

The United States Embassy in Jerusalem: Does location matter?

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1. *A question of non-recognition*

The partition of Mandatory Palestine was first proposed by the Peel Commission in 1937. Jerusalem, however, was to remain under British control. This, the Commission contended, would ensure the city's sanctity and maintain 'free and safe' access to its Holy Places.¹ Subsequent efforts to settle the status of the territory between the Jordan River and the Mediterranean Sea deferred the question of Jerusalem. Opposing claims to Jerusalem are so entrenched, the answer to its contested sovereignty so elusive, that conventional wisdom supposes that considerations of the city's status must be relegated to a later time if progress will be made elsewhere. Following the 1967 war, Israel gained full control of Jerusalem. It annexed the city's eastern sector and declared that the 'united' city was its 'eternal and undivided' capital.² East Jerusalem came under Israeli occupation. Legislation and policies, imposed by Israel to affect annexation, were declared null and void by the international community.³ President Trump's announcement that the United States would recognize Jerusalem as Israel's capital and relocate its Embassy from Tel Aviv are inseparable from this contested history.⁴ When the international community responded in near unanimity, it suggested

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¹ United Kingdom, *Report of the Palestine Royal Commission* (Cmd 5479, 1937) para 19.

² Laws of the State of Israel, *Basic Law: Jerusalem, Capital of Israel*, Vol 34, 5740 - 1979/80, para 1.

³ UNSC Res 478 (20 August 1980) UN Doc S/RES/478 (1980) para 2.

⁴ United States, 'Presidential Proclamation Recognizing Jerusalem as the Capital of the State of Israel and Relocating the United States Embassy to Israel to Jerusalem' (6 December 2017).



that the Trump Administration's policy shift constituted a violation of international law.⁵

Maurizio Arcari's recent contribution to this debate offers a helpful analysis of the obligation of non-recognition.⁶ Professor Arcari explains that the international opprobrium that followed the US proclamation was prompted by the Administration's disregard of the obligation not to recognize illegal situations arising from certain serious breaches of international law.⁷ Reactions to the recent events in Jerusalem inform Arcari's consideration of the source of the non-recognition obligation.⁸ They lend credence to Arcari's argument that this obligation is not limited by a strict reading of Article 41(2) of the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA).⁹ Important questions are posed regarding the content of the non-recognition obligation. As Professor Arcari suggests, the precise actions forbidden by the non-recognition obligation remain contested.¹⁰

These issues are convincingly addressed throughout the paper. In conclusion, Professor Arcari ponders whether the actions of the Trump Administration render the non-recognition principle as an 'obligation without real impact.'¹¹ Several states have since, as Arcari notes, recognized Israel's claim to Jerusalem and expressed willingness to relocate

⁵ The General Assembly held by a vote of 128-9 (with 35 abstaining) that acts altering the character, status, or demographic composition of Jerusalem have no legal effect; it called upon all states to refrain from establishing diplomatic missions in Jerusalem; and it demanded that all states comply with all Security Council resolutions regarding Jerusalem and not recognize any actions or measures contrary to those resolutions. See, UNGA Res ES-10/19 (21 December 2017).

⁶ M Arcari, 'The Relocation of the US Embassy to Jerusalem and the Obligation of Non-recognition in International law' (2018) 50 QIL-Questions of Intl Law 1, 13.

⁷ Professor Arcari notes that such breaches include the prohibition on territorial acquisitions accrued through the use of force. See, *ibid* 2-3.

⁸ The paper considers whether the non-recognition obligation stems from the general principle *ex injuria jus non oritur*; whether it is applied only to breaches of an *erga omnes* nature; or if the obligation constitutes a secondary consequence of a violation of a peremptory norm. See *ibid* 4.

⁹ Art 41(2) holds that 'no State shall recognize as lawful a situation created by a serious breach [of a peremptory norm] of general international law.' ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, 53 UN GAOR Supp (No 10) UN Doc A/56/10 (2001) 43 [ILC ARSIWA].

¹⁰ Arcari (n 6) 9.

¹¹ *ibid* 13.



their embassies.¹² Ultimately, Arcari holds that the prevalence of the non-recognition obligation within the debates that succeeded the US pronouncement illustrate the principle's enduring relevance. The debates within the Security Council and before the General Assembly, however, did not explicitly question whether the location of the Embassy – in West Jerusalem; in East Jerusalem; or in no-man's land – would influence the non-recognition obligation. This comment asks – in relation to the non-recognition obligation – does the Embassy's location matter?

