



INTERNATIONAL CONFERENCE ON THE QUESTION OF JERUSALEM*

Jerusalem and the international community: providing political and economic support

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CHECK AGAINST DELIVERY

PLENARY III

International and regional support for East Jerusalem

Leveraging international law and UN resolutions

Paper presented by

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Introduction

May I first express my gratitude and thanks for the honour of being asked to speak to you today as part of the United Nations conference on the question of Jerusalem. Please excuse my physical absence from the conference, but I am pleased that I can join you in a virtual way.

I have been asked to address the issue of leveraging international law and UN resolutions to advance a just and final settlement on the question of Jerusalem. Of course, the question of Jerusalem is inseparable from the larger question of self-determination for the Palestinian people, and the achievement of a final, just and durable peace between Israel and Palestine.

In the short time that I have before you today, I want to address four aspects of this topic, all within the framework of international law. As such, while there have been many diplomatic and political proposals to resolve the question of Jerusalem, the foundational test that we must rely upon to assess any of these proposals is whether they met the foundational standards of fairness, equality and justice that are mandated by international law.

And as my final preliminary remark, I would like to stress the indispensable importance of using international law as our universal measuring stick. International law is our global language, it is one of our most vital of common goods that we share, and it reflects the progress that we have made respecting international morality and political consensus. Above all, international law is the promise that states make to one another to maintain peace and pursue justice.

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1. International Law and the Israel-Palestine Conflict

International law has spoken regularly and resolutely with respect to the larger issues involved in the Israel-Palestine conflict, which also bear upon the question of Jerusalem.

- The annexation of territory through the use of war or force has been strictly forbidden by international law since the adoption of the Charter of the United Nations in 1945.¹ This principle was affirmed in UNSC resolution 242 in November 1967,² and re-affirmed most recently in UNSC resolution 2334, adopted in December 2016.³
- The Palestinian territories captured by Israel in the June 1967 war are almost universally accepted by the international community as being occupied, which means that the full protections of the *Fourth Geneva Convention of 1949* are extended to the Palestinian people and their lands.⁴
- Given the application of the *Fourth Geneva Convention* to the oPt, international law strictly forbids the implantation of civilian settlers into territories deemed to be occupied, in order to prevent demographic engineering by the occupying power and to forestall the displacement of the protected indigenous peoples of that territory.⁵ Indeed, under the 1998 *Statute of Rome*, this would be a presumptive war crime.⁶
- Self-determination is perhaps the most central of collective human rights in international law,⁷ and the United Nations has stated on numerous occasions that the Palestinian people are entitled to exercise this right in their homeland.⁸

¹ *Charter of the United Nations*, 1945, 1 UNTS XVI, Article 2(4).

² S.C. Res. 242, U.N. Doc. S/RES 242 (22 November 1967).

³ S.C. Res. 2334, U.N. Doc. S/RES 2334 (23 December 2016).

⁴ S.C. Res. 2334, U.N. Doc. S/RES 2335 (23 December 2016); G.A. Res. 71/96, U.N. Doc. A/RES/71/96 (6 December 2016).

⁵ *1949 Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War*, 75 UNTS 287/ 1958 ATS No 21, Article 49(6).

⁶ *1998 Rome Statute of the International Criminal Court*, 2187 UNTS 90/37 ILM 1002 (1998)/[2002] ATS 15, Article 8(2)(b)(viii).

⁷ *Charter of the United Nations*, 1945, 1 UNTS XVI, Article 1(2); UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, Article 1; UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, Article 1.

⁸ G.A. Res. 71/184, U.N. Doc. A/RES/71/184 (19 December 2016).

- Finally, each state signatory to the *Fourth Geneva Convention* has a specific obligation not only to each respect the Convention, but also to ensure respect by all other High Contracting Parties as to its requirements and protections in all circumstances.⁹

2. International Law and the Question of Jerusalem

Turning now specifically to the question of Jerusalem, the United Nations has regularly spoken out about the legal status of Jerusalem, both before and after the 1967 conquest. Let me review some of the leading principles from these resolutions:

- In 1947, the United Nations General Assembly, when passing Resolution 181 regarding the partition on Palestine, declared the creation of a *corpus separatum* for Jerusalem, where the city would be administered by the UN for a ten-year period after which there would be a referendum to determine its future.¹⁰ Although this plan was never put into practice following the 1948-9 war, it still guides the diplomatic practice of states and demonstrates the refusal of the international community to accept a unilateral claim of sovereignty by one party to the exclusion of the other.¹¹
- In late June 1967, three weeks after capturing East Jerusalem, Israeli proclaimed the “municipal fusion” of West and East Jerusalem, and also annexed parts of the West Bank beyond the pre-June 1967 municipal borders of East Jerusalem. Early the following month, the United Nations General Assembly condemned the move by Israel to change the status of the city, and declared the measures “invalid.”¹²

⁹ *1949 Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War*, 75 UNTS 287/ 1958 ATS No 21, Article 1. Also see: International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3, Article 86; and S.C. Res. 681, U.N. Doc. S/RES 681 (20 December 1990).

