Changing Israel Capital: A Serious Breach of International Law

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Summary

President Trump officially declared Jerusalem to be the capital of Israel. According to international law, including United Nations resolutions, Jerusalem is an international area and does not belong to either Palestine or Israel. An unlawful unilateral act by a state to change the established rules of international law is completely unacceptable. The situation of Jerusalem has been one of the most important and controversial conflicts in international law. The action of one state, in this case United States of America, could not affect the resolutions and organized actions of international bodies. This action also makes serious obstacles in peaceful settlement of the dispute between two parties. Breach of the fundamental human rights of Palestinian people such as the right to self-determination is just one of many consequences of changing Israel's capital by the United States. In this text, after reviewing the validity of United States act in the context of international law, the effects of this action will be surveyed by established rules of international law, specially the opinions of International jurists and International Court of Justice. At the end, we will come to this conclusion that this action is a big step backward to years that force and chaos was ruling international community. Respecting international human rights is not just an ideal slogan, but it is a globally accepted rule which has to be enforced by all states, especially those apparently claiming to be the decision-makers of the international society.

Introduction

Relocating the US embassy would derail hopes for peace by recognizing Israel's

hostile military occupation, which divides and impoverishes residents. The city has been Israel's center of government since 1948. Britain and the United States have been the principal external powers that have affected Palestine. While both were cognizant of justice considerations, those considerations were not always primary in their policy decisions. Britain and the United States did not always view Palestine through the lens of what is just and appropriate for Palestine and its inhabitants. (Quigley, 2004, 1).

The international law of occupation is a subset of International Humanitarian Law (IHL) designed to balance the needs of the occupying power against the needs of the occupied population pending determination of the fate of the occupied territory. The central tenet of this body of law is found in Article 43 of the 1907 Hague Regulations, which provides: The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and [civil life], while respecting, unless absolutely prevented, the laws in force in the country.

World War II only made matters worse. Jews liberated from Nazi camps wanted to leave. Surveys of displaced Jews showed they wanted to go West, but Western countries did not want them, and the Zionist organization urged Western countries not to take them. It viewed the long-term solution for Jews as a state in Palestine, even if it meant forcing Jews to go there who had no interest. (Quigley, 2004, 3).

In the wake of World War II, the Fourth Geneva Convention of 1949 was designed to provide additional protections to occupied populations. The four Geneva Conventions of 1949 have been said to "constitute the heart of international humanitarian law," and both the Hague Regulations and the Geneva Conventions are generally regarded as customary international law. (Harris, 2008, 89)

The city's status has been an open question for decades. The intent of the U.N., when it voted in 1947 to partition what was then British-administered Palestine into Jewish and Arab states, was to put Jerusalem under an international regime. But after the Arab-Israeli war of 1948, newly born Israel controlled the western portion of the city and Jordan the east. In the 1967 war Israel captured the eastern sector and annexed it. No country, however, recognizes Israel's hold there. The Arab states insist on Arab sovereignty over at least East Jerusalem, which the Palestinians want to make the capital of their hoped-for future state.

Human Rights of Palestinian

Israel's continuing control of the bulk of Palestine's territory left one glaring problem that the international community could not avoid. The Arabs expelled in 1948 numbered half a million to one million, depending on which estimate one accepts. Israel's government let Jews migrating to Israel move into their houses and take over their lands. By its Resolution 194 in December 1948, the UN General Assembly called on Israel to repatriate the Arabs. By the same resolution, the General Assembly set up a Conciliation Commission for Palestine to work towards an overall settlement of the Palestine problem, and in particular to urge

Israel to repatriate the displaced Arabs. (Quigley, 2004, 5).