2. *Conformation of the status quo or acknowledgment of an illegal situation?*

Daniel Shapiro, the former US Ambassador to Israel, stated that moving the American Embassy to a location in West Jerusalem is 'correct and reasonable.'¹³ West Jerusalem, Shapiro argued, has 'served as Israel's capital since the founding of the state, and no plausible two-state map would change that.'¹⁴ Following the 1948 War, Israel began transferring its governmental institutions to the city. On 21 January 1950, the Knesset declared West Jerusalem as Israel's capital.¹⁵ Importantly, and despite the international community's designation of Jerusalem as a *corpus separatum*, neither the Security Council nor the General Assembly objected to the Israeli declaration.¹⁶

¹² N Landau, 'Netanyahu After Trump Recognition: Other Nations Now Looking Into Moving Embassies to Jerusalem' *Haaretz* (Tel Aviv, 7 December 2017) <www.haaretz.com/israel-news/netanyahu-other-nations-now-looking-into-moving-embassies-to-jerusalem-1.5628023>. See also, M Bachner, 'Netanyahu: At least six states in 'serious' talks to move embassies to Jerusalem' *The Times of Israel* (Jerusalem, 19 April 2018) <www.timesofisrael.com/netanyahu-at-least-six-states-in-serious-talks-to-move-embassies-to-jerusalem/>.

¹³ DB Shapiro, 'What everyone's getting wrong about the US Embassy move to Jerusalem' *The Washington Post* (Washington DC, 8 May 2018) <www.washingtonpost.com/news/global-opinions/wp/2018/05/08/what-everyones-getting-wrong-about-the-u-s-embassy-move-to-jerusalem/?utm_term=.5a50335e8bad>.

¹⁴ *ibid.*

¹⁵ Israel Parliamentary Protocol, 1st Knesset, 2nd Session, 108th Meeting, 602-603 (1950).

¹⁶ WT Mallison, SV Mallison, *The Palestine Problem: The International Law and World Order* (Longman Group 1986) 214.



It is, of course, correct that any plausible peace agreement would not meaningfully alter Israel's claim to Jerusalem's western sector. However, following the 1967 war, Israel expanded Jerusalem's municipal boundaries and applied its jurisdiction throughout the city. Israeli officials initially denied that the imposed policies constituted annexation.¹⁷ This pretence was abandoned in 1980 when the Knesset passed a Basic Law declaring 'Jerusalem, complete and united, the capital of Israel.'¹⁸ Where the international community passively received Israel's claim to West Jerusalem in 1950, it strenuously objected to the formal annexation of East Jerusalem. Security Council Resolution 478 held that Israeli initiatives contravened international law and reaffirmed that the City's eastern sector constituted occupied territory.¹⁹ This initiated a process of non-recognition. The Security Council directed states 'not to recognize the 'basic law' and other such actions by Israel that, as a result of this law, seek to alter the character and status of Jerusalem.' States that had established embassies in Jerusalem were required to withdraw from the city.²⁰

The non-recognition requirement is conveyed by Article 41(2) of the ARSIWA. This insists that, 'no State shall recognize as lawful a situation created by a serious breach [of a peremptory norm of general international law].'²¹ The ARSIWA Commentaries note that 'Article 41(2) not only extends to formal recognition but prohibits acts that "imply" recognition.'²² Following a serious breach of a peremptory norm, the

¹⁷ UNGA, 'Report of the Secretary General on measures taken by Israel to change the status of the City of Jerusalem' 5th Emergency Special Session UN Doc A/6753 S/8052 (10 July 1967).

¹⁸ The Basic Law continued to note that 'the jurisdiction of Jerusalem includes, as pertaining to this Basic Law, among others, all areas that is described in the appendix of the proclamation expanding the borders of Municipal Jerusalem beginning [28 June 1967] as was given according to the City's ordinance.' See, Laws of the State of Israel, *Basic Law: Jerusalem, Capital of Israel*, Vol 34, 5740 -1979/80 paras 1, 5.

¹⁹ UNSC Res 478 (n 3) para 2.

²⁰ *ibid* para 5, 5(b). See also, DB Green, 'Trump, Take Note: How Jerusalem Went from Hosting 16 Embassies to Zero' *Haaretz* (Tel Aviv, 14 May 2018) <www.haaretz.com/israel-news/.premium-trump-take-note-how-jerusalem-went-from-hosting-16-embassies-to-zero-1.5627682>.

²¹ ILC ARSIWA (n 9) art 41(2).

²² ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries', UN Doc A/56/10 (2001) 114 (art 41 Commentary) [ILC ARSIWA Commentaries].



obligation of non-recognition operationalizes when the violation facilitates a legal claim of status or entitlement by the violating state.²³ Both state practice and the Commentaries link the triggering breach to, as Martin Dawidowicz explains, ‘territorial acquisitions brought about or maintained by the threat or use of force.’²⁴ The 1970 Friendly Relations Declaration insists that, ‘no territorial acquisition resulting from the threat or use of force shall be recognized as legal.’²⁵ The International Court of Justice and the International Law Commission both contend that the duty not to recognize forceful territorial acquisitions reflects customary international law.²⁶ It is informed by the ‘principle that legal rights cannot derive from an illegal act (*ex injuria jus non oritur*).’²⁷ And it serves to prevent the entrenchment of the illegal situation so that a legal wrong does not become permanent.

