

## **The American Policies on Jerusalem**

Arnon Gutfeld  
Tel Aviv University

On August 6, 2015, The American Supreme Court convened to hear arguments in a case defined by many as crucial to the American diplomacy in the Middle East and also having important ramifications on the question of the separation of powers in the American political system. The case centered on the demand of Ari and Naomi Zivotofsky, parents of Menachem Zivotofsky, an American citizen that was born in Jerusalem, to change his place of birth in his passport from [the city of] Jerusalem to the [state of] Israel. This request, that seemed to the Zivotofskys as a simple bureaucratic act that should not raise any significant legal problems, raised again the debates in the United States as to the legal status of Jerusalem and the dilemma over the recognition of sovereignty over the city. The US Supreme Court struck down a law passed by Congress that would have made this possible.<sup>1</sup>

The city of Jerusalem is one of the most controversial cities in the world for numerous reasons – especially religious and political. It is most holy to the followers of the three great monotheistic religions – Judaism, Christianity and Islam. Two national movements – Zionism and the Palestinian regard it as their capital city and wish to establish their sovereignty over the city or at least, over parts of it. The status of the city and its boundaries are a subject of heated, often highly emotional debates in and outside Israel. One of the major controversies focuses on the legal status of the city after the 1967 Six Days War during which Israel conquered the West Bank including Jordanian held East Jerusalem. The status of Jerusalem caused a series of debates among legal experts in the international community. To date very few nations, recognize Jerusalem as the capital city of Israel. When President Donald Trump announced the American recognition of Jerusalem as Israel's capital city it was clear that he meant West Jerusalem. But later, in Trumpian fashion, when talking to his Evangelist and other right wing political supporters he intimated that he meant the unified city. [This will be discussed and analyzed below]. A few nations still support the United Nations 1947 Partition Plan that called for the internationalization of Jerusalem.<sup>2</sup> The importance of the legal status of the city is evidenced by the dozens of resolutions passed by numerous

---

<sup>1</sup> John Roberts, Chief Justice of the Supreme Court wrote in his decision that recording "Israel" in the passport could create significant problems in the Middle East, *Zivotofsky v. Kerry*, 576 SC 1059 (2015) 628.

<sup>2</sup> *United Nations General Assembly Resolution 181(II)*. November 29, 1947.

**Mentalities/Mentalités Volume 34, Number 1, 2020**

**ISSN- 0111-8854**

**@2020 Mentalities/Mentalités**

All material in the Journal is subject to copyright; copyright is held by the journal except where otherwise indicated. There is to be no reproduction or distribution of contents by any means without prior permission. Contents do not necessarily reflect the views of the editors.

bodies of the international community above all the U.N. General Assembly and Security Council.<sup>3</sup> It must be emphasized that U.N. Security Council, is considered the governing body of the U.N. and the only one with the authority to apply sanctions or send forces to implement its resolutions. U.N. Security Council resolutions could be binding in questions of peace and security if accepted according to chapter VII of the U.N. Charter but this is far from being automatic. Most Security Council resolutions are recommendations whereas all U.N. General Assembly resolutions are recommendations only.<sup>4</sup> It also must be stressed that in the United Nations General Assembly there is a majority of nations [Arab states, Moslem states, Third World nations, during the Cold-War Communist nations and during the oil-crisis years Western European nations dependent on Arab oil] that almost automatically voted for resolutions considered anti-Israel and pro-Arab/Palestinian. In the Security Council the U.S. often used its veto power to block anti-Israel resolutions.<sup>5</sup>

The importance of the analysis of America's policies on the status of Jerusalem stems especially from the central role that the United States plays in the Israeli – Palestinian and the Israel-Arab states arenas. The U.S. possesses significant political, military and economic influence on the adversaries in the Middle East and on the western great powers. Both the Palestinians and Israel recognize the importance of being supported by the U.S. diplomatically, politically and economically and American policies have a great impact on Jerusalem's international status. The Palestinians increased tendency to approach national and international tribunals as part of their struggle to obtain national political recognition turned the international arena into a central and important arena to study and comprehend the nature of the Israeli-Palestinian conflict and perhaps also ways to resolve it. It emphasizes the importance of the U.S. as a central actor in this arena. Thus policies, decisions of American courts, congressional legislation and various governmental declarations and the analysis of sundry American, Israeli and other legal experts will be presented and examined.

In this article the focus will be on the relevant legal controversies that occurred in the period 1947 to date. On November 29, 1947, the U.N. General Assembly passed the U.N. Partition of Palestine Resolution. In this resolution the General Assembly recommended that in the territory ruled by Britain since 1917, based on the mandate that Britain had received from the League of Nations, a Jewish and an Arab state with strong economic ties should be established. The third part of the resolution discussed Jerusalem and recommended that a separate international governing entity should be established that would be administered by a Trusteeship Council that would govern

---

<sup>3</sup> See for example Security Council Resolutions 250, 251, 252, 267, 271, 298, 446, 452, 471, 476, 478, 592, 605, 904, and U. N. General Assembly Resolutions 181 (II), 2253, 2254.

<sup>4</sup> Patrik Johansson, "The Humdrum Use of Ultimate Authority: Defining and Analyzing Chapter VII Resolutions," *Nordic Journal of International Law*. Vol. 78 No. 3. 2009, 301-342.

<sup>5</sup> See, [jewishvirtualibrary.org/un-general-assembly-resolutions-on-israel-middle-east](http://jewishvirtualibrary.org/un-general-assembly-resolutions-on-israel-middle-east)

**Mentalities/Mentalités Volume 34, Number 1, 2020**

**ISSN- 0111-8854**

**@2020 Mentalities/Mentalités**

All material in the Journal is subject to copyright; copyright is held by the journal except where otherwise indicated. There is to be no reproduction or distribution of contents by any means without prior permission. Contents do not necessarily reflect the views of the editors.

under U.N. auspices. The Trusteeship Council was directed to prepare, within five months a detailed proposal for a constitution that would govern the city.<sup>6</sup> According to the Resolution the boundaries of the city will be in the east - Abu Dis, in the south - Beth-Lehem, in the west - Ein Kerem and in the north - Shuafat. [these suburbs were included in the proposed international territory].<sup>7</sup>

