

Distinctions with Differences

Jerusalem as corpus separatum and its legal implications

Diakonia International Humanitarian Law Resource Centre
July 2017

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Acronyms

UN	United Nations
IHL	International Humanitarian Law
IHRL	International Human Rights Law
EU	European Union

Introduction

Resolution of Jerusalem's status arguably remains controversial because of the divergent analytical lenses through which the conflict's parties, and others, view its intertwined legal, territorial, historical and religious issues. Thus, Jerusalem persists as an intricate and intractable cornerstone of the Israel-Palestine conflict.

This legal brief outlines the *corpus separatum* concept originally proposed for Jerusalem in 1947 and briefly surveys subsequent interest, invocation of, and criticism surrounding the concept. Emphasis is placed on the concept's basic history, legal implications and current relevance of the *corpus separatum* internationalization idea for Jerusalem. It also analyzes the *corpus separatum* concept with an eye to its possible relevance to an eventual peaceful resolution of the Israeli-Palestinian conflict.

At the outset, however, the continuing lack of an international consensus about territorial title to Jerusalem necessitates a summary examination of the historical and international legal context, as well as examination of distinctions in how the international community views the status of East and West Jerusalem respectively.

I. HISTORICAL BACKGROUND

A. Advent of the Jerusalem *corpus separatum*

Following Great Britain's referral of the question of Palestine to the United Nations (UN) in 1947,¹ the UN General Assembly adopted Resolution 181, a partition plan for Palestine, on 29 November 1947 (Partition Plan).² The Partition Plan recommended the division of Palestine into Jewish and Arab states, with the Jerusalem area to be constituted as a *corpus separatum* under a special international regime administered by the Trusteeship Council on behalf of the UN.³

The idea of internationalizing the administration of Palestine originated in the secret 1916 Sykes-Picot agreement between the French and British governments, to which tsarist Russia also assented.⁴ This internationalization concept was developed further in Great Britain's 1937 Royal Peel Commission Report, undertaken in response to strenuous mid-1930s Palestinian resistance to Jewish immigration, but it envisioned internationalization applying only to Palestine's holy sites.⁵

Securing unfettered access to Palestine's Christian holy sites appears to have been a prime motive for these and other earlier foreign approaches toward Jerusalem. The 1947 Partition Plan's *corpus separatum*, the first plan to concretely propose a unique and separate status for the city, specifically aimed to ensure economic sustainability, and stability, in a broader Jerusalem environs, yet was framed with a special focus on the three major monotheistic faiths' interests in the city, including its numerous holy sites.⁶

¹ UNSCOP, Report to the General Assembly (Sep. 3, 1947) [hereinafter UNSCOP Report], <https://unispal.un.org/DPA/DPR/unispal.nsf/0/07175DE9FA2DE563852568D3006E10F3>.

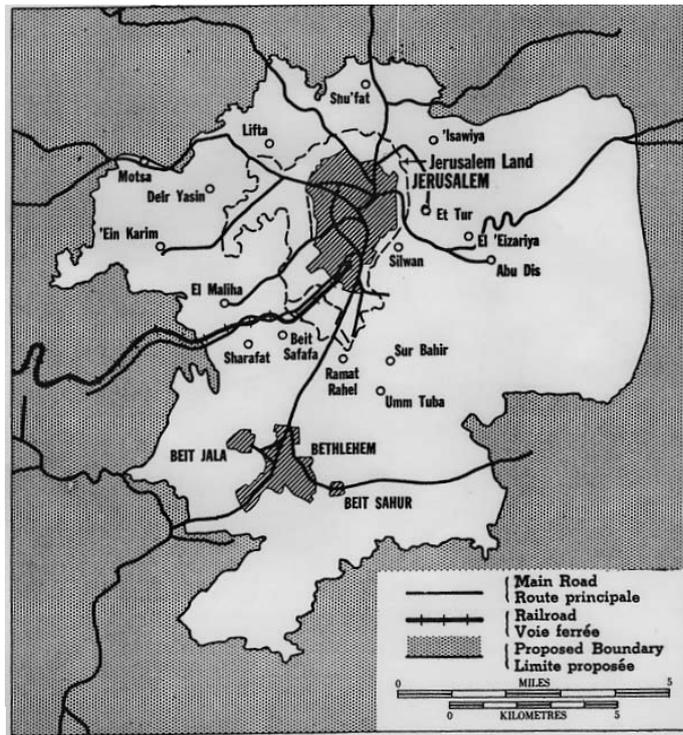
² G.A. Res. 181 (II), Future government of Palestine, U.N. Doc. A/RES/181 (II) (Nov. 29, 1947) [hereinafter Partition Plan].