A clear international distinction has emerged between the legal and political treatment of West and East Jerusalem. While the international community formally holds Jerusalem’s status as unsettled, Israeli sovereignty in West Jerusalem receives *de facto* acknowledgement. When considered singularly, in relation to West Jerusalem exclusively, Shapiro’s sentiment is mostly correct. The formal recognition of West Jerusalem (ideally coupled with a corresponding endorsement of the Palestinian claim to East Jerusalem) is consistent with the international community’s enduring approach to the conflict.²⁸ The Trump Admin-

²³ D Hughes, ‘Did the Trump Administration’s Jerusalem Declaration Violate International Law?’ *Opinio Juris* (5 March 2018) <<http://opiniojuris.org/2018/03/05/did-the-trump-administrations-jerusalem-declaration-violate-international-law/>>.

²⁴ M Dawidowicz, ‘The Obligation of Non-Recognition of an Unlawful Situation’ in J Crawford, A Pellet, S Olleson (eds), *The Law of International Responsibility* (OUP 2010) 677, 678.

²⁵ UNGA ‘Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations’ UNGA Res 2625, UN GAOR 25th Session Supp No 28 UN Doc A/8028 (1971) para 1.

²⁶ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep para 87. Also, in its Nicaragua decision, the International Court of Justice recognized that this non-recognition requirement possessed unanimous state approval. See, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US)* (Merits) [1986] ICJ Rep 14 para 188. ILC ARSIWA Commentaries (n 22) art 41.

²⁷ Dawidowicz (n 24) 677.

²⁸ UNSC, ‘United Nations Position on Jerusalem Unchanged, Special Coordinator Stresses, as Security Council Debates United States Recognition of City’ (8 December



istration's Proclamation, however, did not strictly limit recognition to West Jerusalem. The Proclamation's ambiguity, references to the 1995 Embassy Act, and subsequent comments by President Trump collectively infer a broader form of recognition.²⁹

In contrast to the US pronouncement, when the Czech Foreign Ministry followed the Trump Administration and announced that it would recognize the Israeli claim to Jerusalem, officials in Prague plainly limited recognition to West Jerusalem. Jerusalem, the Czechs contended, was to serve as the capital of both Israel and a future Palestinian state.³⁰ The relocation of the Czech Embassy to Jerusalem was contingent upon these stipulations.³¹ Eight months earlier, Russia extended a similar form of recognition. Moscow announced that it viewed West Jerusalem as Israel's capital.³² This too was coupled with an endorsement of the Palestinian claim to East Jerusalem and support for the division of Jerusalem through negotiation and in accordance with the two-state solution.³³ Neither the Czech or Russian endorsements evoked much international attention or any legal censure.

The legal and political distinction between the treatment of East and West Jerusalem was exhibited when the Security Council and the General Assembly convened emergency sessions shortly after the Trump Administration's announcement. Gathered to discuss the implications and legality of the US Proclamation, these meetings occurred weeks before the Embassy's location had been determined. Condemnation was general. It stemmed from the assumption that US acknowledgement of the Israeli claim to Jerusalem disrupted diplomatic and le-

2017) Press Release SC/13111. See also, UNSC Verbatim Record (8 December 2017) UN Doc S/PV/8128 [UNSC 8128th Meeting].

²⁹ Hughes (n 23). See also, V Kattan, 'Why US Recognition of Jerusalem Could Be Contrary to International Law' (2018) 47 *J Palestine Studies* 72.

³⁰ J Delk, 'Czech Republic recognizes West Jerusalem as Israel's capital' *The Hill* (Washington, DC, 6 December 2017) <<http://thehill.com/blogs/blog-briefing-room/363633-czech-republic-recognizes-west-jerusalem-as-israels-capital>>.

³¹ Ministry of Foreign Affairs of the Czech Republic, 'Statement of the MFA of the Czech Republic on Opening of its Honorary Consulate and Czech Centre in Jerusalem' (25 April 2018) <www.mzv.cz/jnp/en/issues_and_press/mfa_statements/x2018_04_25_statement_of_the_mfa_of_the_czech.html>.

³² The Ministry of Foreign Affairs of the Russian Federation, 'Foreign Ministry statement regarding Palestinian-Israeli settlement' (6 April 2017) <www.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/2717182>.

³³ *ibid.*



gal orthodoxy. Within the UN bodies, members repeated their commitment to the two-state solution, expressed that Jerusalem should serve as a capital for both Israel and a Palestinian state, and suggested that relocating an Embassy to the City constituted a violation of international law.³⁴

Security Council members did not explicitly confirm whether the Embassy's (potential or future) location influenced legal considerations. Such considerations were, however, implicit. The Swedish representative told the Security Council that the Trump Administration's recognition of Israel's claim to Jerusalem – and its decision to relocate the Embassy – contradicted international law. These actions violated past Security Council Resolutions. Sweden called upon the US to

‘follow up its statement with action towards the two-State solution. Now is the time to move forward with a detailed peace plan that enables the State of Israel and the State of Palestine to live side by side in peace and security, with Jerusalem as the future capital of both States.’³⁵

This infers that location matters. Had the US pronouncement limited recognition to West Jerusalem, had it acknowledged the Palestinian claim to East Jerusalem, the Administration's policy shift could be aligned with international consensus. It would not have implied recognition of Israel's claim to East Jerusalem, to territory that had been acquired through the use of force.