The majority of the Jewish leadership in Palestine accepted the Partition Plan. The Palestinian-Arab leadership rejected the plan. Jamal Al-Husseini the head of the Palestinian U.N. delegation, announced that the partition line would only be "a line of blood and fire."<sup>8</sup> On the day that the British mandate ended, on May 14, 1948, the state of Israel was established. Immediately it was invaded by the Arab armies of Egypt, Trans-Jordan, Syria, Lebanon, Iraq with assistance from Saudi Arabia.<sup>9</sup> The war ended on July 20, 1949 with the signing in Rhodes of the final armistice agreement with Syria. In the Rhodes armistice agreements, the Armistice Demarcation Lines [the "Green Line"] was agreed upon as the cease fire borders and gradually it became the de facto border of Israel. In 2004, the International Court of Justice [Hague] in an Advisory Opinion on the *Legal of the Construction of the Wall in the Occupied Palestinian Territory* "took it for granted that the Israeli-Jordanian Demarcation Line, popularly called the Green Line – established in the 1949 Armistice Agreement- is the boundary between Israel and the West Bank" <sup>10</sup>

During the 1948-1949 war Jerusalem was divided in two. Israel held on to West Jerusalem while the Kingdom of Trans-Jordan conquered East Jerusalem that included the Old city, the Temple Mount, the Jewish Quarter and the Wailing Wall. The Jewish Quarter was besieged for six months and finally surrendered to the Jordanian Arab Legion. The Jewish fighters became prisoners of war and the rest of the Jewish population was transferred to West Jerusalem. Mt. Scopus that included the Hebrew university buildings, a hospital and the Jewish cemetery remained an Israeli enclave in

---

<sup>6</sup> Ruth Lapidot and Moshe Hirsch, *The Arab-Israeli Conflict and Its Resolution: Selected Documents*. Dordrecht, Holland, Martinus Nijhoff Publishers 1992, 33.

<sup>7</sup> Ibid., 48.

<sup>8</sup> Yoav Gelber, *From Independence to Nakbah: The Arab-Israeli War of 1948*. [Hebrew]. Ganei Tikvah: Zmora-Bitan Publishers, 2004, 31.

<sup>9</sup> J. B. Tulman, "The International Status of Jerusalem," *International Law Students Association Journal*. Vol. 39, 1979, 46.

<sup>10</sup> Yoram Dinstein, *War Aggression and Self-Defence*. (second edition), Cambridge, UK: Cambridge University Press, 2017, 43,48-49; Advisory Opinion on the *Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory*. ICJ Report 136, 2004,171; On the "Green Line" and the recognition of it as the de facto international border of Israel see Gideon Biger, "The Boundaries of Israel-Palestine, Past, Present and Future: A Critical Geographic View," *Israel Studies*. Vol 13 (1), 2008, 65-74; Moshe Brawer, *Borders of Israel- Past, Present and Future*. [Hebrew], Tel-Aviv: Yavneh, 1988; Shaul Arieli, *All of Israel's Borders*. [Hebrew]. Tel-Aviv: Yediot Aharonot, 2018.

East Jerusalem. On August 2, 1948, Israel proclaimed Jerusalem as an "Israel Occupied City" and started to move government offices to West Jerusalem.<sup>11</sup>

Palestinian leaders met in the Jericho and called on King Abdullah to annex the West Bank and on April 24, 1950, the Jordanian Parliament formally annexed the West Bank including East Jerusalem to the newly named Kingdom of Jordan [formerly Trans – Jordan].<sup>12</sup> All the Arab states opposed this move as it was contrary to the Arab League Resolution of April 12, 1950 that forbade any annexation of Palestinian territory by an Arab nation. Egypt, Saudi Arabia, Syria and Lebanon even supported a resolution to expel Jordan from the Arab League. Jordan immediately announced that the annexation was not final and would not injure the final settlement of the Palestine issue.<sup>13</sup> From the end of Israel's War of Independence till June 1967 Jerusalem remained divided and throughout shooting incidents occurred.<sup>14</sup> Between 1948 and 1952 several United Nations bodies discussed the Jerusalem issue. On December 11, 1948, the U.N. General Assembly adopted Resolution 194(III) that called to place Jerusalem under effective U.N. control.<sup>15</sup> Between 1953 and until the Six Days War in 1967 the question of Jerusalem did not come up in United Nations.

On June 5, 1967, the Six Days War erupted. In that war, in six days, the Israeli Defense Forces (IDF) captured the West Bank that included East Jerusalem, the Golan Heights, the Gaza Strip and the Sinai Desert. A few days later the Israeli parliament (Knesset) passed the Amendment to the Decree of the Administration, Rule and Justice.<sup>16</sup> In this amendment to the decree the 11b clause was added: "the law, jurisdiction and administration of the state will apply in the entire domain of land of Israel [Eretz Yisrael] that the government established". The law became valid on June 27, 1967, the day it was approved by the Knesset.<sup>17</sup> On the next day the government announced a decree that placed East Jerusalem under the Israeli law, the Israeli jurisprudence and

---

<sup>11</sup> "Jerusalem declared Israel Occupied - City". *Israel Official Gazette*. No. 12, August 2, 1948. [mfa.gov.il/mfa/foreignpolicy/documents/yearbook1/pages/2%20jerusalem%20declared%20israel-occupied%20city%20governm.aspx](http://mfa.gov.il/mfa/foreignpolicy/documents/yearbook1/pages/2%20jerusalem%20declared%20israel-occupied%20city%20governm.aspx)

<sup>12</sup> Richard Cavendish, "Jordan Formally Annexes the West Bank" *History Today*. Vol. 50, issue 4, April 2000. <http://www.historytoday.com/richard-cavendish/jordan-formally-annexes-west-bank>

<sup>13</sup> See Allan Gerson, *Israel, the West Bank and international Law*. Abingdon, UK: Taylor and Francis, 2009, 146.

<sup>14</sup> Nathan Shor, *History of Jerusalem*. (Hebrew, three vols.). Or Yehuda: Dvir, 1988. Vol. I, 855.

<sup>15</sup> "Palestine Progress Report of the Mediator". United Nations General Assembly Resolution 194(III), 11 December 1948. [unispal.un.org/DPA/DPR/unispalnsf/0/c75857/2B78D1CD0085256BCF0077](http://unispal.un.org/DPA/DPR/unispalnsf/0/c75857/2B78D1CD0085256BCF0077)

<sup>16</sup> The Amendment to the Decree to the Administration of Rule and Justice, (No. 11), 1967.

"Law and Administration Ordinance Amendment No. 11) Laws of Israel 75 (5727-1967). See also Yoram Dinstein, *The international Law of Belligerent Occupation*. (second edition). Cambridge, UK: Cambridge University Press, 2019, 22-23.