³ Id.; The Trusteeship Council, a principle UN organ, was established in 1947 pursuant to Chapter XIII of the UN Charter to ensure that former League of Nations trust territories, including Palestine, were administered in their inhabitants' best interests and to maintain international peace and security. On 1 December 1947, the Trusteeship Council appointed a Working Committee composed of Australia, China, France, Mexico, the United Kingdom and the United States to aid in formulating recommendations to the Council for the Statute of the City of Jerusalem. See Trusteeship Council, 2(2) INT'L ORG. 337-342 (1948).

⁴ Sykes-Picot Agreement, May 16, 1916, http://avalon.law.yale.edu/20th_century/sykes.asp.

⁵ League of Nations, Report of the Palestine Royal Commission (Peel Commission) (Nov. 30, 1937), <https://unispal.un.org/DPA/DPR/unispal.nsf/561c6ee353d740fb8525607d00581829/08e38a718201458b052565700072b358?OpenDocument>.

⁶ See, e.g., Davinia F. Abdul Aziz, Utility of an International Legal Approach to the Jerusalem Question: Camera Obscura or Camera Lucida? 2003 Sing. J. Int'l Comp. L. 511, 526-531 (2003) [hereinafter Aziz].



CITY OF JERUSALEM
BOUNDARIES PROPOSED
(map published as Annex B to 1947
Partition Plan)

B. Envisioned *corpus separatum*

The 1947 Partition Plan envisioned for the *corpus separatum* was to encompass a greater Jerusalem area, spanning from ‘Ein Kerem to the West, Bethlehem to the South and Shu’fat to the North, and to comprise a special international regime administered by the Trusteeship Council on behalf of the UN (see Partition Plan map reproduced above). The Trusteeship Council was to elaborate, and approve, a detailed Statute of the City, setting forth the detailed substance for the *corpus separatum*’s governance. The Statute was to include: (a) appointment of a Governor to administer and conduct the city’s external affairs with assistance of an administrative staff comprised of Jerusalem and Palestine residents, wherever possible; (b) autonomous local units, such as municipalities, which were to enjoy wide local governance and administrative powers; (c) an elected Legislative Council that would exercise legislative and taxation powers. The *corpus separatum* was to be demilitarized and its neutrality expressly declared, while religious, minority and property rights, including with respect to Holy Places, were to be “under the guarantee of the United Nations, and no modifications shall be made in them without the consent of the General Assembly of the United Nations.”⁷

C. Facts on the ground, rejection and non-implementation 1948-1950

Evolving facts on the ground during the course of the 1948-49 war, most notably the occupation and de facto division of Jerusalem by Israeli and Jordanian forces, wholly defeated implementation of the 1947 Partition Plan’s proposed *corpus separatum*.⁸ Inasmuch as the UN seized itself of the question of Palestine in response to mandatory power Great Britain’s specific 1947 request,⁹ prompt Palestinian rejection of the Partition Plan, swiftly followed by Great Britain’s May 1948

⁷ 1947 Partition Plan, Part 3C, Statute of the City.

⁸ See, e.g., H. EUGENE BOVIS, JERUSALEM QUESTION 67-69 (1971) [hereinafter Bovis]. YOSSIE FEINTUCH, U.S. POLICY ON JERUSALEM 50 (1987) [hereinafter Feintuch].

⁹ See 1947 UNSCOP Report.

withdrawal from, and cancelation, of its mandatory power responsibility over Palestine arguably served to terminate it.¹⁰ Moreover, by virtue of its General Assembly origin, the Partition Plan arguably only ever had recommendatory, as opposed to binding, power.¹¹ Nevertheless, Britain's withdrawal from Palestine did not preclude the United Nations from seizing itself of Palestine issues based on the nascent UN core peace and security mandate.

Thus, the 3 April 1949 Israel-Jordan General Armistice Agreement formalized Jerusalem's de facto division between the two powers effectively controlling different parts of the former mandate territory, yet the agreement expressly disavowed that it should be interpreted as having any relevance to the ultimate political and legal disposition of Palestine.¹²

The UN General Assembly nevertheless also persisted in adopting Resolution 303 on 9 December 1949, which again specifically called for Jerusalem to be placed under a special permanent *corpus separatum* international regime and requested for the Trusteeship Council to prepare and approve a Statute of the City along the lines set forth in the defunct 1947 Partition Plan.¹³ The draft Statute of the City subsequently approved by the Trusteeship Council on 4 April 1950 substituted a system of communal election to the Legislative Council, which was to govern the city in conjunction with a Governor, by Christians, Muslims and Jews in lieu of universal suffrage and proportional representation, as had been stipulated in 1947 Partition Plan *corpus separatum* scheme. These and other changes, together with the reality that the 1950 draft Statute of the City could not be implemented, as a practical matter, because of Israeli and Jordanian opposition, ultimately led the General Assembly to ignore these 1950 efforts. Subsequent General Assembly and other UN and diplomatic discussions similarly led nowhere.¹⁴