The United Kingdom similarly noted that,

‘in line with relevant Security Council resolutions...we regard East Jerusalem as part of the occupied Palestinian territories. We *therefore* disagree with the United States decision to move its Embassy to Jerusalem and to unilaterally recognize Jerusalem as the capital of Israel before a final status agreement.’³⁶

The link between East Jerusalem's status – as occupied territory, as subject to annexation through forceful territorial acquisition – recurred throughout the Security Council's deliberations. Resolution 2234 was repeatedly cited. Adopted in 2016, this confirmed that any modification

³⁴ UNSC 8128th Meeting (n 28).

³⁵ *ibid* 4.

³⁶ *ibid* 6.

to the 1967 border, unless agreed to by the parties, would not be recognized by the international community.³⁷ The French representative called upon the US 'to clarify the compatibility of President Trump's announcement...with this common legal base on which all peace efforts are built.'³⁸ Recognition of an Israeli claim that extended beyond the 1967 borders – recognition that would be further implied when the Embassy's location was announced – prompted the legal objection to the US declaration.

Establishing an Embassy in Jerusalem – regardless of location – appears incompatible with Security Council Resolution 478 though the United States insists that the Resolution is not binding.³⁹ As per the policy objectives conveyed through Article 41(2) of the ARSIWA, however, limited acknowledgment of the Israeli claim to West Jerusalem neither recognizes as lawful a situation created by a serious (peremptory) breach of international law, renders assistance in maintaining that situation, or lends permanence to the illegal situation.⁴⁰ Given the sensitivities surrounding Jerusalem's status and the entrenched positions of the competing parties, the political wisdom of unilateral acknowledgment is questionable.⁴¹ Legally, however, explicit recognition of Israel's claim to West Jerusalem does not significantly diverge from the international community's treatment of the city's status. Explicit recognition of an Israeli claim to East Jerusalem would dramatically depart from this international consensus. It would acknowledge the legality of a territorial acquisition that resulted through the use of force and it would solidify Israel's claim to the 'united' city. In this sense, the location of the Embassy – and the corresponding extension of recognition – matters. The Embassy's location may be sufficient to constitute a violation of the non-recognition obligation but not a necessary requirement. If the Trump Administration's recognition is simply affirmation of a pre-existing international consensus then

³⁷ UNSC Res 2234 (23 December 2016) UN Doc S/RES/2234 (2016) para 3.

³⁸ UNSC 8128th Meeting (n 28) 7.

³⁹ UNSC Verbatim Record (18 December 2017) UN Doc S/PV/8139. Resolution 478 was not adopted under Chapter VII. See, Kattan (n 29) 76-77.

⁴⁰ ILC ARSIWA Commentaries (n 22) 114.

⁴¹ For an informative discussion of the political implications, see, D Seidemann, 'Moving the US Embassy in Israel to Jerusalem: A Hard Look at the Arguments & Implications' (*Terrestrial Jerusalem*, 5 January 2017) <<http://t-j.org.il/LatestDevelopments/tabid/1370/currentpage/1/articleID/823/Default.aspx#headline>>.



the Embassy would presumably be situated in West Jerusalem. This, however, does not appear to be the case.

3. *A cartographer's nightmare and a geographer's catastrophe*

On 14 May 2018, the US celebrated the opening of its Embassy in Jerusalem's Arnona neighbourhood.⁴² Located on David Flusser Street, the Embassy building had housed the US Consulate General and oversaw relations with the Palestinian Authority (PA).⁴³ The site straddles the 1949 Armistice line.⁴⁴ Re-partitioning Palestine and dividing Jerusalem, the Armistice line was sketched by military leaders from Israel and Jordan. Moshe Dayan and Abdullah el-Tell, with red and green pencils, separated the contested territory. Under the terms of ceasefire, the land to the east of the green line was controlled by Jordan. The land to the west was under Israeli auspices.⁴⁵ Between these lines, however, a third area was created. Within Jerusalem, nearly 750 acres of territory was designated as no-man's land. Neither the Israeli or Jordanian leadership believed that this process of demarcation – which Meron Benvenisti described as 'a cartographer's nightmare and a geographer's catastrophe' – would become permanent.⁴⁶ Yet when the Armistice Agreement was signed the following year in Rhodes, the hastily sketched lines that

⁴² US Department of State, Press Statement, 'On the Opening of US Embassy Jerusalem' (14 May 2018) <<https://www.state.gov/secretary/remarks/2018/05/282066.htm>>.

⁴³ US Department of State, Press Statement, 'Opening of US Embassy Jerusalem' (23 February 2018) <www.state.gov/r/pa/prs/ps/2018/02/278825.htm>. Consular services, including relations with the Palestinian population and the PA would continue in the former Consulate General building. See, US Department of State, Media Note, 'US Embassy Jerusalem Dedication Ceremony' (11 May 2018) <www.state.gov/r/pa/prs/ps/2018/05/282032.htm>.