<sup>17</sup> Moshe Hirsch and Dvora Housen-Coriel, *Wither to Jerusalem: Suggestions as to the Future of the City*. Jerusalem: Jerusalem Institute for the Study of Israel, 1995, 6.

the Israeli administration.<sup>18</sup> Concurrently the Knesset passed a law that amended the municipal decree and accorded the Interior Minister the authority to enlarge the territory of a municipality by including under its jurisdiction areas that were designated by decree according to clause 11b.<sup>19</sup> On the same day the Knesset adopted the law of Protection of the Holy Places. That law guaranteed the freedom of access and worship in the holy sites. The law also contained severe sanctions and penalties against those desecrating or in any way injuring the holy sites.<sup>20</sup>

The U.N. reaction to these steps was negative and extreme.<sup>21</sup> The General Assembly convened to a special session and Resolution 2253 expressed deep regret about the steps undertaken by Israel to change the status of Jerusalem.<sup>22</sup> On November 22, 1967, the Security Council adopted Resolution 242 that emphasized the "inadmissibility of acquisition of territory by war". It called on Israel [the American version] to withdraw from "territories" that it occupied during the war. The Arabs preferred the French translation that called for Israeli withdrawal from "all territories" it conquered during the war. The original resolution was written in English and therefore, according to international law, it and not the translation is legally binding. By using the term "territories" the intention of the writers was that the withdrawal would be subject to negotiations. It was no accident, as one of the writers of U.N. Resolution 242 was the American Ambassador to the U.N. Arthur Goldberg, a former U.S. Supreme Court Justice and an ardent supporter of Israel. The Resolution also called for a lasting just peace in the Middle East that had to include withdrawal of Israeli military forces from territories it occupied in the recent war.<sup>23</sup> On July 30, 1980, the Knesset adopted "Basic law: Jerusalem, capital of Israel". This law did not change Jerusalem's legal status but it had important declaratory significance. The international community vigorously opposed Israel's unilateral steps. The U.N. Security Council adopted Resolution 478 that deplored the passage of this law and declared that it was a violation of international law and therefore it regarded the annexation null and void. In the Resolution the Security Council called on all the member states that had diplomatic missions in

---

<sup>18</sup> *Kovetz Hatakanot*. [Secondary Legislation of the State of Israel] (in Hebrew), June 28, 1967; See also Dinstein, *Belligerent Occupation*. Supra note 16, 22-23.

<sup>19</sup> *Ibid*.

<sup>20</sup> "Protection of the Holy Places Law", June 27, 1967.

[Mfa.gov.il/mfa/foreignpolicy/mfadocuments/yearbook1/pages/14%20protection%20of%20holy%20place%20law.aspx](http://Mfa.gov.il/mfa/foreignpolicy/mfadocuments/yearbook1/pages/14%20protection%20of%20holy%20place%20law.aspx)

<sup>21</sup> See for example General Assembly Resolutions 2253 and 2254. Also see Security Council Resolution 242, 252, and 267.

<sup>22</sup> General Assembly Resolution 2253, (ES-V). "Measures taken by Israel to change the status of the city of Jerusalem," July 4, 1967.

[unispal.un.org/DPA/DPR/unispal.nsf/0/A39A906C89D3E98685256C29006D4014](http://unispal.un.org/DPA/DPR/unispal.nsf/0/A39A906C89D3E98685256C29006D4014)

<sup>23</sup> Security Council Resolution 242, November 22, 1967; See, Arnon Gutfeld and Boaz Vanetik, "The American Involvement in the Drafting of U.N. Resolution 242 (1967)." In Yoram Dinstein (ed.). *Israel Yearbook on Human Rights*. Vol. 49, 2019, 237-260.

Jerusalem to close and remove them from the city.<sup>24</sup> The U.N. General Assembly condemned Israel in Resolution 35/169 and declared that all the legal and administrative steps that Israel undertook and changed, or intended to change the status of Jerusalem were null and void. Following this Security Council Resolution all nations in that had diplomatic missions in Jerusalem moved them to Tel-Aviv.<sup>25</sup>

In 1982, the Arab states summit convened in Fez, Morocco. There a Resolution passed calling on Israel to withdraw from all territories it conquered in 1967, including "Arab Jerusalem", meaning East Jerusalem. In addition, the Summit called for creating a Palestinian state whose capital city would be Jerusalem.<sup>26</sup> In the Algiers Declaration of the P.L.O. of November 15, 1988, known as the Palestinian Declaration of Independence, Yasser Arafat, P.L.O. leader repeated its demand that Israel had to withdraw from Jerusalem that would serve as the capital of the Palestinian State when it will be established.<sup>27</sup> In 1988, King Hussein of Jordan announced that he is relinquishing Jordan's control over the West Bank, including East Jerusalem in legal and administrative matters. Through this act Jordan relinquished its claims over the West Bank and Jerusalem in favor of the Palestinian National Movement led by the P.L.O. Thus Jerusalem became one of the central issues that had to be resolved through negotiations between Israel and the Palestinians.<sup>28</sup>

The Oslo negotiations between Israel and the P.L.O. that began in 1993 and the consequent agreements that were reached did not include essential principles on the Jerusalem issue.<sup>29</sup> In the Declaration of Principles that was signed by Israel and the P.L.O. on September 13, 1993, it was decided that the parties would negotiate the Jerusalem question during the Final Settlement Negotiations that would commence no later than after the beginning of the third year of the intermediate period.<sup>30</sup> In the year 2000 the Second Intifada began. The reason the Palestinians gave for its eruption was the visit of MK Ariel Sharon, the leader of the opposition in the Knesset, to the Temple Mount in the end of September of that year. Other believed that that the Second Intifada, resulted from the failure of the 2000 Camp David talks led by President

---

<sup>24</sup>United Nations Security Council Resolution 478 on Jerusalem, August 20, 1980.  
[Unispal.un.org/DPA/DPR/unispal.nsf/0/DDE590c6FFF23200](http://Unispal.un.org/DPA/DPR/unispal.nsf/0/DDE590c6FFF23200).

<sup>25</sup> Hirsch and Hausen-Koriel, *supra* note 17, 9.

<sup>26</sup> *Ibid.*

<sup>27</sup> Algiers Declaration of the Palestinian State, November 15, 1988.

[Unispal.un.org/UNISPAL.NSF/0/6EB54A389E2DA6C6852560DE0070E392](http://Unispal.un.org/UNISPAL.NSF/0/6EB54A389E2DA6C6852560DE0070E392)

<sup>28</sup> " King Hussein Address to the Nation," July 31, 1988.[mkinghussein.gov.jo/88\\_july31.html](http://mkinghussein.gov.jo/88_july31.html); Dinstein, *Belligerent Occupation*. *Supra* note 16; Robbie Sibal and Yael Ronen, *International Law*. [Hebrew, 2nd edition], Jerusalem: Nevo, 2010, 124.

<sup>29</sup> Menachem Klein, *Jerusalem in the Peace Negotiations: Arab Positions*. [Hebrew], Jerusalem: Jerusalem Institute for the Study of Israel, 1995, 106.