¹⁰ GA Res. 181 (II), UN Doc. A/RES/181(II) (29 November 1947).

¹¹ See the first paragraph of the preamble in GA Res. 71/25, UN Doc. A/RES/71/25 (30 November 2016). Also see M. Dumper, “Constructive ambiguities? Jerusalem, international law, and the peace process” in S. Akram et al, *International Law and the Israeli-Palestinian Conflict: A Rights-Based Approach to Middle East Peace* (London: Routledge, 2011) 119.

¹² GA Res. 2253, UN Doc. A/RES/2253 (ES-V) (4 July 1967); GA Res. 2254, UN Doc. A/RES/2254 (ES-V) (14 July 1967).

- In 1980, the Security Council adopted three resolutions with respect to the status of Jerusalem. In Resolution 465, the Council affirmed that Jerusalem was part of the occupied Palestinian territory, the *Fourth Geneva Convention* applied, and “all measures taken by Israel to change the physical character, demographic composition, institutional structure or status” of any of the occupied territories had “no legal validity.”¹³ Later, in Resolutions 476 and 478, the Security Council expressly denounced the legislative steps being considered by the Israeli Knesset to extend formal Israeli sovereignty over East Jerusalem as both “null and void and must be rescinded immediately” and as a violation of international law.¹⁴
- In 2004, the International Court of Justice stated, in its Advisory Opinion, that the Wall built by Israel in the occupied territories, including East Jerusalem, was illegal under international law, and approvingly cited Security Council resolutions 298 (1971) and 478 (1980) on the unlawfulness of Israel’s actions to alter the status of Jerusalem.¹⁵
- In December 2016, the Security Council re-affirmed that East Jerusalem is part of the occupied Palestinian territory, the Fourth Geneva Convention applies, the settlements are in flagrant violation of international law, and it will not recognize any changes to the 4 June 1967 lines, including those with regard to Jerusalem.¹⁶
- In the same month, the General Assembly adopted its latest resolution on Jerusalem (by a vote of 149/7/8 /29), stating that all legislative and administrative measures taken by Israel with respect to the character and status of Jerusalem are “null and void and must be rescinded immediately”, and stressed that “a comprehensive, just and lasting solution” to the Question of Jerusalem should take into account the “legitimate concerns of both the Palestinian and Israeli sides”, including provisions to ensure

¹³ S.C. Res. 465, UN Doc. S/RES/465 (1 March 1980).

¹⁴ S.C. Res. 476, UN Doc. S/RES/476 (30 June 1980); S.C. 487, UN Doc. S/RES/478 (20 August 1980). The Israeli Knesset had adopted the “Basic Law: Jerusalem, Capital of Israel” on 30 July 1980 (https://www.knesset.gov.il/laws/special/eng/basic10_eng.htm). Also see S.C. Res. 298, UN Doc. S/Res/298 (25 September 1971).

¹⁵ [2004] ICJ Rep. 136, 43 ILM 1009, paras. 75, 120, 122.

¹⁶ S.C. Res. 2334, U.N. Doc. S/RES 2334 (23 December 2016).

freedom of worship and the unhindered access to the holy places by people of all religions and nationalities.¹⁷

3. Leveraging International Law and UN Resolutions

Given the consistent stance taken by the United Nations Security Council and the General Assembly on the key international law issues respecting Jerusalem – it is occupied territory, the Fourth Geneva Convention applies, the Israel settlements in East Jerusalem are illegal, all of the measures enacted by Israel to alter the status and demographic composition of East Jerusalem are null and void and contrary to international law, and any final settlement must ensure the rights of all peoples who call Jerusalem home, as well as the rights of all peoples to their holy sites – we now turn our attention to what can be done through international law in order to transform Jerusalem into a true and inclusive City of Peace.