Neither the failure to implement the 1947 Partition Plan *corpus separatum*, nor subsequent related and similarly failed efforts in the UN General Assembly amounted to international community acquiescence to Israeli and Jordanian sovereignty over the parts of Jerusalem each had occupied and asserted sovereignty over, however. Despite most states' recognition of both Jordan and Israel, no recognition of sovereignty could be assumed to have been granted in Jerusalem. Most states carefully made clear their non-recognition of either states' de jure exercise of sovereignty over any part of the city. This non-recognition of de jure Israeli or Jordanian sovereignty was clear despite some third states' acceptance of each occupying state's respective de facto control in the parts of the city controlled by each.¹⁵

¹⁰ See, e.g., Michael Eisner, Jerusalem: An Analysis of Legal Claims and Political Realities, 12 WIS. INT'L L. J. 249-250 (1993); including authorities cited therein. See also, e.g., Henry Cattán, Status of Jerusalem, 10 J. PALESTINE STUDI. 3, 8-9 (1981) [hereinafter Cattán]; arguing, among other things, that "[t]he only 'status' or 'legal status' or 'specific status' which Jerusalem possesses is that laid down in resolution 181 [the Partition Plan's *corpus separatum*"].

¹¹ See, e.g., Eisner, p. 55; but see VICTOR KATTAN, FROM COEXISTENCE TO CONQUEST 154-155 (2009); relating that the then-UN Secretary General, Trygve Lie, viewed the Partition Plan as legally binding because the UN General Assembly was successor to the Council of the League of Nations and noting that the Government of Israel also argued that the Partition Plan was binding and based its statehood claim on it. See also Guy Harpaz, The Dispute over the Sovereignty of Jerusalem: EU Policies and the Search for Internal Legal Coherence and Consistency with International Law, 17 EUROPEAN FOREIGN AFF. REV. 451-470 n129 (2012) [hereinafter Harpaz].

¹² Hashemite Jordan Kingdom – Israel: General Armistice Agreement, in U.N. Doc. S/1302/REV.1 (Apr. 3 1949), <https://unispal.un.org/DPA/DPR/unispal.nsf/o/F03D55E48F77AB698525643B00608D34>. Article II reads in full: "It is also recognized that no provision of this Agreement shall in any way prejudice the rights, claims and positions of either Party hereto in the ultimate peaceful settlement of the Palestine question, the provisions of this Agreement being dictated exclusively by military considerations."

¹³ G.A. Res. 303 (IV), Palestine: Question of an international regime for the Jerusalem area and the protection of the Holy Places, U.N. Doc. A/RES/303 (IV), (Dec. 9, 1949), <https://unispal.un.org/DPA/DPR/unispal.nsf/o/2669D6828A262EDB852560E50069738A>. See also Feintuch, 82-85.

¹⁴ Bovis, 68-92 (detailing the intricacies of 1948-50 diplomatic efforts, and the ultimate failure, to revive numerous variations of the Partition Plan's *corpus separatum* proposal and other proffered arrangements for Jerusalem). See also Feintuch, 102, 108, 141.

¹⁵ See, e.g., Antonio Cassese, Legal Considerations on the International Status of Jerusalem, III PALESTINE Y.B. INT'L L. 13, 22-28 (1986) [hereinafter Cassese]; dismissing that sovereignty could be established over the highly charged and sensitive holy city by acquiescence or silence, which in any case was absent. See also Cattán, 9. See also Feintuch 102-121, detailing the evolution of United States Jerusalem policy between 1950 and 1967, culminating in a 1966 United States effort to demonstrate its "resolve to take no overt action which would violate the concept of Jerusalem as a city with an independent political status-a concept shared also by the U.N., Britain, and France."

II. SOVEREIGN CLAIMS OVER THE TERRITORY OF JERUSALEM

Territorial sovereignty arguably constitutes the core organizing principle of international law¹⁶ and “denotes the legal competence which a state enjoys in respect of its territory.”¹⁷ The 1928 Island of Palmas arbitration judgment conveys the concept’s classical essence and notably makes clear that the international law term ‘sovereignty’ refers to territorial sovereignty and that its exercise amounts to independence.¹⁸ It also bears noting, however, that a traditional sovereignty definition, which insists on one state exercising exclusive power, could serve to block more modern or creative approaches to navigating Jerusalem’s thorny sovereignty thicket. Such approaches could include the possibilities of joint, third-party or functional sovereignty, non-traditional approaches that arguably may be required to reach a stable and mutually agreed solution.¹⁹

Territorial sovereignty in the Jerusalem context merits examination because the parties to the conflict hold diametrically opposed views about who holds a valid claim to it, both currently and, more generally, in the post-Ottoman Empire era. Moreover, surveying the territorial sovereignty analytical landscape sheds clarifying light on the *corpus separatum* concept’s continued relevance and possible applicability.