<sup>30</sup> Paragraph 5(1) of the Declaration of Principles on the Interim Agreement on Self-Rule with the P.L.O. September 13, 1993.

[Mfa.gov.il/mfa/foreign-policy/peace/guide/pages/declaration%20of%20principles.aspx](http://Mfa.gov.il/mfa/foreign-policy/peace/guide/pages/declaration%20of%20principles.aspx)

Bill Clinton, Yasser Arafat and Prime Minister Ehud Barak. The disagreements over the status of Jerusalem were believed to be one of the main reasons given for the failure of that Summit. Many of the terrorist acts in that Intifada, called by the Palestinian the Al-Aqsa Intifada occurred in Jerusalem which was the preferred target. The Palestinian leadership was cognizant that Israel could not agree to all of their demands and though Prime Minister Barak offered them more than any previous Israeli Prime Minister, they realized that the Summit was doomed to failure. There exists evidence that the PLO leadership pre-planned the "popular uprising".<sup>31</sup>

In 2002, the Israeli Government decided to erect a security barrier in order to prevent terrorists from entering Israel. In 2003, the Government of Israel decided to build a wall around Jerusalem ("wall Encircling Jerusalem"). The wall was planned to encircle the municipal boundaries of Jerusalem but it disconnected entire neighborhoods in East Jerusalem from Jerusalem that were situated east of the fence.<sup>32</sup> The Fence as well as its outline raised numerous economic, political and legal questions.<sup>33</sup>

The opinions as to Jerusalem's legal status are many and diverse and there is little consensus on the subject among scholars and states. The stands of certain elements are direct results of their political-ideological views of the Arab-Israeli conflict. Numerous nations do not recognize Jerusalem as Israel's capital and many do not recognize her as an Israeli city. The central point of contention is the conquest and annexation of the eastern part of the city in 1967. The Israeli legal status of these areas according to Israeli laws is very different from their legal status under International Law.

Annexation is defined as forcible acquisition of another state's territory by another state.<sup>34</sup> This in opposition of territorial transfers where territories are given or sold by one political entity to another political entity through agreement or in case of political union where both sides are asked about their opinions as to the merger. Annexation is a unilateral act in which one state forcibly takes over territory of another state.<sup>35</sup>

In the past, International Public Law traditionally recognized certain rights of the victor in a conflict, including annexation.<sup>36</sup> It was generally accepted that a nation could annex

---

<sup>31</sup> Benny Morris, *One State, Two States: Resolving the Israel/Palestinian Conflict*. New Haven and London: Yale University Press, 2009, 150- 151; Danny Yatom, *The Confidant: From Sayeret Matkal to the Mossad*. Tel-Aviv: Miskal-Yediot Ahronot and Chemed Books, 2009, 426-427; "Arafat Ordered Hamas Attacks against Israel in 2000" *Jerusalem Post*. September 24, 2010. [jpost.com/Middle-East/Arafat-ordered-Hamas-Attacks-against-Israel-in-2000-189574](http://jpost.com/Middle-East/Arafat-ordered-Hamas-Attacks-against-Israel-in-2000-189574)

<sup>32</sup> "People's City-Fixed Times" the Legal-Political status of the City of Jerusalem. No. 43, May 2012. Ir Amim [People's City] is an association affiliated with the political left in Israel, whose aims are "stability, equality and an agreed political future in Jerusalem."

<sup>33</sup> Robbie Sibal and Yael Ronen, supra note 28, 125.

<sup>34</sup> Rainer Hoffman, "annexation". *Max Planck Encyclopedia of Public International Law*. New York: Oxford University Press, 2013.

<sup>35</sup> "Annexation", *Encyclopedia Britannica Online*.

<sup>36</sup> Hoffman, supra note 34 2.

through a unilateral act, areas that it conquered during a war provided that the other side suffered total defeat, meaning, that it ceased to exist or could not continue to fight. During World War II, annexation was a method through which populations lost their defenses in occupied territories. Changes enacted by the Fourth Geneva Convention, made it difficult for conquering nations to ignore international law on the question of annexation. This was based on the prohibition to use force that was part of paragraph 2(4) of the U.N. Charter. Today a wide consensus exists that an aggressor nation is not entitled to annex territories so that it will not profit from gains resulting from its illegal acts. Concurrently, there is recognition that wars may result in the losses of territory by nations, therefore War Laws define the duties of the conqueror in the occupied land and the rights of the inhabitants in those areas. Those rights and duties are anchored in a great degree in the Hague Convention (1907)<sup>37</sup> and in the Fourth Geneva Convention (1949).<sup>38</sup> After Israel conquered the West Bank in 1967 and imposed Israeli Law in East Jerusalem the U.N. and its agencies refused to recognize this act.<sup>39</sup> Since then, numerous scholars expressed numerous contradictory opinions concerning East Jerusalem's status. According to the prevailing opinions in the international community the final status of sovereignty over Jerusalem will not be decided until a comprehensive agreement will be reached between Israel and the Palestinians.<sup>40</sup> The status of Jerusalem is still bound the U.N. General Assembly Resolution of November 29, 1947, that recommended an international status, control and administration for the city.<sup>41</sup> In this Resolution known as the "Partition Plan" the General Assembly called for the establishment in mandatory Palestine of two states - a Jewish state and an Arab state with close economic ties. The third part of the Resolution dealt with Jerusalem and included a recommendation that a special, separate and neutral (*corpus separatum*) international entity would be created. That entity would be administered by Trusteeship Council that would be authorized by and act on behalf of the U.N. This Trusteeship Council was instructed to prepare, within five months, a detailed Constitution for the city.<sup>42</sup> Hassan Bin Talal, the Jordanian prince, wrote that capture of land by Israel in the 1948 War did not accord Israel sovereignty because, according to international law,

---

<sup>37</sup> Hague Convention Respecting the Laws and Customs of War on Land (Hague IV), October 18, 1907.

[Uyscbs.org/1899---1907-hague-conventions.html](http://Uyscbs.org/1899---1907-hague-conventions.html)

<sup>38</sup> The Fourth Geneva Convention on Protection of Citizens XXI, No. 30, 453, August 12, 1949.

[IOC.gov/rr/frd/Military\\_Law/pdf/GC\\_1949-IV.pdf](http://IOC.gov/rr/frd/Military_Law/pdf/GC_1949-IV.pdf)

Israel never admitted that this convention binds her as it relates to its actions in the Palestinian occupied territories. Instead, Israel declared that it would abide, as a matter of custom, by the "Humanitarian" directions of the Fourth Geneva Convention as it relates to those territories.