⁴⁴ I Kershner, 'New US Embassy May Be in Jerusalem, but Not in Israel' *The New York Times* (New York, 7 March 2018) <www.nytimes.com/2018/03/07/world/middleeast/jerusalem-embassy-occupied-territory.html>.

⁴⁵ D Nissenbaum, *A Street Divided: Stories from Jerusalem's Alley of God* (St Martin's Press, 2015) 17-19. See also, M Benvenisti, *A City of Stone: The Hidden History of Jerusalem* (U California Press, 1996) 56-59.

⁴⁶ *ibid* 57.

cut through Jerusalem and fortified Israeli and Jordanian strongholds became authoritative.⁴⁷

The consular compound and the physical Embassy building that now hosts the US Ambassador to Israel is partially located in the territory designated as no-man's land in 1949.⁴⁸ The legal status of this territory – or of any area regarded as no-man's land – is convoluted. Uncertainty marred Israeli and Jordanian treatment of this territory during the nearly two decades that passed between demarcation and the commencement of East Jerusalem's occupation in 1967. Lives were lost and countless disputes arose when the territory was encroached.⁴⁹ It became apparent that the Jordanians, the Israelis, and the United Nations held contrasting interpretations of their respective boundaries.⁵⁰

The State Department has not provided a formal position regarding the legal status of the territory that now houses the US Embassy to Israel but was formerly designated as no-man's land and subsequently annexed by Israel following the 1967 war.⁵¹ Instead, the State Department has cited the fact that the Embassy's location 'has been in continuous Israeli use since 1949' and that it is 'today a mixed residential-commercial neighborhood.'⁵²

Sectors of the no-man's land – inside and beyond Jerusalem's boundaries – came under exclusive Israeli or Jordanian use. In certain instances, these uses were informally accepted.⁵³ Often, however, intrusions were challenged before the UN's Mixed Armistice Commission (MAC). The lack of certainty resulting from the demarcation of no-man's land became

⁴⁷ *ibid* 58.

⁴⁸ Kershner (n 44). See also, D Seidemann, 'The Site for the New US Embassy in Jerusalem: What You Need to Know (So Far)' *Terrestrial Jerusalem* (21 February 2018) <<http://tj.org.il/LatestDevelopments/tabid/1370/articleID/872/currentpage/1/Default.aspx>>.

⁴⁹ Nissenbaum (n 45) 19-37.

⁵⁰ Benvenisti (n 45) 58-59.

⁵¹ M Lipin, 'Why New US Embassy Isn't Entirely in Israel' *VOA News* (Washington, DC, 14 May 2018) <<https://www.voanews.com/a/unusual-siting-of-jerusalem-embassy-draws-muted-reactions/4392920.html>>.

⁵² Kershner (n 44).

⁵³ UNSC, 'Report by the Acting Chief of Staff of the United Nations Truce Supervision Organization in Palestine, Colonel BV Leary, Dated 23 September 1957, Relating to the Area Between the Lines (Neutral Zone) Around Government House Area' (24 September 1957) UN Doc S/3892 para 7(b) [UNSC Report 23 September].



increasingly contentious.⁵⁴ The Israeli-Jordanian Armistice Agreement offered specificity. Under the terms of the Agreement, large areas designated as no-man's land after the war – to the north and south of Jerusalem – were equally divided between Israel and Jordan.⁵⁵

The reallocation of land in Jerusalem, however, was excluded. At the behest of the Arab League, the undetermined areas of Jerusalem would not be formally divided.⁵⁶ Agreement remained elusive.⁵⁷ During the subsequent years, Israeli authorities treated the Armistice line as an international border.⁵⁸ When Israel gained control of the entirety of Jerusalem following the 1967 war, the Government requested the Foreign Ministry to determine the sovereign status of the 750 acres. The Ministry resisted domestic pressure and refused to pronounce that sovereignty vested with Israel.⁵⁹ Unsatisfied with the Ministry's determination, the Israeli Government altered its position regarding the Armistice Agreement. It claimed that it had not recognized *any* form of Jordanian rule in Jerusalem. The Armistice line, Israel insisted, only served to define a ceasefire.⁶⁰ It did not confer or limit rights to the contested territory. Now under full Israeli control, Jerusalem – East, West, and the area defined as no-man's land – was governed unitarily.

⁵⁴ UNSC Verbatim Record (6 September 1957) UN Doc S/PV.787 [UNSC 787th Meeting]; UNSC Verbatim Record (6 September 1957) UN Doc S/PV.788 [UNSC 788th Meeting]; UNSC Verbatim Record (22 November 1957) UN Doc S/PV.806 [UNSC 806th Meeting].

⁵⁵ Israel-Jordan Armistice Agreement (Israel-Jordan) (3 April 1949). See also, Benvenisti (n 45) at 58.

⁵⁶ Jordanian officials also formally rejected proposals that sought to divide the territory designated as no man's land. These rejections explicitly renounced proposals to divide the area where the US Embassy is now located. See, UNSC 787th Meeting (n 54) paras 54-61.

⁵⁷ Benvenisti (n 45) 58.

⁵⁸ *ibid* 62.

