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The Legal Status of Jerusalem: Is Trump Right?

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Abstract

President Donald Trump's decision to move the US embassy in Israel from Tel Aviv to Jerusalem has been subject to intense international scrutiny. Amid the debate, what does the law suggest?

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Australian Outlook

In this section

The Legal Status of Jerusalem: Is Trump Right?

13 Dec 2017

By Professor Gregory Rose





President Donald Trump's decision to move the US embassy in Israel from Tel Aviv to Jerusalem has been subject to intense international scrutiny. Amid the debate, what does the law suggest?

In the Jerusalem Embassy Act 1995, the US Congress instructed the president to open an American embassy in Jerusalem, allowing postponement biannually. However, as seems often the case, President Trump has acted against the cautions of his diplomats and, although signing another waiver on 6 December, last week signalled a US embassy move to Jerusalem, after 45 postponements.

The outcry against Trump's announcement last week was immediate. Turkey will break off relations with Israel and flags have been burned across the Muslim world. Jerusalem is significant for Islam. However, for Christianity, it is a geographic navel of the faith. Countries predominantly of both these religions have refused formally to accept Jerusalem as the capital of the Jewish state for 70 years and continue to oppose it through the United Nations and other forums.

The international campaign against Jerusalem as the capital of Israel has continued over years and become increasingly legal. Britain's Advertising Standards Authority banned an Israeli government tourism advert in 2015 implying that Jerusalem was part of Israel. The US State Department refuses to issue passports designating Jerusalem-born US citizens as Israeli. Legal sanctions are urged against Israelis and prosecutions are brought against companies doing business with them.

So, who has the best legal title to Jerusalem? Israel, Palestine, Jordan or the United Nations?

The Israeli claim

The starting point for the Israeli claim to legal title is that Jerusalem has been the Jewish spiritual capital for three millennia. Referring to the capital of ancient Israel and Judea, a harp-playing psalmist wrote 2,500 years ago, "If I forget you Jerusalem, let my right hand lose its skill."

Second, 20th century commitments set out in the San Remo treaty, League of Nations and UN Mandate were to create a Jewish homeland. These form a body of international law recognising the historic Jewish claim to the country.

Third, in the present day, Israel exercises de facto control over Jerusalem and it is the de facto capital in international practice. Ambassadors conduct intergovernmental business and attend diplomatic meetings there, although their embassies are located in Tel Aviv.

Fourth, Israeli control over Jerusalem was acquired in legitimate self-defence. After the British renounced their UN Mandate to establish a Jewish homeland and Israel declared its independence in 1948, Arab armies attacked the new state, which survived and gained control over West Jerusalem. Israel gained control over East Jerusalem from Jordan in 1967 in another Arab war that vowed Jewish destruction.

Fifth, the Oslo agreements between Israel and the Palestine Liberation Organization accepted that the final status of Jerusalem would be subject to negotiations. This would not be necessary if the Israeli claims were illegal.

The United Nations' claim

What about the United Nations' claim to title? In 1947, the UN recommended partition of the area of the mandate to create a UN-administered international basin for the holy city region including Bethlehem. This '*corpus separatum*' acknowledged Christian interests: the Vatican opposed the creation of Israel, as did the World Council of Churches.

However, the 1947 partition plan lapsed with its rejection by Arab League members and there was no UN objection to Jordan's de facto control from 1949 to 1967 over East Jerusalem, now known as the West Bank. The UN never acquired control over Jerusalem in fact or law, subsequently recognised Palestinian claims and has no meaningful legal claim.

Jordan's claim

Transjordan's Arab Legion, under British command, was successful in its attacks against the ragtag forces of the new Israel in 1948-9. It annexed the West Bank, renamed itself as Jordan, and declared East Jerusalem its second capital. The UN implicitly approved the annexation by listing Jerusalem's Old City as a Jordanian World Heritage Site in 1981.

However, Jordan's occupation of East Jerusalem by war in 1948 did not create international legal title to it. Recognising its weakness relative to the Israeli army and loss of that territory in the Six Day War, after 21 years 'in absentia', Jordan renounced its annexation in favour of a Palestinian country in 1988. It has no current claim to Jerusalem.

The Palestinian claim

The Palestine Liberation Organization (PLO) then declared an independent Palestine, purporting to exercise national self-determination over Jerusalem. This is the most important claim competing with Israel's. A majority of UN members voted to recognise Palestine in 2012, sequeing Jordanian to Palestinian sovereignty. UNESCO has since declared East Jerusalem "part of the occupied Palestinian territory" in terms that deny its Jewish character.

Yet, how can a state be occupied if it is not there? No Palestinian Arab state existed under the Ottoman Empire or British Mandate. A Palestinian Arab state cannot exist by merely strength of UN resolutions (which are recommendations not binding as laws). Currently, the Palestinian Authority lacks essential international legal prerequisites for a sovereign country, such as borders, a defined population and a national government exercising control.

Actual legal status

Although the International Court of Justice has stated that Israel illegally occupies Palestinian national land, it did not provide legal analysis or argumentation for this proposition. It drew legal sources for its advice from the political resolutions of other UN organs. As it is structured to be a politically representative and subordinate UN organ, it assumed the declared UN position as law. Further study indicates that demands for self-determination, whether Aboriginal, Basque, Catalan, Dayak, etc., do not automatically generate legal statehood.

Jerusalem is depicted on medieval maps as the meeting point of Africa, Asia and Europe, reflecting its geostrategic centrality. Modern lawfare over Jerusalem is being fought by established international power blocs manoeuvring for strategic advantage. With the Jewish state in a minority of one in 193 members with only a handful of friends among the 175 UN members that are predominantly Christian and Muslim, the UN is the perfect theatre for the latter to enact out the Abrahamic religions' sibling rivalry over this symbolically powerful city.

On a careful review of the international laws, the odd maverick US president is clearly right to recognise Jerusalem as the legitimate capital of Israel, based on Israel having by far the strongest legal title in the modern world. He did not specify Jerusalem in its entirety, or deny it as a future Palestinian joint capital, or exclude the possibility of other forms of its future internationalisation. These matters remain for negotiation between the enduring interests competing for Jerusalem.

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