<sup>39</sup> Usama Halabi, *The Legal Status of Jerusalem and Its Arab Population*. **Beirut: Institute of Palestine Studies.47, 1997.**

<sup>40</sup> Shmuel Berecovitch, "The Legal Status of the Holy Sites in Jerusalem," Jerusalem: The Jerusalem Institute for the Study of Israel, 1997, 73.

<sup>41</sup> Sibal and Ronen, *supra* note 28, 126.

<sup>42</sup> Lapidoth and Hirsch, *supra* note 6, 33.



self-defense is not a legal way to acquire territory. Thus, according to him, Israel's status in Jerusalem was that of a military occupier.<sup>43</sup> Bin Talal emphasized that Israel took on itself, in its foreign minister's communique to the U.N. on May 15, 1948, to unilaterally carry out the U.N. Partition Resolution on the partition of Jerusalem and by her actions disregarded her commitments to the international community.<sup>44</sup> In a similar vein, the legal expert G.I.A.D. Draper claimed that Israel did not acquire the rights of sovereignty in Jerusalem this, since the international community intended to establish an international governing body supervised and controlled by the U.N. Therefore, according to his analysis, the question of sovereignty remained suspended and Israel's status in the city was that of a military occupier.<sup>45</sup>

In a series of articles by Professor Yoram Dinstein, international law expert at Tel-Aviv University, in 1971, explained that Israel, in the Six Days War acted in legal self-defense and while undertaking these defensive steps East Jerusalem was captured. In a similar fashion to Bin Talal and Draper he stated that conquest during war did not accord a state title over the captured territory.<sup>46</sup> Concurrently, he pointed to the fact that international law did not accord Israel title over East Jerusalem did not mean that Israel did not possess any rights in East Jerusalem. He argued as long as the state of conquest continues during war or cease fire Israel has Possession Right until a permanent solution would be reached on the question of sovereignty over the city. U.N. agencies did not abandon the Partition Plan and consistently continued to support its execution. Between 1948 and 1952 various U.N. bodies raised the Jerusalem question. On December 12, 1948, the General Assembly adopted Resolution 194(III) that called to place Jerusalem under effective supervision and control of the U.N. and a re-affirmation of the Partition Plan was adopted in Resolution 303 (OIV) of December 9, 1948.<sup>47</sup> The U.N. Security Council in Resolution 252 decided that all the legal and administrative steps that were undertaken by Israel on the status of Jerusalem after the conquest of the territories in the Six-Days War were null and void. The General Assembly in Resolution 35/169 determined that the 1947 Partition Plan had to be implemented. On January 26, 2012, the General Assembly adopted Resolution 66/18 that repeated the call to implement the 1947 Partition Plan emphasizing the sections that dealt with Jerusalem.<sup>48</sup> In 1988, the

---

<sup>43</sup> Hirsch and Housen–Coriel, *Wither to Jerusalem*. supra note 12, 15

<sup>44</sup> Hassan Bin Talal, *A Study on Jerusalem*. London: Prentice Hall Press, 1980, 11.

<sup>45</sup> G.I.A. Draper, "The Status of Jerusalem as a Question of International Law," In Hans Kochler (ed.). *The Legal Aspects of the Palestine Problem with Special Regard to the Question of Jerusalem*. Vienna: Baumuller, 1980, 154, 162-163.

<sup>46</sup> Yoram Dinstein, "Zion Shall Be Redeemed by International Law," *Hapraklit*. [The Advocate] (Hebrew), Vol.27, 1971, 5.

<sup>47</sup> Elihu Lauterpacht, *Jerusalem and the Holy Places*, London: The Anglo- Jewish Association. (pamphlet), 1968, 23.

<sup>48</sup> General Assembly of the United Nations Resolution 66/18, January 26, 2012.

Unispal.un.org/DPA/DPR/unispqal.nsf/0/34BE727D1EED7D688525799500579D23

**Mentalities/Mentalités Volume 34, Number 1, 2020**

**ISSN- 0111-8854**

**@2020 Mentalities/Mentalités**

All material in the Journal is subject to copyright; copyright is held by the journal except where otherwise indicated. There is to be no reproduction or distribution of contents by any means without prior permission. Contents do not necessarily reflect the views of the editors.

General Assembly used the term "Occupied Palestinian Territory" to describe the status of East Jerusalem.<sup>49</sup>

Another organization that consistently supports the Partition Plan and views Jerusalem as a separate entity is the European Union.<sup>50</sup> Its official position is that a fair and just solution for the question of Jerusalem's legal status must be reached in the context of "two states for two peoples" taking into consideration the religious constraints and political views of all sides. The European Union opposes any steps that would determine, ahead of negotiations, what the final status of the city would be. The decision had to take into consideration U.N. Security Council Resolution 242 and especially emphasized the inadmissibility of acquisition of territory by war.<sup>51</sup>

The Arab states do not recognize Jerusalem as Israel's capital and view East Jerusalem as an occupied territory that would be the capital of the Palestinian state once it would be established. The collective and official position of the Arab states found expression in the resolutions passed in the Arab summits. As far as the future of Jerusalem was concerned there exists a common dynamometer that repeats itself in every Arab Summit since 1967. In all of them they called upon Israel to withdraw from all occupied territories including East Jerusalem as was decided in the Amman Summit of 1987 - "Peace in the Middle East will be achieved only by the return of all occupied Arab territories, above all Jerusalem."<sup>52</sup>

The importance of the American policy on the future of Jerusalem stems, among numerous reasons, from the central role that the U.S. plays in peace negotiations between Israel and its neighbors. The U.S. began to express its policy positions on the status of Jerusalem in 1947 and continued to express it to date. The American policies underwent changes during those years. Its policies were not always coherent and clear and often great divergences existed when statements by different American governmental administrators and elected officials were examined. Since Harry Truman's presidency the practical American approach towards Israel ranged consistently between two American positions; The first, that was prevalent until recent years pursued by the Department of State and the Defense-Security establishment was that in order to assist both sides to find the way for a *modus vivendi* the American policy must maintain a strict balance in its relations with both sides without showing any favoritism to any side. On the other side the other approach maintained that increasing Israel's strength would cause the Arabs to recognize not only the very fact of Israel's existence, honor its rights and sovereignty but also to realize that because of Israel's

---

<sup>49</sup> U.N. General Assembly Resolution A/DEC/53/423, December 7, 1998.

<sup>50</sup> Lapidoth, supra note 6, 21. See also *Bulletin of the European Communities*. Vol. 10, 1996, Para.1.4.13.

<sup>51</sup> Local EU Statement on the Continued Closure of East Jerusalem Institutions, August 3, 2012. Dinstein, *War, Aggression and Self-Defence*. Supra note 10, 48-49.

<sup>52</sup> *Jerusalem in the Peace Negotiations*. Supra note 28, 8.