⁵⁹ Meron Benvenisti explains that the Government sought sovereign acknowledgement so as to apply the Absentee Property Law under which the property of Palestinian refugees who left the State of Israel had been seized. See, *ibid* 63.

⁶⁰ *ibid*.



4. *Determining the status of no-man's land*

The designation 'no-man's land' is not a term of art. It may be conflated with the principle of *terra nullius*.⁶¹ It may refer to the establishment of a demilitarized zone. Prominently, it described the area between the Allied and German trenches during the First World War. Within Jerusalem, the specified territory separating Israel and Jordan was synonymously termed no-man's land, the neutral zone, or the area between the lines. Its origins vested in a parcel of land that the Red Cross designated to protect individuals – Arab and Israeli – who sought safety during the 1948 war.⁶² The Armistice Agreement stipulated that the signatories' armed forces and civilian populations were banned 'from crossing the fighting lines or entering the area between [these] lines.'⁶³ The MAC – established to monitor the terms of the ceasefire – found that small population centres remained within the designated territory.⁶⁴ Several Israeli and Arab communities were granted permission to remain within defined spaces inside of no-man's land. The MAC stipulated that the exception extended only to those groups that remained in no-man's land when the Armistice Agreement operationalized. Those who owned property within the territory but were absent or had left were precluded from re-entry.⁶⁵ Formally, the territory designated as no man's land was placed under UN supervision.⁶⁶

Efforts to formalize a further agreement regarding the existing civilian population failed. At the urging of the MAC, Israeli and Jordanian officials met in 1949. The MAC Chairman pursued an agreement between the parties that would normalize the situation of the Israeli and Arab populations. This would clarify the status of the designated territory. A tentative agreement was reached. It proposed that a 'civilian

⁶¹ *Western Sahara* (Advisory Opinion) [1975] ICJ Rep 12 paras 79-80.

⁶² UNSC, 'Cablegram Dated 4 September 1948 from the United Nations Mediator to the Secretary-General Concerning the Situation in Jerusalem' (7 September 1948) UN Doc S/992 [UNSC Cablegram].

⁶³ UNSC, 'Hashemite Jordan Kingdom-Israel: General Armistice Agreement' (3 April 1949) UN Doc S/1302/Rev.1 art 4(b) and (c).

⁶⁴ UNSC 787th Meeting (n 54) para 64.

⁶⁵ *ibid.*

⁶⁶ UNSC Cablegram (n 62).



line' would divide no-man's land in Jerusalem.⁶⁷ In accordance with the terms of ceasefire, armed forces would be unable to access these areas. Civilians, however, could enter and develop the respective territorial allotments. Initial progress dissipated when Jordanian officials informed the MAC that they would not sign the agreement or consent to any formal division.⁶⁸ Israel would later argue that the proposed 'civilian line' became 'the *de facto* demarcation line dividing the respective areas of activity of Israeli and Jordanian civilians.' Both parties, Israel claimed, 'have ever since conducted their activities in the area between the lines on the basis of the existence of the civilian line.'⁶⁹ The State Department's claim – that the Embassy is (partially) located in a section of no-man's land that 'has been in continuous Israeli use since 1949' – appears to reference the sections of land to the west of the 'civilian line' and to which Israel had long claimed access.

The legal status of this area became central to a territorial dispute between Israel and Jordan. In 1957, Israel began a large afforestation project. It announced plans to plant 100,000 trees in the valleys and on the hillsides between Talpiot and Abu Tor.⁷⁰ Labourers began cultivating sections of no-man's land that Israel claimed was on its side of the 'civilian line.'⁷¹ Jordanian officials protested. They filed a formal complaint with the MAC alleging that Israeli actions violated the Armistice Agreement and constituted an act of aggression.⁷² Informal efforts to mediate failed and the dispute was referred to the Security Council.⁷³ In New York, the Israeli representative insisted that the *de facto* 'civilian line' created a status quo that informed the legal treatment of no man's land in Jerusalem.⁷⁴ Despite the absence of a formal agreement, Israel claimed that the:

'most important agreement that has been made between the parties was the drawing, eight years ago, of a civilian line running through the area dividing it between Jordan and Israel. As a result, ever since, civil-

⁶⁷ For an account of these events, see the Israeli Representative's statement. See, UNSC 788th Meeting (n 54) paras 38-39.

⁶⁸ *ibid* para 39.

⁶⁹ *ibid*.

⁷⁰ Nissenbaum (n 45) 31-37.

⁷¹ UNSC Report 23 September (n 53) para 2.

⁷² *ibid*.

⁷³ Nissenbaum (n 45) 32-33.