The official Palestinian position posits that sovereignty over the entirety of historical Palestine, including Jerusalem, rested with the Ottoman Empire prior to the British Mandate. In the PLO view, sovereignty over Jerusalem remains in abeyance today, as it was in the British Mandate period. Thus, the creation of the mandate in 1920 did not transfer sovereignty to the League of Nations or Great Britain, as mandatory power. The PLO further asserts that because the Palestinian right to self-determination and Palestine’s provisional independence, under the League of Nations mandate to Great Britain, have been recognized, sovereignty rests with the Palestinian people and lies dormant, but will be exercised in historic Palestine once independence is achieved.²⁰

Israel’s official position asserts that the “Jewish claim to Jerusalem is rooted in 3,000 years of history.” This history notably includes that “Jerusalem has been at the center of Jewish consciousness for over three thousand years, even before King David made it the capital of his kingdom in 1004 B.C.E” and that “throughout the Diaspora, Jerusalem has always remained foremost in the thoughts of the Jewish people as they turned to Zion three times a day in prayer.”²¹

¹⁶ See, e.g., States, Fundamental Rights and Duties, MAX PLANCK ENCYC. INT’L L., para. 36 (Jan. 2009), <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1112>.

¹⁷ JAMES CRAWFORD, BROWNLIE’S PRINCIPLES OF INTERNATIONAL LAW 211 (8th ed., 2012).

¹⁸ “Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State. The development of the national organisation of States during the last few centuries and, as a corollary, the development of international law, have established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations. Territorial sovereignty is, in general, a situation recognized and delimited in space, either by so-called natural frontiers as recognised by international law or by outward signs of delimitation that are undisputed, or else by legal engagements entered into between interested neighbours, such as frontier conventions, or by acts of recognition of States within fixed boundaries.”; see *Island of Palmas Case (Neth. v. U.S.)*, Award II RIAA 829, 838 (Perm. Ct. Arb. 1928).

¹⁹ See, e.g., Hussein Agha & Robert Malley, *Camp David: The Tragedy of Errors*, N.Y. REV. BOOKS (Aug. 9, 2001), <http://www.nybooks.com/articles/2001/08/09/camp-david-the-tragedy-of-errors/>; describing, among others, practical negotiating efforts to resolve the issue of sovereignty over Jerusalem and its holy sites during the US brokered July 2000 Camp David talks between Israel and the PLO. See also Aziz; outlining a range of possible approaches toward accommodating competing sovereignty claims over Jerusalem.

²⁰ Palestine Liberation Organization-Negotiations Affairs Department, *Status of Jerusalem in International Law*, <http://www.nad-plo.org/etemplate.php?id=33>.

Israeli opposition to the Palestinian sovereignty claim over Jerusalem centers on the assertion that termination of the British mandate in May 1948 created a sovereignty vacuum.²² Thus, according to Israel, seizure of West Jerusalem during the 1948 war was perfectly logical and valid,²³ while Israel's 1967 annexation of East Jerusalem was undertaken as a legitimate exercise of Israel's right to self-defense.²⁴

This post-mandate sovereignty vacuum argument has, in turn, been criticized because it rests on the premise that Jerusalem's Palestinian residents possess no legal claim to sovereignty or, as the word 'vacuum' appears to suggest, that these Jerusalem Palestinians simply are not present. The valid claim to sovereignty for Palestinians, together with the bedrock international law prohibition against acquisition of territory by force, forms the basis of criticism of Israel's assertion that it acted legitimately and in acquiring West Jerusalem in 1948, based on the 'legal vacuum' theory, and East Jerusalem in 1967, based on Israel's assertion of self-defense.²⁵

This criticism of Israel's asserted basis for sovereignty in Jerusalem centers around two principles. First, that Palestinians were indeed present in Jerusalem in 1948, negating the 'legal vacuum' theory and, second, with respect to Israel's 1967 East Jerusalem occupation, that not even a legitimate self-defensive war and attendant occupation of territory could confer sovereignty to Israel over any part of Jerusalem. Thus, international law makes clear that a state may not unilaterally assert its sovereignty over a territory apart from the only modern exception to this rule, where a territory never has been subject to any state's sovereignty (so-called terra nullius), or where any prior sovereign has relinquished its sovereignty. Neither exception applies in the Jerusalem context.²⁶

Moreover, even where a state asserts control over a territory by military means, for example, by occupying it for whatever legitimate or illegitimate reason, that state is strictly prohibited from acquiring sovereign legal title over such territory.²⁷ Jerusalem clearly does not fit the terra nullius paradigm. Moreover, the critical view asserts Israel never had, nor can it plausibly make, any claim to sovereignty or even exercise of de facto authority over Jerusalem prior to 1948. A history of prior sovereignty could, in theory, lead to the conclusion that sovereignty merely reverted to Israel following its occupations of the city's western and eastern parts in 1948 and 1967 respectively.²⁸ Of course, however, Israel did not exist prior to 1948, thereby defeating any such reversion of sovereignty claim.