**Mentalities/Mentalités Volume 34, Number 1, 2020**

**ISSN- 0111-8854**

**@2020 Mentalities/Mentalités**

All material in the Journal is subject to copyright; copyright is held by the journal except where otherwise indicated. There is to be no reproduction or distribution of contents by any means without prior permission. Contents do not necessarily reflect the views of the editors.

strength coupled with U.S. support there would not exist a different passage to end the conflict but through dialog and negotiations with Israel and with the U.S. acting as the "honest broker" [Actually it meant that the U.S. would protect and guarantee its interests] . This policy was based on a basic premise that Israel was a full partner of the American desire to reach peace based on agreements with the Arab states. Thus, The U.S. could not be a partner to those that rejected territorial compromise and disregarded the principles of U.N. Resolution 242 meaning "exchange of territories for peace". That was the core of American diplomacy since the Six Days War.<sup>53</sup> Based on this view, the U.S. did not recognize the annexation of East Jerusalem by Trans-Jordan and later, its annexation by Israel. This despite repeated declarations by American presidential candidates that promised that if elected they would move the American embassy to Jerusalem. American presidents (until Donald Trump) waited for an Israeli-Palestinian agreement on the subject. An agreement that had to be approved by Moslem and Christian leaderships. This was an important component of the American approach as Israel and the Palestinians failed to reach an agreement. There was no doubt that in recent decades Islamic religious radicalization became a grave security and political problem for the U.S. The U.S. preferred to avoid any public clashes and opposed unilateral acts by both sides on the status of Jerusalem. Acts that might be interpreted, by the adversaries, as an attempt to create an irreversible reality. In this context, one needs to take into account the changes in the makeup of the religious population in the U.S. Today, Moslems constitute over 1% percent of the American population. Some claim that it is the religion with the fastest growth rate in the U.S.<sup>54</sup> Under these conditions future American administrations would have to consider and take into account the views of this group in a similar fashion that it is sensitive to the views of the Jewish minority. Especially on an emotional issue such as Jerusalem.<sup>55</sup>

In the discussion about Jerusalem's legal status one needs to separate between the legal status of West Jerusalem and that of East Jerusalem. That because of the different historical circumstances that made them subjects to Israeli rule. The main controversy centers over the rights of Israel in East Jerusalem. On the question of Israeli sovereignty over West Jerusalem there exists a much wider consensus in the international community, at least on the *de-facto* rule of Israel in that part of the city.<sup>56</sup> It could be argued that since most nations did not recognize Jerusalem as the capital of Israel before the 1967 war, there is no difference between the status of East and that of West Jerusalem. Despite that, the prevailing opinions in the legal discourse on the status of Jerusalem is there is an essential difference between the status of both parts of the city

---

<sup>53</sup> Nathan Bar On, " The Fifty First Years of American-Israeli Relations," In Anita Shapira, (ed.). *Atzmaout [Independence: The First Fifty Years]* (Hebrew), Jerusalem: The Shazar Center for the Study of Israel, 1958, 377-408.

<sup>54</sup> PEW Research Center, Population Growth Projections, 2010-2050.

<sup>55</sup> Nathan Bar On "Fifty Years," *supra* note 53.

<sup>56</sup> Hirsch and Housen-Coriel, *Whither to Jerusalem*. *Supra* note 18, 15.

and this for a number of reasons. Israel's eastern boundary was set by the armistice lines in the Rhodes agreements in 1949. It is not an agreed upon international border. But the case of the West Jerusalem boundary as drawn in 1967 is different and is similar to the laws governing the entire "Green Line". The Hague International Court recognized the 1967 lines, in an opinion it delivered in 2003, as the recognized and sovereign borders of Israel.<sup>57</sup> This view was bolstered by President Barack Obama's statement in May 2011, during Prime Minister Binyamin Netanyahu's visit to the U.S., that dealt with the principles that were to be the guide of the future Peace Treaty that was to be concluded between Israel and the Palestinians. That agreement was to be based on the pre 1967 War borders with small territorial adjustments and agreed upon exchanges of territories.<sup>58</sup>

It is important to note that recognition of West Jerusalem as Israel's capital parallels the Clinton Parameters of 2000 that stipulated that the borders in Jerusalem should be drawn according to the nature of the population residing in in the neighborhood.<sup>59</sup> In West Jerusalem the Jewish population has been the majority since 1887.<sup>60</sup> Accordingly, it would be correct to presume that West Jerusalem, though it was not recognized formally as being under Israeli sovereignty certainly would be recognized as such when a peace treaty would be concluded with the Palestinians. Therefore, the status of West Jerusalem is, *de facto* already different from that of East Jerusalem.<sup>61</sup> It can be argued that the Arab states and the P.L.O. recognized Israel's sovereignty in West Jerusalem when they accepted U.N. Security Council Resolution 242 that called on Israel to withdraw only from territories that were occupied during the 1967 War. In addition, the European Parliament also recognized the pre-1967 War borders.<sup>62</sup> Thus, it can be argued that acceptance Security Council Resolution 242, by the Arab states was an acceptance, on their part, that in a future peace agreement with Israel that no demand would be made for Israeli withdrawal beyond the 1949 cease-fire lines. Despite the fact that there is no formal universal recognition of Israel's sovereignty in any part of Jerusalem, no one demands imposing the laws of conquest on West Jerusalem and foreign courts accepted that Israeli law prevails in West Jerusalem.<sup>63</sup> Concurrently, both

---

<sup>57</sup> "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion," *I.C.J. Reports*. 2004.

<sup>58</sup> "People's City- Fixed Times," *Supra* note 31, 14.

<sup>59</sup> Bill Clinton, *My Life*. New York, Knoff, 2004, 936-938, 2004.

<sup>60</sup> Michal Oren – Nordheim and Ruth Kark, *Jerusalem and Its Environs: Quarters, Neighborhoods, Villages 1800-1948*. Detroit: Wayne State University Press, 2001, 28.

<sup>61</sup> "People's City [Ir Amim] Solution for Jerusalem: Possible, with an Ever Increasing Price. Jerusalem on the Negotiations Table – Between Principles and Facts," (Hebrew), Jerusalem, April, 2014.

<sup>62</sup> The European Parliament, Resolution 2694(RSP), 2012, 5 July, 2012. "EU policy on the West Bank and East Jerusalem". Op.Europa.EU/en/publication/1702a16e5e56b-11e3-960f-01aa75ed71a1/language-en/format-PDF/source-118626904

<sup>63</sup> See paragraphs from court rulings from various countries such as England and Italy in Ruth Lapidoth and Moshe Hirsch, (eds.). *The Arab-Israeli Conflict: Selected Documents*. *Supra* note 6, 479.