⁷⁴ UNSC 788th Meeting (n 54) para 39.

ians of both parties could move into and perform civilian functions in their respective sectors without specific agreement between the two countries, but could not enter the sector of the other party.⁷⁵

Jordan insisted that no such ‘civilian line’ had been created. It did not exist within any formal agreement. When talks had been initiated by Israel to divide the area in 1949, Jordan immediately objected. Their representative told the Security Council,

‘it was no more prepared at that time than it is today to accept the division of an area which is Arab property almost in its entirety and which is strategically of vital military importance... At no time was the area partitioned either through a formal agreement or in practice.’⁷⁶

The Security Council acknowledged the Armistice Agreement’s inconclusiveness. The Philippine delegation explained that the Agreement did not ‘provide for the regulation of affairs within the area between the lines.’⁷⁷ Collectively, the Council called upon the UN’s Truce Supervision Organization (UNTSO) to produce a report detailing existing conditions within no-man’s land and to consider the territory’s legal status.⁷⁸ The resulting report explained that that both Israeli and Jordanian civilians had regularly accessed specific sectors of the no-man’s land. Neither party had treated these incursions as violations of the Armistice Agreement.⁷⁹ The UNTSO suggested the Israeli and Jordanian presence within no-man’s land lent credence to the suggestion ‘that there has existed some kind of division line.’⁸⁰

The Report was sent to the Security Council. During the ensuing debate, the United States noted the existence of three competing interpretations that each conferred the legal status of no-man’s land. Israel continued to maintain that a mutually agreed ‘civilian line’ divided the territory that citizens of the respective states could access. Jordan denied the existence of a formal agreement and contended that the area remained no-man’s land under UN auspices. The UNTSO claimed that

⁷⁵ *ibid* para 48.

⁷⁶ UNSC 806th Meeting (n 54) paras 39, 89.

⁷⁷ UNSC 788th Meeting (n 54) para 57.

⁷⁸ *ibid* paras 59, 61, 65.

⁷⁹ UNSC Report 23 September (n 53) para 7(b).

⁸⁰ *ibid* at para 7(c).



the Armistice Agreement did not consider the status of civilians within the territory and that Israel and Jordan had, at least tacitly, agreed to certain civilian activities.⁸¹ Despite the contrasting views, the United States' position was explicit. The legal status 'of the area between the armistice demarcation lines is affected by provisions of the General Armistice Agreement and that neither Israel nor Jordan enjoys sovereignty over any part of the area between the respective demarcation lines.'⁸² Unanimously, the Security Council endorsed the view that neither state possessed any sovereign claim to the territory designated as no-man's land.⁸³ On 22 January 1958, Security Council Resolution 127 was adopted. This confirmed that the parties do not hold 'sovereignty over any of the zone (the zone being beyond the respective demarcation lines).'⁸⁴

5. *Occupation and non-recognition of no-man's land*

When the Security Council convened to consider the Trump Administration announcement, its membership insisted that the international community withhold recognition of a situation that the Council defined as illegal. The illegal situation was created following Israel's annexation of East Jerusalem. The Council warned that recognition of the Israeli claim to Jerusalem would entrench the occupation. The Jordanian representative told the Council that recognition risked 'consolidating the Israeli occupation [of East Jerusalem].'⁸⁵ The Security Council's approach is consistent with state practice, customary international law, and numerous legal instruments that oblige states 'not to recognize as legal territorial acquisitions resulting from the threat or use of force.'⁸⁶

The legal status of East Jerusalem is well-established in international law. However, the status of the territory designated as no-man's land in

⁸¹ UNSC Verbatim Record (22 January 1958) UN Doc S/PV.809 paras 29, 30.

⁸² *ibid* para 32.

⁸³ *ibid* at paras 39, 52, 77.

⁸⁴ UNSC Res 127 (22 January 1958) UN Doc S/3942.

⁸⁵ UNSC 8128th Meeting (n 28) 20.

⁸⁶ S 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?' in C Tomuschat, J-M Thouvenin (eds), *The Fundamental Rules of the International Legal Order Jus Cogens and Obligation Erga Omnes* (Brill 2005) 99, 101-103.



1949 is less certain. First, through the proposed partition of Mandatory Palestine, and then through Armistice, this territory near the centre and in the south-east of Jerusalem remained unallocated. The Palestinian Authority and the United Nations have both suggested that the areas of Jerusalem designated as no-man's land came under Israeli occupation following the 1967 war (a UN official, however, distinguished between occupied territory and occupied Palestinian territory).⁸⁷ The major scholarly works on the law of occupation – which each include detailed accounts of East Jerusalem – do not reference or assign specific status to this unallocated territory.⁸⁸ International law does not define no-man's land other than to imply that it is territory devoid of sovereignty.

Yehuda Blum has argued that the law of occupation is inapplicable when the displaced state is not the lawful sovereign or when sovereignty is simply 'missing' from the relevant territory. The absence of sovereign designation, Blum contends, creates a void that may be filled by the state that illustrates 'better title' to the contested territory.⁸⁹ Israel has applied Blum's argument in relation to the West Bank and East Jerusalem. Israeli officials have contended that the territorial requirement conveyed by Article 2 of the Fourth Geneva Convention – 'the Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party' – should be construed narrowly.⁹⁰ Blum's thesis, however, has been widely dismissed.⁹¹ The use of 'territory' within Article 2 is understood broadly. In accordance with the text, drafting history, and humanitarian purposes of the Fourth Geneva Convention, the occupation framework is applied regardless of prior

⁸⁷ Kershner (n 44). See also, Lipin (n 51).