Thus, neither Israel's nor Jordan's presence in Jerusalem after Britain's withdrawal and termination of its mandate in 1948 conferred to either state a valid sovereignty claim over any part of the city. Moreover, apart from recent United States Trump administration announcements of its intention to move the US embassy to Jerusalem²⁹ and a 6 April 2017 Russian statement asserting

²¹ Israeli Ministry of Foreign Affairs, *The Status of Jerusalem*, <http://www.mfa.gov.il/mfa/mfa-archive/1999/pages/the%20status%20of%20jerusalem.aspx>. See also ELIHU LAUTERPACHT, *JERUSALEM AND THE HOLY PLACES* 47-53 (1968) [hereinafter *Lauterpacht*].

²² Moshe Hirsch, *Legal Status of Jerusalem Following the ICJ Advisory Opinion on the Separation Barrier*, 38 *ISR. L. REV.* 298, 300 (2005); summarizing legal scholarship supporting Israel's position.

²³ *Lauterpacht*, 37-46.

²⁴ Israeli Ministry of Foreign Affairs, *Answers to Frequently Asked Questions- Palestinian Violence and Terrorism- The International War against Terrorism* (Aug. 5, 2002), <http://www.mfa.gov.il/mfa/foreignpolicy/faq/pages/answers%20to%20frequently%20asked%20questions-%20palestinian.aspx>. But see, e.g., JOHN QUIGLEY, *THE SIX DAY WAR AND ISRAELI SELF-DEFENSE: QUESTIONING THE LEGAL BASIS FOR PREVENTIVE WAR* (2012); questioning the premises for citing the six day war as a precedent for the legitimate use of force in anticipatory self-defense.

²⁵ Eisner, 247-9.

²⁶ See, e.g., Cassese, 30-31.

²⁷ *Id.* Self-defense is limited to those measures necessary to protect the defender against an armed attack; acquisition of territory is not a necessary measure in the self-defense context.

²⁸ Cassese, 23-25.

²⁹ See, e.g., Jonathan Broder, *Why Trump Won't Move the U.S. Embassy in Israel to Jerusalem – At Least for now* (Jan. 25, 2017), <http://www.newsweek.com/trump-jerusalem-embassy-move-tel-aviv-netanyahu-kushner-friedman-palestinians-548185>.

that it would view West Jerusalem as Israel's capital in the context of a peace agreement,³⁰ no state explicitly has recognized Israeli or Palestinian sovereignty over any part of Jerusalem, west or east.³¹ In this same vein, the European Union (EU) ultimately backed away from declaring East Jerusalem the future capital of a Palestinian state in December 2009, despite that discussions between European states at that time evidently indicated that this position enjoyed some currency among them and their representatives.³²

III. WHAT DO INTERNATIONAL LAW, INCLUDING INTERNATIONAL HUMANITARIAN LAW, HAVE TO DO WITH IT?

Following Israel's 1967 occupation of the West Bank, including East Jerusalem, Israel unilaterally annexed a 70 square kilometer area, the entirety of which commonly is referred to as East Jerusalem.³³ Acquisition of territory by force is prohibited under international law.³⁴ The UN Security Council and wider international community never have recognized Israel's annexation of this 70 square kilometer area and continue to view East Jerusalem as an integral part of the occupied Palestinian territory.³⁵

A. International humanitarian and human rights law

International humanitarian law (IHL) and international human rights law (IHRL) prohibit the impacts that result from policies related to Israel's annexation of East Jerusalem. Israel's assertion of its domestic legal jurisdiction in East Jerusalem and its imposition of highly vulnerable permanent residency status on East Jerusalem Palestinians in their place of origin violate the minimum protections that an occupying power is required to provide to protected persons under IHL,³⁶ as well as the most fundamental tenets of international human rights law (IHRL).³⁷

Accordingly, the consistent international community position has been, and remains, that Israel's annexation of East Jerusalem, undertaken in the context of its military occupation of the West Bank in June 1967, is illegal.³⁸

³⁰ Ministry of Foreign Affairs of the Russian Federation, Foreign Ministry statement regarding Palestinian-Israeli settlement (Apr. 6, 2017), http://www.mid.ru/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/2717182?p_p_id=101_INSTANCE_cKNonkJE02Bw&_101_INSTANCE_cKNonkJE02Bw_languageId=en_GB; "We reaffirm our commitment to the UN-approved principles for a Palestinian-Israeli settlement, which include the status of East Jerusalem as the capital of the future Palestinian state. At the same time, we must state that in this context we view West Jerusalem as the capital of Israel."

³¹ See, e.g., Federica Bicchì, *Europe under occupation: the European diplomatic community of practice in the Jerusalem area*, 25 *EUROPEAN SECURITY* 461, 467-470 (2016).

³² *Id.*, 471-472. See also Barak Ravid, Livni to Sweden: Ditch EU Plan on Dividing Jerusalem, *HA'ARETZ* (Dec. 1, 2009), <http://www.haaretz.com/livni-to-sweden-ditch-eu-plan-on-dividing-jerusalem-1.3077>; Howard Schneider, Israeli criticizes proposed E.U. stance on East Jerusalem, *WASHINGTON POST* (Dec. 2, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/12/01/AR2009120103153.html>.