**Mentalities/Mentalités Volume 34, Number 1, 2020**

**ISSN- 0111-8854**

**@2020 Mentalities/Mentalités**

All material in the Journal is subject to copyright; copyright is held by the journal except where otherwise indicated. There is to be no reproduction or distribution of contents by any means without prior permission. Contents do not necessarily reflect the views of the editors.

the U.N. and the European Union view East Jerusalem as an occupied, conquered territory that the Fourth Geneva Convention applies to it.<sup>64</sup>

Any discussion of America's view of its role as probably the only mediator that could assist in bridging the divergent stances in the Middle East cannot overlook the American position on the Jerusalem issue. In 1947-1948 the U.S. supported the internationalization of Jerusalem. This found expression in the American support of the U.N.'s General Assembly Partition Resolution of November 1947 and in the support of Security Council Resolution 194 in 1948 that demanded to transfer Jerusalem and its suburbs to U. N. control.<sup>65</sup> The most important constraint was to secure the status of the holy places and the international character of the city holy to the three monotheistic religions.

Over the years, and because of the changing realities, first the division of the city in 1947-1948 and later, in 1967, the application of Israel's laws over the unified city, the U.S. had to abandon its internationalization policy. During those years several elements in the American administration supported a functional internationalization of the holy places. The American administrations insisted that the problem of Jerusalem could only be solved by negotiations and agreements between the opposing sides through a strict adherence to the universal religious interests.<sup>66</sup> Accordingly, The U.S. opposed, in 1949, U.N. General Assembly Resolution 303 that reconfirmed the proposal to internationalize the city because the U.S. felt that this solution was not practical anymore after Jordan and Israel annexed areas of the city that were under their control and established their political institutions there.

After the 1967 War in which Israel captured East Jerusalem the U.S. insisted on the need to return these territories. After the War the U.S. bolstered Israel's military strength but at the time the U.S. wished to have good, improved relations with the Arab states. The future relations with Saudi Arabia, Kuwait and the other Gulf states received top priority and despite the fact that Egypt and Syria severed relations with U.S., the U.S. wished to restore and improve relations with these nations in order to remove them from the Soviet sphere of influence.<sup>67</sup>

Starting in the 1970s, the American administrations adopted varying positions on the Jerusalem question that were influenced by the nature and quality of the relations between the two nations and changing international circumstances. The American Presidents felt that Jerusalem should remain a unified city and that the holy places had

---

<sup>64</sup> See, for example, U.N. Security Council Resolution 478, August 20, 1980.

<sup>65</sup> Security Council Resolution 194. See supra note 24.

<sup>66</sup> Clyde Merk, "Jerusalem: The U.S. Embassy and P.L. 104-45," *CRS Reports*. September 22, 1999.

<sup>67</sup> Dennis Ross, *Doomed to Succeed: The U.S. – Israel Relationship from Truman to Obama*. New York: Farrar Straus and Giroux, 2015, 102-123.

to remain accessible to all worshipers– Moslems, Christian and Jews. Under Jordanian rule, between 1948 and the 1967 war, this was denied to Jews.

Immediately after the end of the 1967 War the U.S. viewed East Jerusalem as an area gained by force and therefore no official meetings could or should be conducted there by official American personnel. Also, the American administration expressed its opposition to all legislative acts adopted by the Knesset about the unification of the city and declared that these acts did not change the status of the city. In addition, the U.S. repeated its demand to secure the status of the holy places and also that the free access to the holy

places would be guaranteed to all. This stance found expression in a speech to the U.N. General Assembly by Arthur Goldberg, U.S. Ambassador to the U.N.:

*"The safeguarding of the Holy Places and freedom of access to them for all should be internationally guaranteed and the status of Jerusalem in relation to them should be decided not unilaterally but in consultation with all concerned. These statements represent the considered and continuing policy of the United States... My government does not recognize e that the administrative measures taken by the Government of Israel on 28 June can be regarded the last word on the matter, and we regret that they were taken."*<sup>68</sup>

On December 9, 1969, William Rogers, President Richard Nixon's Secretary of State, presented his proposals for a Middle East peace settlement. On the question of Jerusalem, he stated that "we believe Jerusalem should be a unified city within which there would no longer be restrictions on the movement of persons or goods. There should be open access to the unified city for persons of all faiths and nationalities. Arrangements for the administration of the unified city should take into account the interests of all its inhabitants and of the Jewish, Islamic and the Christian communities. And there should be roles for both Israel and Jordan in the civic, economic and religious life if the City." The final status of the Jerusalem had to be determined primarily by the Governments of Israel and of Jordan.<sup>69</sup>

This approach remained also in the early 1980s. Thus, for example, when Prime Minister Menachem Begin, in 1981, announced his intention to move his office to East Jerusalem, Samuel Lewis, the American Ambassador to Israel declared that if Israel

---

<sup>68</sup> "The Status of Jerusalem in America's Foreign Policy, Legislation and Jurisprudence", The U.N. General Assembly, July 14, 1967. [jcpa.org/article/the-status-of-jerusalem-in-america-s-foreign-policy-legislation-and-jurisprudence](http://jcpa.org/article/the-status-of-jerusalem-in-america-s-foreign-policy-legislation-and-jurisprudence)

<sup>69</sup>"The War of Attrition, the Rogers Plan". [Jewishvirtuallibrary.org/the-rogers-plan-december-1969](http://Jewishvirtuallibrary.org/the-rogers-plan-december-1969)

would go through with this intent they could not meet there. Begin did not proceed with his plan.<sup>70</sup>

From the mid-1980s, during President Donald Reagan's second term, his policy seemed to change. Despite several clashes Reagan had an extraordinary supportive and warm relationship with Israel.<sup>71</sup> Reagan, officially, did not diverge from his predecessors' policies on Jerusalem but, in fact, representatives of his administration began to attend meetings with Israeli governmental officials in East Jerusalem and thus granted a certain symbolic official cachet to Israeli sovereignty over that part of the city.<sup>72</sup>

Just as it seemed that the U.S. position on the Jerusalem issue was drawing closer to the Israeli policy the First Intifada erupted. This resulted in a change in the trend and a greater American support of the Palestinian rights in East Jerusalem. This change was demonstrated in 1990 during President George H.W. Bush's Administration when he declared that according to his perception the Jewish enclaves in East Jerusalem were settlements similar to those in the West Bank. Bush not only opposed Israeli policy he also issued a directive that ordered American officials not to enter Israeli governmental offices in East Jerusalem [in Sheik Jerach].<sup>73</sup> During the Bill Clinton Administration, 1992-2000, American policy was much friendlier towards Israeli policies on Jerusalem. This was evident in Secretary of State Madeleine Albright's statement that declared that the U.S. Government rejects the description of Jerusalem as "Occupied territory".<sup>74</sup>

Clinton's successor George W. Bush opposed the creations of new settlements in the West Bank and opposed the building there by Israel. On numerous occasions he declared that the erection of the security walls by Israel had to be stopped.<sup>75</sup>

In 2009, upon assuming the Presidency, Barack Obama demanded the freezing of further Israeli construction in East Jerusalem as a central goal in American Middle Eastern policy. Obama demanded cessation of all further building by Israel in East Jerusalem and in the West Bank. Obama viewed this as a pre-requisite to negotiations between Israel and the Palestinians.<sup>76</sup>

---

<sup>70</sup>"Begin Aide Says Premier's Office Will Soon Be Moved to East Jerusalem".

