaraby, 'Some Legal Implications of the 1947 Partition Resolution and the 1949 Armistice Agreements', *Law and Contemporary Problems*, Vol.33, No.1, 1968, p.104 et seq.

by either UN or states after 1967 to locating of Israel's government offices in West Jerusalem.

UN used to put a stronger emphasis on the international status of Jerusalem in its former resolutions. However, the recent resolutions have laid relatively more focus on East Jerusalem. This dilemma reveals a shift from idealism to realism. The status of the entire Jerusalem still harbours many uncertainties due to lack of reaction or remaining silent. The European Parliament does not recognise the borders emerging after 1967 and highlights that Jerusalem will be the prospective capital of both states concerned.<sup>41</sup> On the other hand, some other states like Russia and China recognise West Jerusalem as the capital of Israel and East Jerusalem as the capital of Palestine within the borders of 1967.<sup>42</sup>

The states that attended in the OIC meeting on December 13, 2017 accepted East Jerusalem as the capital of Palestine while they remained unresponsive to and silent on West Jerusalem. Additionally, they did not make any statement as to recognition of Tel Aviv as the capital of Israel. It is quite understandable for the states having embassies in Tel-Aviv to recognise Tel-Aviv as the capital of Israel. However, neither UN nor states have made a plain and clear statement about the current status of West Jerusalem or the necessity for Israel to move its capital-oriented activities to Tel-Aviv.<sup>43</sup> Noting that UN emphasizes that the borders prior to 1967 have to be respected and observed and that final status of Jerusalem will be determined through bilateral negotiations, and knowing that the states defending independence of Palestine bring to the forefront the division of East-West sectors rather than unity of Jerusalem, it can then be inferred that UN does not pay much attention to international city status any more, and that the current *de facto* situation (West Jerusalem/Israel and East Jerusalem/Palestine) has been accepted. If they wish to preclude the current *de facto* situation in Jerusalem from turning into a customary international law rule, it is requisite for states to break their silence and decide on status of Jerusalem from every aspect in plain words.

This conundrum is also very obvious in the text drawn up by the

<sup>41</sup> European Parliament, Jerusalem: The Heart of the Israeli-Palestinian Conflict, p.20. [https://www.europarl.europa.eu/RegData/etudes/briefing\\_note/join/2012/491443/EXPO-AFET\\_SP\(2012\)491443\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/briefing_note/join/2012/491443/EXPO-AFET_SP(2012)491443_EN.pdf) (retrieved 06.05.2021).

<sup>42</sup> In order to see statement of China: <https://www.un.org/unispal/document/auto-insert-195150/> (retrieved 06.05.2021).

<sup>43</sup> The facts that Trump underlines in his announcement that Israel has been using Jerusalem as its capital for years and that no serious or strong objection has been raised to this situation are actually of high significance in this regard.

members of UN General Assembly that convened urgently right upon hearing the decision of U.S. to move its embassy. After the draft resolution issued by the UN Security Council against the Embassy decision of the USA was vetoed<sup>44</sup> by the USA with 14 votes in favour and 1 vote against on 18.12.2017, the General Assembly, which convened urgently on 21.12.2017, passed a resolution with 128 votes in favour, 9 votes against and 35 abstentions. The legal basis of this resolution stems from the Uniting for Peace Resolution No. 377 passed in regards to the Korean War in 1950.<sup>45</sup> Pursuant to Resolution 377, in the event that the Security Council reaches a deadlock due to the right to veto and fails to fulfil its primary duty of maintaining and safeguarding peace and security, UNGA can summon an urgent meeting to take necessary measures.<sup>46</sup>

As the draft resolution of the Security Council about Jerusalem was vetoed by the USA, the states in the leadership of Turkey and Yemen called for ‘an urgent meeting’ to be held by the General Assembly as in the case of Uniting for Peace Resolution 377. The decisions taken in the meeting on 21.12.2017 primarily affirmed each and every previous UN Resolution which made a reference to Resolution 181, and further declared null and void the occupation of East Jerusalem and actions thereabout carried out by Israel after 1967. Furthermore, UN reiterated the resolution 478 passed in 1980 which emphasized the necessity for states to refrain from establishing an embassy in Jerusalem, and called for desisting from such actions. Additionally, it was restated therein that the final status of Jerusalem would be determined through two-state solution-oriented negotiations. In essence, this Resolution is highly significant for international law-making. The call, which was supposed to be issued by the Security Council, for abiding by the previous UN Resolutions, was made by the General Assembly. The Resolution generally repeats the former findings of UN and does not envision or impose any new and effective sanction. It bears additional importance in terms of being an indicator of complexity of state attitudes because it incorporates many contradictory and conflicting statements.

<sup>44</sup> The Security Council adopts resolutions in proportion of 9/15 (9 in favour) on the primary condition of no negative vote by any of five permanent members. Absention by any permanent members are not counted as a negative vote.

<sup>45</sup> UNGA Resolution 377(V), 3 November 1950. <https://unispal.un.org/DPA/DPR/unispal.nsf/0/55C2B84DA9E0052B05256554005726C6> (retrieved 06.05.2021).

<sup>46</sup> UN has convened 10 emergency meetings so far. The most recent General Assembly meeting is a continuation of 10th Emergency meeting which began in 1997 and later continued in many separate sessions at various dates. In accord with Article 18 of UN Charter, decisions on some specific matters including ‘recommendations on maintenance of peace and security’ are taken by qualified majority of General Assembly members. This proportion refers to two thirds of members present and voting.