The ICJ declared in an advisory opinion, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, that the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR), and the Convention on the Rights of the Child apply to occupation except to the extent that particular provisions of such conventions are subject to derogation in times of national emergency. (Harris, 2008, 115)

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One of the issues the 1993 agreement put on the negotiation table was that of the Palestine Arabs displaced in 1948. Israel shortly dealt a blow on that issue, as it was doing on settlements. A right-of-center government that assumed power in Israel in 1996 gave a new rationale for refusing repatriation to the displaced Arabs, namely, "demographic security."53 Israel, according to Prime Minister Benjamin Netanyahu, did not want a diminution of Israel's Jewish majority. The new government would oppose "the right of return of Arab populations to any part of the Land of Israel west of the Jordan River,"54 a position that precluded repatriation not only to Israel, but even to the Gaza Strip or West Bank. (Quigley, 2004, 12).

To the Palestinians, a demand for a state in that portion of Palestine that Israel did not take in 1948 was modest. This demand represented a serious concession from the original Palestinian position that there be a single state in Palestine. The demand involved recognizing a Jewish state in the bulk of Palestine's territory, a recognition that was all the more difficult because Israel established itself by driving out the majority of the Arabs who lived there.

Israel demanded that Jerusalem be under its sovereignty, even though the international community had never recognized Jerusalem as belonging to Israel. The eastern half, taken by Israel in 1967, was viewed as under Israel's belligerent occupation. The western half, taken by Israel in 1948, was viewed as falling appropriately under an international status. Foreign governments, even those most friendly to Israel politically, have refused to situate their embassies in Jerusalem, because they do not recognize Israel's sovereignty over west Jerusalem. (Quigley, 2004, 13).

The ICJ declared, inter alia, that the "Green Line" was apparently of provisional character, but nonetheless that the territories, including East Jerusalem, are considered occupied territories in which Israel has the status of occupying power

under international humanitarian law. The ICJ also stated that the establishment of Israeli settlements in the territories is illegal according to international law. (Noam, 2006, 12)

Until the early years of the C20th, conquest was a recognized basis for title to territory: a State could lawfully acquire territory through the use of force. During the course of the C20th, this traditional rule of international law was decisively reversed by two key substantive developments, namely the incremental prohibition of the use of force in international relations, which culminated in the adoption of Article 2.4 of the United Nations Charter, and the emergence of the principle of self-determination as "one of the essential principles of contemporary international law. As both embody aspects of international public order, they may be viewed as ius cogens norms, that is norms from which no derogation is allowed, which are also obligations owed to the international community as a whole. (Scobbie & Hibbin, 2010, 85)

A right of self-determination is included in the corpus of customary international law. As recognized during the inter-war period, the people of Palestine are entitled to exercise self-determination there. The "people" so entitled includes those who were displaced from Palestine in 1948. Those people as well are entitled to be repatriated by Israel. The accession of Hamas to control of the Palestinian Authority in the West Bank and Gaza Strip has put new focus on the self-determination issue. It is, of course, within the rights of the Palestinian people as a collectivity to forego a claim to part of the territory to which they are entitled. By negotiation with Israel, this might be done. Repatriation, as a right adhering to the individual, is not subject to being ceded by the collectivity. (Quigley, 2007, 16)

Jerusalem Embassy Act (1995)

Bill Clinton didn't want it, the Israeli prime minister was against it, and yet the U.S. Congress voted overwhelmingly 23 years ago to move the U.S. Embassy from Tel Aviv to Jerusalem. Successive presidents blocked the law's implementation until this year, when Donald Trump decided to recognize Jerusalem as Israel's capital. Every six months for more than two decades, U.S. presidents have had to decide all over again whether to move the U.S. embassy in Israel from Tel Aviv to Jerusalem. Since the Clinton administration, they decided each time to keep the embassy where it is, seeking not to throw a wrench into delicate Middle East peace talks.

The law required the U.S. to move the embassy from Tel Aviv to Jerusalem by a set deadline, but conceded that the move could be put off for six months at a time as long as the President "determines and reports to Congress in advance that such suspension is necessary to protect the national security interests of the United States."