⁸⁸ E Benvenisti, *The International Law of Occupation* (2nd ed OUP 2012). See also, Y Dinstein, *The International Law of Belligerent Occupation* (CUP 2011); Y Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interaction with International Human Rights Law* (Martinus Nijhoff 2009).

⁸⁹ Blum focused this argument on Israel's claim to the West Bank and East Jerusalem in two separate articles. See, YZ Blum, *Will "Justice" Bring Peace? International Law – Selected Articles and Legal Opinions* (Brill 2016) 191-235.

⁹⁰ Mallison, Mallison (n 16) 253. See also, M Shamgar, 'The Observance of International Law in the Administered Territories' (1971) 1 *Israel YB Human Rights* 262, 266. See, 1949 Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (12 August 1949) art 2.

⁹¹ Arai-Takahashi (n 88) 47-48. See also, Mallison, Mallison (n 16) 252-268.



sovereign title.⁹² As per Article 42 of the Hague Regulations, ‘territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.’⁹³

The US Field Manual on the Law of Land Warfare emphasizes a nexus between the existence of military occupation and indeterminate territory. The Manual states that it is US practice to establish a military government following the occupation of, *inter alia*, neutral territory that ‘has not been made the subject of a civil affairs agreement.’⁹⁴ Similarly, it is well-established that occupation is unaffected by the terms of armistice. Territory that is designated by or established as neutral through a ceasefire agreement is not immune from occupation law. As noted by Morris Greenspan, ‘the situation in occupied territory during an armistice remains unchanged from that during hostilities.’⁹⁵

This suggests, for the purposes of the non-recognition obligation, that the US Embassy in Jerusalem is partially situated in occupied territory. The State Department’s contention that the territory now hosting the Embassy ‘has been in continuous Israeli use’ implies some variant of the ‘better title’ argument. The International Court of Justice, in the *Minquiers and Ecrebos* case, held that a territorial dispute between the UK and France should be determined upon an appraisal of ‘the relative strength of the [parties’] opposing claims to sovereignty.’⁹⁶ This, however, occurred through a formal process of dispute resolution. As demonstrated above, when the Security Council discussed the status of Jerusalem’s no-man’s land in the late 1950s, its members were explicit that any past actions – by Israel or Jordan – did not confer sovereignty. A process of discerning ‘better title’ or ‘relative strength’ must contend with this explicit statement of non-allocation. The US suggestion that

⁹² *ibid* 253-258.

⁹³ Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land (18 October 1907) art 42.

⁹⁴ US Department of the Army, *Field Manual: The Law of Land Warfare*, FM 27-10 (July 1956).

⁹⁵ M Greenspan, *The Modern Law of Land Warfare* (U California Press 1959) 390. See also, G von Glahn, *The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation* (U Minnesota Press 1957) 274.

⁹⁶ *The Minquiers and Ecrebos Case* (France v UK) (Judgment) [1953] ICJ Rep 47, 67.

continuous Israeli use reflects better title is an explicit retraction of its early commitment to withholding sovereign appointment.

The Embassy's location is not the sole determinate of recognition. That the compound extends into the territory designated as no-man's land may be explained. To do so convincingly, to provide assurances that the US decision to relocate its Embassy to Jerusalem does not recognize an unlawful situation, does not imply rights to territory that has been acquired through force, and does not facilitate permanence would require explicit acknowledgement that the Embassy's location does not confer recognition beyond West Jerusalem. The US could confirm that the Embassy's location is a quirk of the building's previous designation as a consular site that served both West and East Jerusalem. Instead, the State Department has only claimed that Israel has had continuous use of this territory. Since the territorial disputes over access to no-man's land in the 1950s, Israel's use of this territory has been in contradiction of international will. Its initial claim to the territory – to the west of the supposed 'civilian line' – and its subsequent annexation of the entirety of no-man's land following the 1967 war has been explicitly denounced by the international community. Sovereign recognition has been purposefully withheld. Coupled with other forms of implied recognition – including recent reporting that the Embassy relocation was motivated by efforts to frustrate Palestinian aspirations in East Jerusalem – this further suggests that the Trump Administration's policy shift violates the non-recognition obligation.⁹⁷

The implication that Israel's continued use of territory confers rights may have tangible consequences. If this conflict is to resolve – through some semblance of a two-state model – the future status of this and other contested territory would be determined through negotiation. Devoid of an explicit explanation, justifying the Embassy's location through 'better title' or 'continuous use' imposes a standard that risks prejudicing negotiations and incentivising the creation of *fait accompli*. Extended beyond Jerusalem's no-man's land, the precedent that 'continuous use' or 'better title' facilitates territorial claims risks undermining the fundamental legal principles that the non-recognition obligation safeguards. To this extent and for these reasons, the location of the US Embassy in Jerusalem matters.

⁹⁷ A Entous, 'Donald Trump's New World Order' *The New Yorker* (New York, 18 June 2018) <www.newyorker.com/magazine/2018/06/18/donald-trumps-new-world-order>.