Despite being controversial, many authors argue that states cannot remain silent and unresponsive when actions of other states are concerned; otherwise, they lose their chance of ‘rejecting a rule’ in case a new international law rule emerges in the future. What states do not say is legally as important as what they say. Any state which opposes a situation is called ‘persistent objector’ and the newly emerging rule is not applicable to this persistent objector.<sup>47</sup> In the Resolution on *Anglo-Norwegian Fisheries*, ICJ referred to the persistent objector rule as follows: ‘in any event the 10-mile rule would appear to be in-applicable as against Norway inasmuch as she has always opposed any attempt to apply it to the Norwegian coast.’<sup>48</sup> As a result of this rule, pursuant to international customary law and UN Resolutions, states are under the obligation not to recognise any actions contrary to international law. As emphasized by Talmon, both illegal use of force and violation of right to self-determination come to the forefront as the actions not to be recognised.<sup>49</sup>

ICJ reflects the same obligation in Its *Wall* advisory opinion: “Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction”.<sup>50</sup> The same obligation is valid for the Israeli governmental acts on East Jerusalem. In this respect, such unilateral actions as ‘condemnation, not recognising or declaring null or void’ are indeed critically important in order to ensure that actions contrary to international law do not lead to any negative consequence for other states. Under ordinary circumstances, selection of capital is a domestic issue. Sovereign states are free to designate as their capital any province they legally own and other states have to respect this process.

<sup>47</sup> Jonathan I. Charney, ‘The Persistent Objector Rule and the Development of Customary International Law’, *British Yearbook of International Law*, Vol.56(1), 1986, pp.5-16.

<sup>48</sup> Fisheries Case (United Kingdom v. Norway), Judgment of December 18th, 1951, ICJ Reports, p.131.

<sup>49</sup> Stefan Talmon, ‘The Duty Not to ‘Recognize as Lawful’ a Situation Created by the Illegal Use of Force or Other Serious Breaches of a Jus Cogens Obligation: An Obligation without Real Substance?’ Christian Tomuschat and Jean-Marc Thouvenin (ed.), *The Fundamental Rules of the International Legal Order: Jus Cogens And Obligations Erga Omnes*, Martinus Nijhoff Publishers, 2006, p.99.

<sup>50</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ, Advisory Opinion, para.159.



Nevertheless, the issue of Jerusalem is the concern of international law, whose final status has not yet determined. UN resolutions, state practices and judicial decisions with regard to Jerusalem demonstrate that the status of Jerusalem is still controversial and that this issue can be resolved through negotiations or through other procedures stipulated by international law. It has to be born in mind that Israel has been gaining more and more effective control over the region through occupying Palestinian territories and building settlements therein since 1948. What is more, Israel first used the West Jerusalem as its capital as from 1950 to 1967 since when the entire Jerusalem have been used as capital. President's Office, Parliament (Knesset), Supreme Court, many ministries and government bodies operate in Jerusalem. Many issues that emerged as *de facto* have the potential to turn into *de jure* by virtue of the support of other states like USA or silence of other states. To this end, clear, explicit and appropriate objection of states is essential in international law.

## CONCLUSION

A complicated picture comes out when the resolutions adopted by UN General Assembly and Security Council from 1947 up to now are examined. In some resolutions passed even after the occupation of East Jerusalem in 1967, the General Assembly highlighted that the actions of Israel in Jerusalem (without mentioning any division into East-West) which might affect the legal status of Jerusalem were invalid. However, in the more recent UN resolutions issued especially after 2000s, a particular emphasis on East Jerusalem draws attention, East Jerusalem is counted as a part of the Palestinian territories under occupation, Israel is called upon to refrain from any action that might jeopardize peace in the region because such actions might preclude two-state solution and constitute a breach of armistice line of 1949. These resolutions place its focus on East Jerusalem rather than international status of Jerusalem.

Likewise, the earlier resolutions of UN Security Council emphasized the necessity for Israel to refrain from all sorts of action that could damage the status of the whole Jerusalem and such actions would be rendered null and void whereas the latest resolutions, under the influence of two-state solution-oriented negotiations, have focused on 'East Jerusalem under Occupation'. The Security Council declared that occupation of East Jerusalem beyond the 1967 borders would not be recognized. Many resolutions of UN come to the forefront with their emphasis on 'avoiding from actions that might damage two-state solution' and 'solution through peaceful methods'.

Despite being few, some UN resolutions remind Resolution 181 even in 2000s. In fact, Resolution 181 supports two-state solution; but this solution is deemed today to be found within 1967 borders. UNSC Resolution 2334

adopted in 2016 made references solely to the UNSC Resolutions passed after 1967. Resolution 2334 mentions neither Resolution 181 nor *corpus separatum*. Similarly, UNGA Resolution 10/19 adopted in 2017 made references only to UN resolutions passed after 1967 and does not touch upon Resolution 181 or *corpus separatum*. In this regard, both Resolutions 2334 and 10/19 give the impression that states recognize the divided city of Jerusalem according to 1967 borders, thus showing the current course of events.

Jerusalem as envisioned by UN to be under international governance (*corpus separatum*) is no longer considered to be realistic and applicable. In this sense, the recent resolutions of UN, which reflect the state practices and also place its main focus on East Jerusalem, suggest strong evidences with respect to the facts that the status of city might remain as divided as per 1967 borders and this might be accepted by both parties. Therefore, the status of West Jerusalem might not be debated by states anymore. It seems improbable for this division to take place as designed in the proposal announced as the 'Deal of the Century' in which Israel unlawfully demands "facts on East Jerusalem should become law", and offers annexation of whole Jerusalem to be recognised and furthermore envisions a new city for Palestinians close to Jerusalem. Thus, other states and Palestinian authorities must keep persistently objecting to such unilateral plans for East Jerusalem and avoid being silent as is seen in the case of West Jerusalem.

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