The Act asserted that every country has a right to designate the capital of its choice, and that Israel has designated Jerusalem. The act notes that "the city of Jerusalem is the seat of Israel's President, Parliament, and Supreme Court, and the site of numerous government ministries and social and cultural institutions." Jerusalem

is defined as the spiritual center of Judaism. Furthermore, it stipulates that since the reunification of Jerusalem in 1967, religious freedom has been guaranteed to all.

The United States described the evolution of its position on Jerusalem from this point forward in its 2014 merits brief in the matter of Zivotofsky v. Kerry, stating: When Israel declared independence in 1948, President Truman immediately recognized the new state. But the United States did not recognize Israeli sovereignty over any part of Jerusalem. Nor did it recognize Jordanian sovereignty over the part of the city it controlled. That same year, the United Nations General Assembly, with United States support, passed a resolution stating that Jerusalem "should be accorded special and separate treatment from the rest of Palestine." In 1949, when Israel announced an inaugural meeting of its Parliament in Jerusalem, the Truman Administration declined to send a representative because "the United States cannot support any arrangement which would purport to authorize the establishment of Israeli . . . sovereignty over parts of the Jerusalem area."

In 1967, Israel established control over the entire city of Jerusalem. In subsequent United Nations proceedings, the United States stated that the "continuing policy of the United States Government" was that "the status of Jerusalem . . . should be decided not unilaterally but in consultation with all concerned." The United States emphasized that it did not recognize any Israeli measures as "altering the status of Jerusalem" or "prejudging the final and permanent status of Jerusalem."

In 1993, with the assistance of the United States, representatives of Israel and of the Palestinian people agreed that the status of Jerusalem is a core issue to be addressed bilaterally in permanent status negotiations. Subsequently, both President George W. Bush and President Obama sought to assist the parties in establishing negotiations on all outstanding issues, including Jerusalem's status.

Just as East Jerusalem is Palestinian territory under international law, so have Israel's West Bank settlements been constructed in violation of the Fourth Geneva Convention, to which Israel is a party. (Israel is also a signatory to the UN Charter and remains in perpetual violation of numerous Security Council resolutions, as well.)

Within this "highly sensitive" and "potentially volatile" context, "U.S. Presidents have consistently endeavored to maintain a strict policy of not prejudging the Jerusalem status issue and thus not engaging in official actions that would recognize, or might be perceived as constituting recognition," of Jerusalem as "a city located within the sovereign territory of Israel." This policy is rooted in the Executive's longstanding assessment that any such action would "discredit[] our facilitative role in promoting a negotiated settlement," which would be "damaging to the cause of peace and . . .therefore not . . . in the interest of the United States." That assessment affects a range of United States actions. In particular, the United States maintains its embassy in Tel Aviv. (https://www.lawfareblog.com/waiving-jerusalem-embassy-act-or-not)

A poll, taken in November 2017, by the Brookings Institute found that, of a national sample of 2,000 adults, 63% of Americans polled opposed the move

of the embassy from Tel Aviv to Jerusalem, while 31% supported it. Among Democrats, 81% opposed the move and 15% were in support, while among Republicans, 44% opposed the move and 49% supported it.

In the 2017 AJC Survey of American Jewish Opinion, done in September 2017, it was found that 16% of American Jews polled supported an immediate move of the embassy to Jerusalem, 36% wanted to move the embassy at a later date in conjunction with Israeli-Palestinian peace talks, 44% opposed moving the embassy, and 4% said they weren't sure.

The Jerusalem Embassy Act of 1995 is the most forceful expression of Congress's desire that the U.S. embassy be moved to Jerusalem. The act declares that "Jerusalem should be recognized as the capital of the State of Israel" and that "the United States Embassy in Israel should be established in Jerusalem no later than May 31, 1999." To ensure this happens, it imposes sanctions on the executive branch if it fails to take such steps along an enumerated timeline. Specifically, section 3(b) of the act states:

"The UN Charter recognizes the universal right to self-determination, and the UN cannot legally act in a manner that prejudices this right. Nevertheless, the partition plan was premised on the explicit rejection of Palestinian self-determination

Not more than 50 percent of the funds appropriated to the Department of State for fiscal year 1999 for ''Acquisition and Maintenance of Buildings Abroad'' may be obligated until the Secretary of State determines and reports to Congress that the United States Embassy in Jerusalem has officially opened.