³³ This annexed territory includes the six-square kilometer area defined as East Jerusalem under Jordanian rule, plus an additional 64 square kilometers of surrounding West Bank territory.

³⁴ U.N. Charter art. 2.4.

³⁵ See, e.g., UN Security Council Resolutions 252, 267, 471, 476, 478 and 2334. See also 9 December 2009 Council Conclusions on the Middle East Peace Process, Council of the European Union, 2985th Foreign Affairs Council meeting (stating that "[t]he Council recalls that it has never recognised the annexation of East Jerusalem").

³⁶ See, e.g., *Legality of Israel's Policy Regarding the Revocation of Residency in East Jerusalem*, Expert Legal Opinion by Michael Bothe (June 22, 2016), at 6; asserting, among other IHL and IHRL violations, that: Israel's imposition of permanent resident status on East Jerusalem Palestinians violates the occupying power's "duty to restore and ensure public order and safety, which in modern terms is understood as a duty to ensure good governance," a core tenet of the occupation law requirements under IHL contained in Hague Regulations Art. 43; further noting that "creating conditions which make the existence of many persons precarious is the contrary of promoting the wellbeing of the population,"; and, concluding that the Art. 43 good governance duty amounts to "a prohibition to extend the law of the occupying power to the occupied territory or to enact new laws unless they are necessary to ensure the wellbeing of the protected population of the occupied territory."

³⁷ *Id.*, 10-16; detailing numerous IHRL violations that arise where permanent resident status imposed on East Jerusalem residents by Israel in violation of IHL is revoked by Israel.

³⁸ See, e.g., Declaration of the Conference of the High Contracting Parties to the Fourth Geneva Convention and the Statement by the ICRC (Dec. 5, 2001); 2004 I.C.J. Rep. 136 (July 9), paras. 93-101.

Despite that no state has to date definitively recognized Israel or any other state's sovereignty over any part of Jerusalem, most States have accepted the de facto application of Israeli law in West Jerusalem. Yet none has demanded that IHL, and the law of occupation in particular, should be applied in West Jerusalem.³⁹ This raises the inevitable question of 'why?', as has been raised by an Israeli legal academic in regard to EU policy. The international law issues addressed in this critique, however, equally apply to the broader array of states that recognize Israel's de facto control over West Jerusalem:

...the EU recognizes Israel's de facto control over West Jerusalem, refusing to see it as occupied territory subject to the laws of belligerent occupation, although Israel's sovereignty over it is based on her use of force. Yet, at the same time, the EU's position on East Jerusalem is that this territory is under Israel's occupation and that Israel is subject to the laws of belligerent occupation, based on the customary and conventional international law principle of legal inadmissibility of sovereignty over territory through the use of force. The EU fails to offer an explanation as to why the same legal principle is applicable in one military-territorial context (the 1967 War and East Jerusalem) and not in another (the 1948 War and West Jerusalem), and why it adhered to international law in the former and to political reality in the latter.⁴⁰

No explanation for this apparent policy contradiction appears evident, nor has any explanation or rationale formally been proffered by the EU or other states. This appears to suggest that international law has been applied inconsistently with respect to Jerusalem's eastern and western parts. It also raises the question of whether it may be desirable for the international community to align itself around a comprehensive and consistent international law based policy that applies to the entirety of Jerusalem, east and west. That is, an international law based policy that extends beyond the existing broad international consensus regarding Israel's occupation and annexation of East Jerusalem and the applicability of IHL and the law of occupation in the East Jerusalem context.

IV. WHITHER THE *CORPUS SEPARATUM*?

UN General Assembly Resolution 303 of 9 December 1949, together with Jerusalem's virtual absence from the UN agenda between the early 1950s and the June 1967 war nominally preserved the *corpus separatum* as the only expressed UN Jerusalem policy.⁴¹ On the other hand, the organization consistently has adopted a cautious stand, neither insisting on internationalization of the city, nor its division,⁴² thus leaving the *corpus separatum* for states and others to preserve or promote.

Diplomatic activity after Israel's 1967 military occupation of the West Bank, including East Jerusalem, makes clear that the *corpus separatum* internationalization concept has neither been viewed by many states as a dead letter, nor relegated to irrelevance. Indeed, the *corpus separatum* idea arguably received fresh impetus, at least in some quarters, following Israel's June 1967 occupation and annexation of East Jerusalem.⁴³ This included the European Economic Community and its then nine member states, as it developed a nascent European foreign policy platform in the early 1970s.⁴⁴

³⁹ Ruth Lapidot, Jerusalem, MAX PLANCK ENCYC. INT'L L. (MAY 2013), [HTTP://OPIL.OUPLAW.COM/VIEW/10.1093/LAW:EPIL/9780199231690/LAW-9780199231690-E1303?RSKEY=PUSDAR&RESULT=1&PRD=OPIL](http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1303?rskey=PUSDAR&result=1&prd=OPIL).