As a prelude to laying out how international law might be leveraged to ensure a just, durable and final resolution of the Question of Jerusalem, let me make three brief points that will shape my comments on leveraging:

1. International law is quite clear on the obligations of Israel, the occupying power, and what it is forbidden to do with respect to Jerusalem. In response, Israel has been consistently and resolutely deliberate in its defiance of the international community's clear directions on Jerusalem, as expressed by the Security Council, the General Assembly, the International Court of Justice, and the High Contracting Parties to the Geneva Conventions, among others.¹⁸
2. The principles for a just, durable and final settlement of the Question of Jerusalem can be found in both the principles of modern international law and the large body of resolutions adopted by the United Nations. I have, a moment ago, laid out the key governing principles from the UN Resolutions. Among the core principles of modern

¹⁷ G.A. Res. 71/25, U.N. Doc. A/RES/71/25 (16 December 2016).

¹⁸ Article 25 of the Charter of the United Nations requires all members to “accept and carry out the decisions of the Security Council in accordance with the present Charter.”

international law that are pertinent to Jerusalem are justice, fairness and equality.

These principles run through international humanitarian law and international human rights law; and

3. International law does not prescribe a particular solution or resolution to the Question of Jerusalem, outside of ensuring that the principles cited above are employed to reach a just solution. In other words, international law is flexible enough to encompass an agreement on Jerusalem – whether it be a re-divided city, a shared city, a unified city, a communal city, an international city, or some other model – that meets the political, administrative, economic, social and spiritual needs of all of its inhabitants on the basis of collective and individual equality.

Turning to the issue of leveraging, I would like to advance three ideas. Ultimately, these ideas are intrinsically tied to the larger question of the right to self-determination of the Palestinian people. Jerusalem is but one aspect, albeit a vitally important and central aspect, of the Question of Palestine.¹⁹

One other notion: I note that the International Court of Justice, in its 2004 *Advisory Opinion* regarding the Israeli Wall, ruled that other states have legal obligations flowing from the Israeli violations of international law in the occupied Palestinian territories. After noting that, in international law, “all States can be held to have a legal interest in the protection” of fundamental rights in international law, the Court held that:

...all the States parties to the [*Fourth*] *Geneva Convention*...are under an obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with humanitarian law as embodied in that *Convention*.²⁰

1. The United Nations General Assembly is in a position to commission legal studies designed to bring Israel into compliance with the United Nations’ body of resolutions on Jerusalem. These studies should include (i) a legal assessment of the obligations

¹⁹ Many of these ideas were inspired by Stephanie Koury’s essay: “Legal Strategies at the United Nations: A Comparative Look at Namibia, Western Sahara and Palestine” in S Akram et al, *International Law and the Israeli-Palestinian Conflict: A Rights-Based Approach to Middle East Peace* (London: Routledge, 2011), chap. 5.

²⁰ *Advisory Opinion, supra*, note 15, at para. 159.

- upon the High Contracting Parties to the Geneva Conventions under common Article 1 to ensure respect and compliance by a High Contracting Party that is in persistent breach of its duties and responsibilities under the Fourth Geneva Convention; (ii) a legal and social assessment of the status of Jerusalem as a Holy City to three world religions and how that may be preserved both while occupation continues and under future conditions of a just settlement of the Question of Jerusalem; (iii) a legal study into the status and membership of a UN member that persistently defies the direction of the Security Council and/or the General Assembly; and (iv) a legal study of the different forms that the future political status of Jerusalem may take, and which forms would be broadly compliant with international law and which ones would not.
2. The General Assembly is also in a position to seek a future advisory opinion from the International Court of Justice as to the continued legality of Israel's occupation of the Palestinian territory, including Jerusalem. If the occupying power appears to have breached all, or most, of the core principles of the law of occupation – (i) no annexation of territory, (ii) acting in the best interests of the population under occupation, (iii) occupations are inherently temporary and short-term, (iv) all of the leading legal obligations of international humanitarian and human rights law (no civilian settlements, no collective punishment, no persistent and egregious violations of human rights, etc) must be obeyed and (v) the occupying power must act in good faith throughout, including accepting and obeying UN resolutions – then I submit that the international community has an obligation to judicially determine whether the occupation has crossed the bright red line into illegality. If it has indeed crossed this line, then the international community has a duty to take every reasonable measure to end the occupation as expeditiously as possible, and to assist the population under occupation to either achieve self-determination and/or to restore its previous political status.
 3. Finally, as the General Assembly should consider a legal study to review its powers under the Uniting for Peace resolution, in a manner that would assist the international

community to bring the occupation to an end. Exploring the use of this extraordinary power is justified in these circumstances, given the permanent responsibility of the United Nations on the Question of Palestine, given the length of the unresolved conflict, given its centrality in world politics and diplomacy, given the clear direction of international law in shaping its outcome, and given the resistance of the occupying power in complying with the strictures of international law to end the occupation and reach a just settlement.