The UN Charter recognizes the universal right to self-determination, and the UN cannot legally act in a manner that prejudices this right. Nevertheless, the partition plan was premised on the explicit rejection of Palestinian self-determination.

The UN Special Committee on Palestine (UNSCOP), the body that produced the partition plan, pointed out that for the majority Arab population of Palestine to exercise their right to self-determination would be contrary to the goal—supported by Western powers like Great Britain and the United States—of establishing a "Jewish National Home" in Palestine.

In all, there are seventeen UN Security Council resolutions condemning Israel for violating international law by attempting to annex East Jerusalem. The key point that the US mainstream media systematically misinform the public about is that the UN did not pass all of these resolutions because Jerusalem's status is "disputed" and needs to be determined through negotiations. On the contrary, every single one of these resolutions was passed because Jerusalem's status is not in dispute.

Under international law, as reflected in numerous UN Security Council

resolutions and affirmed in July 2004 by the International Court of Justice (ICJ), all of the Gaza Strip and the West Bank, including East Jerusalem, remains "Occupied Palestinian Territory". (https://www.foreignpolicyjournal.com/2017/06/23/why-the-us-moving-its-israel-embassy-to-jerusalem-would-be-illegal/)

In 1967, the Security Council failed to force Israel to withdraw from the Palestinian territory it took by force of arms. And since 1993, the Security Council has been even less active, because of the position of the United States that any Security Council action would erode the bilateral peace process

Conclusion

The UN Security Council has never exercised its powers under Chapter VII of the UN Charter to deal with threats to the peace, even though the Palestine- Israel conflict has been arguably the most intractable the United Nations has faced. The Security Council did not try to stop the Jewish Agency from taking territory in Palestine in 1948, or from expelling the Arab population. Ethnic cleansing became a serious matter to the Security Council in the Balkans in the 1990s. But in Palestine in 1948, the Council limited itself to verbal calls for cease fires.

In 1967, the Security Council failed to force Israel to withdraw from the Palestinian territory it took by force of arms. And since 1993, the Security Council has been even less active, because of the position of the United States that any Security Council action would erode the bilateral peace process.

The International Court of Justice, also, using the then-current terminology of obligations erga omnes, declared self-determination as an obligation owed to the international community as a whole in the East Timor case (1995), and reaffirmed it in the Legal consequences of the construction of a wall advisory Opinion(2004). All states are under a duty not to recognize territorial changes brought about by virtue of the use of force, which is essentially a negative duty of abstention, but they also have a positive duty to promote the realization of the right of self-determination in non-self-governing territories. While resolution 242 is, formally, merely a recommendation adopted under Chapter VI of the UN Charter, the prohibition on the acquisition of territory through the use of force is a binding rule of international law. Some claim, although this is contested, that the Security Council can disregard or vary the legal obligations of the parties when it is dealing with a dispute if this is embodied in a decision, in other words when the Security Council invokes and acts under Chapter VII of the UN Charter. By virtue of Article 25 of the UN Charter, Security Council decisions are binding on member States and prevail over their other legal obligations by virtue of Article 103. As resolution

242 was adopted under Chapter VI of the UN Charter, it is merely a non-binding recommendation. Its terms cannot over-ride binding law. Moreover, it is doubtful whether the Security Council is legally competent to adopt a resolution which disregards the prohibition on the acquisition of territory through the use of force. As the International Court affirmed in the Legal consequences of the construction of a wall advisory opinion, this prohibition is a corollary of the prohibition of the threat or use of force in international relations, therefore it presumably shares the ius cogens status of the latter.

Whether justice can be restored is the task now before the international community. It is beyond the scope of this article to formulate proposals. Justice has been overridden for so long that restoring it presents serious problems. Yet in its approach, the international community must understand where the true claims to justice lie, and must make policy to recognize those claims.

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