⁴⁰ Harpaz, 480.

⁴¹ See Feintuch, 132. See also UN Committee on the Exercise of the Inalienable Rights & of the Palestinian People, The Status of Jerusalem (Aug. 31, 1997), <https://unispal.un.org/DPA/DPR/unispal.nsf/0/533B4714451B48BF0525651B00488D02>.

⁴² Cassese, 34-35.

⁴³ See, e.g., Id.

⁴⁴ Harpaz, 459; explaining that EEC appeared to have adopted the *corpus separatum* concept as early as 1971 and that it reiterated this position following the 1973 Yom Kippur war.

Further interest in, and momentum in support of, the *corpus separatum* approach evolved following the September 1993 PLO-Israel Declaration of Principles agreement and the ensuing Oslo peace process. Thus, for example, the EU reasserted its consistent, if not always strenuously or publicly stated, position directly to Israel in 1999 when it asserted that Jerusalem constitutes a *corpus separatum* and that this position is in accordance with international law.⁴⁵ Israeli officials flatly rejected this position⁴⁶ and successive governments of Israel have continued to reject the *corpus separatum* concept, declaring that Jerusalem will remain the undivided capital of Israel.⁴⁷

Ongoing adherence to the *corpus separatum* concept by the EU and its member states reinforces that the international community continues to view Jerusalem as something of a sui generis case. Israeli legal academics have posited that the EU's *corpus separatum* policy is inherently inconsistent with an international law based approach because of the *corpus separatum*'s non-binding UN General Assembly origin, its subsequent rejection, practical defeat and normative rendering as a dead letter by virtue of the UN's inability to implement it. This argument further points to the failure of the UN to revert to the *corpus separatum* concept at any time after 1952 and concludes by noting the absence of any reference to the concept in UN Security Council Resolution 242, which instead relies on the pre-1967 boundaries as the territorial benchmark for resolution of the Israel Palestine conflict.⁴⁸ This *corpus separatum* – international law inconsistency, it is asserted, amounts to an admission by the EU that resolution of Jerusalem and its issues cannot be based entirely on international law. Moreover, this argument also posits that European political and religious interests appear to drive the EU's *corpus separatum* policy, thereby compromising the integrity of the EU approach.⁴⁹

As a leading Palestinian Jerusalem legal scholar has asserted, however, support for a Jerusalem *corpus separatum* is not inherently inconsistent with an international law based approach. This is because “internationalization does not require the effective exercise of sovereignty by the international community.”⁵⁰ Thus, application of a special international regime to Jerusalem along the lines of the *corpus separatum* concept would provide for third-party administration (e.g., by the UN, as envisioned in UN Resolutions 181 and 303), but leave other sovereign attributes, such as legislative, judicial and taxation powers, vested with the city's inhabitants.⁵¹

⁴⁵ Foundation for Middle East Peace, Special Report: Israel's Uncertain Victory in Jerusalem, Settlement Report Vol. 9 No. 7 (May 1999), <http://fmep.org/resource/special-report-israels-uncertain-victory-in-jerusalem/>; quoting a 1 March 1999 letter sent to Government of Israel by Germany's Ambassador to Israel, in Germany's then capacity as EU President, stating: “We reaffirm our stated position regarding the specific status of Jerusalem as a corpus separatum. This position is in accordance with international law. We have no intention of changing our custom regarding meetings in Jerusalem.” See also Harpaz, 476-477.

⁴⁶ Israeli Ministry of Foreign Affairs, Reaction by Foreign Minister Sharon on the EU stand on Jerusalem (Mar. 11, 1999), <http://mfa.gov.il/MFA/ForeignPolicy/MFADocuments/Yearbook12/Pages/149%20Reaction%20by%20Foreign%20Minister%20Sharon%20on%20the%20EU.aspx>; “Foreign Minister Sharon said that he and other senior Foreign Ministry officials are working to have the German Ambassador's letter revoked by European Union member governments. In any event, Foreign Minister Sharon emphasized, “The Government of Israel sharply rejects the content of the letter, and the position presented by the German Ambassador will not serve to undermine Israel's absolute sovereignty over united Jerusalem as the eternal capital of the Jewish people and the State of Israel.”

⁴⁷ See, e.g., Israeli Ministry of Foreign Affairs, The Status of Jerusalem (Mar. 14, 1999), <http://www.mfa.gov.il/mfa/mfa-archive/1999/pages/the%20status%20of%20jerusalem.aspx>; STATUS OF JERUSALEM, ISRAELI MINISTRY OF FOREIGN AFFAIRS, (asserting that consistent government positions have been that “Israel's eternal capital is one indivisible city under Israeli sovereignty”). See also Matt Spetalnick, Israeli ambassador backs Trump pledge to move U.S. embassy to Jerusalem, REUTERS (Dec. 20, 2016), <http://www.reuters.com/article/us-usa-trump-israel-idUSKBN14A061>.

⁴⁸ Harpaz, 470-471.

⁴⁹ Id., 468-476.

⁵⁰ Cattan, 14-15.

⁵¹ Id., 15.

V. CONCLUSION

In summary, international consensus continues to embrace three key positions regarding Jerusalem. First, that Israel's annexation of East Jerusalem is illegal. Second, that the occupation by Israel of East Jerusalem remains subject to IHL and the law of occupation, consistent with the status of the remainder of the territory occupied by Israel in June 1967. And third, the international community has continued to maintain the formal position that sovereignty over Jerusalem remains controversial and, for most states, undetermined. Overwhelming international consensus also appears to assert that Jerusalem's sovereignty may only be resolved through bilateral negotiation and agreement between the Palestinians and Israel. Long-standing United States policy declining to recognize any state's sovereignty over the city is emblematic of this international consensus.⁵²

The principle of self-determination remains the most powerful and clear source of legal legitimacy for any claimant to sovereign rights, despite any political realities that may hamper its effective implementation or conflicts with other legal principles. Thus, legal claims to territory largely derive from the internationally recognized right of people to self-determination, which holds that the inhabitants of a given territory have the right to determine their destiny by choosing to vest their sovereignty in a particular state.⁵³ In the Jerusalem context, definitive determination regarding the legal legitimacy of the parties' sovereign rights has yet to be made.

That said, and putting virtually all states' cautious and formal rhetoric aside, the international community's policies and conduct suggest that many actors already have made important indicative distinctions between East and West Jerusalem. Thus, East Jerusalem expressly is deemed to be an integral part of the territory occupied by Israel in 1967 and, by implication, slated to be sovereign territory of the putative Palestinian state; while Israel's claim to sovereignty over West Jerusalem expressly is denied, yet this latter position is taken without deeming West Jerusalem as occupied territory. This telling distinction appears to serve as an implicit recognition that West Jerusalem is slated to be deemed an integral part of Israel, as the Russian Federation boldly, and unprecedentedly, stated on 6 April 2017.

In the meantime, however, assertions by the EU and member states that the city should be constituted as a *corpus separatum* appear to function as a check on any party's overwrought assertion of exclusive or unchecked control over the city. In this view, the *corpus separatum* approach is both a cautious and restraining policy prescription, one that arguably befits Jerusalem's unique historical, religious and cultural heritage, as well as what remains of the 1947 Partition Plan's legacy.

In the interest of reaching a just and durable resolution to the status and issues surrounding Jerusalem, the international community should maintain a consistent and principled international law centered approach with respect to the entirety of Jerusalem. States and other actors should aim to avoid making policy and practical distinctions between East and West Jerusalem to the greatest extent possible, toward the end of avoiding possible prejudice to the parties, their interests and relative negotiating leverage but, most importantly, reaching a just, stable and sustainable resolution of the holy city's sovereign and administrative status. While the *corpus separatum* concept may not today enjoy the binding force of law per se, the concept is not inherently inconsistent with international law. Adoption of the concept as policy, irrespective of whether it currently holds binding legal force (and whether by the EU, its member states or

⁵² "In 1948, President Truman formally recognized Israel in a signed statement of "recognition."; see Public Papers of the Presidents, Statement by the President Announcing Recognition of the State of Israel, May 14, 1948, (1964), at 258. That statement did not recognize Israeli sovereignty over Jerusalem. Over the last 60 years, various actors have sought to assert full or partial sovereignty over the city, including Israel, Jordan, and the Palestinians. Yet, in contrast to a consistent policy of formal recognition of Israel, neither President Truman nor any later United States President has issued an official statement or declaration acknowledging any country's sovereignty over Jerusalem. Instead, the Executive Branch has maintained that "the status of Jerusalem...should be decided not unilaterally but in consultation with all concerned."; see *Zivotofsky v. Kerry*, 576 US __ (2015), at 2.

⁵³ Eisner, 239-240.

others perhaps), should best be understood as a practical international community lever that can restrain unilateral action that would risk rendering resolution of the city's sovereign and administrative status ever more intractable and elusive. A broader appeal may rest in the possible invocation of the *corpus separatum* concept to solve the Jerusalem question in the context of a peace agreement. In that context, its potential utility as a tool to circumvent at least some part of the contradictory, volatile and intractable claims by the two sides to the conflict may even prove indispensable.



View of Kufr Aqab, the northernmost neighborhood of East Jerusalem and one of several primarily Palestinian Jerusalem neighborhoods unilaterally annexed by Israel following the 1967 occupation but then physically separated from the remainder of Israeli declared municipal Jerusalem with construction of the Wall in Jerusalem, which began in 2003; West Jerusalem in distant background. Copyright 2013 Thomas Dallal.



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