[jta.org/1980/07/21/archive/begin-aide-says-premiers-office-will-soon-be-moved-to-east-jerusalem](http://jta.org/1980/07/21/archive/begin-aide-says-premiers-office-will-soon-be-moved-to-east-jerusalem)

<sup>71</sup> Arnon Gutfeld, "From 'Star Wars' to 'Iron Dome': U.S. Support of Israel's Missile Defense Systems," *Middle Eastern Studies*. Vol 53 n 6, November 2017, 934-958; Arnon Gutfeld, "The 1981 AWACS Deal: AIPAC and Israel Challenge Reagan," *Mideast Security and Policy Studies*. Begin-Sadat Center for Strategic Studies Reports No. 157, Ramat-Gan, Israel, Bar-Ilan University, November 8, 2018; Dennis Ross, *Doomed to Succeed*. Supra note 67, 180-183.

<sup>72</sup> Akiva Adler and Nimrod Goren, "A Jerusalem Ambush: Steps Undertaken to Move the American Embassy to Jerusalem," [Hebrew]. Jerusalem: The Jerusalem Institute for the Study of Israel, Report No. 92, 2002.

<sup>73</sup> See Dennis Ross, *Doomed to Succeed*. Supra note 67, 254-255.

<sup>74</sup> Ibid, 297-298.

<sup>75</sup> Ibid, 339-341.

<sup>76</sup> Steven J. Rosen, "Israeli Settlements, American Pressure and Peace,"

In December 2009, a few days after The ministers of the European Union announced their support of the partition of Jerusalem and also designated East Jerusalem as the Capital of the future Palestinian State,<sup>77</sup> the U.S. State Department presented its policy on the issue:

*"Our position on Jerusalem is clear. United States policy remains unaffected and unchanged as has been stated by every previous administration which addressed this issue, the status of Jerusalem, and all other permanent status issues, must be resolved by the parties through negotiations."*<sup>78</sup>

In June 2016, following Prime Minister Binyamin Netanyahu's and Defense Minister Avigdor Liberman's announcement of the building of 700 new residential units in Ma'ale Adomim and in Jerusalem, the State Department issued an extremely harsh announcement criticizing Israel's policy. John Kirby, State Department Spokes Person described the construction in the territories by Israel as a "systematic process" of acquisition of land, expansion of settlements and legalization of outposts all undermining the Two States Solution.<sup>79</sup>

The American Administration was well aware of the complexity and the sensitivity that the Jerusalem question and the grave emotional reactions it raises. Therefore, American Presidents avoided expressing detailed descriptions of how the future solution on Jerusalem question would be like. Conversely, the U.S. Congress emphasized, on many occasions, its recognition of Jerusalem as Israel's capital and also on the need to keep the City unified. Over the years the U.S. Congress consistently supported the Israeli claims for sovereignty over a "unified Jerusalem" and criticized the policy of Administration officials that avoided undertaking actions that could influence future peace talks.<sup>80</sup> This position found expression in repeated attempts by Congress to legislate and to see to the implementation of the legislation that ordered the transfer of the American Embassy from Tel-Aviv to Jerusalem. The number of these initiatives grew as elections to Congress approached.<sup>81</sup>

In addition to legislations, members of Congress sent numerous letters to Presidents expressing their support of the unification of Jerusalem. On October 5, 1994, 260 members of the House signed a letter to President Clinton expressing their support for

---

*Middle East Forum, JCPA Strategic Perspectives.* 2012. [Medform.org/3265/israeli-settlements-american-pressure?v=1362363401000](http://Medform.org/3265/israeli-settlements-american-pressure?v=1362363401000)

<sup>77</sup> "European Union: 'Jerusalem Should be Capital of two States'," [news.bbc.co.uk/2/hi/middle-east/8401913.stm](http://news.bbc.co.uk/2/hi/middle-east/8401913.stm). BBC. News. December 8, 2009.

<sup>78</sup> [voa.news.com/archive/eu-Jerusalem-should-be-shared-capital](http://voa.news.com/archive/eu-Jerusalem-should-be-shared-capital)

<sup>79</sup> [www.news.walla.co.il/item/297584](http://www.news.walla.co.il/item/297584). July 6, 2016.

<sup>80</sup> Clyde Merk, "P.L. 104-45," September 22, 1999, *supra* note 66.

<sup>81</sup> See for example "To Provide for the relocation of the US Embassy from Tel-Aviv to Jerusalem" [govinfo/app/details/PLAW-104pub/45](http://govinfo/app/details/PLAW-104pub/45); see also Adler and Goren, "Jerusalem Ambush," *supra* note 70.

**Mentalities/Mentalités Volume 34, Number 1, 2020**

**ISSN- 0111-8854**

**@2020 Mentalities/Mentalités**

All material in the Journal is subject to copyright; copyright is held by the journal except where otherwise indicated. There is to be no reproduction or distribution of contents by any means without prior permission. Contents do not necessarily reflect the views of the editors.



a unified Jerusalem as capital of Israel. In addition, on March 1995, ninety-three senators wrote to Secretary of State Warren Christopher demanding to move the U.S. Embassy from Tel-Aviv to Jerusalem. Eighty-four senators repeated that demand in a similar letter, in July 1995, to President Clinton.<sup>82</sup>

In June 2007 that marked forty years to the Six Days War, the U.S. House of Representatives adopted Resolution 152, that had a declaratory value only. In it the House congratulated the residents of Jerusalem and all Israelis on the occasion of the fortieth year to historical unification of the city and commended Israel on the manner it administered the unified city by honoring all the religions present in Jerusalem in the past four decades. In addition, the House reiterated its commitment to its Jerusalem Embassy Ordinance of 1995 and called on the President to implement it.<sup>83</sup>

Another legislative act related to Jerusalem occurred in 2002. In it Congress determined by a decision of a majority of the members that the U.S. State Department should write in the passport the word "Israel" as the place of birth of those U.S. citizens born in Jerusalem. This Congressional directive came as a result of the administrative decision to leave blank the country's designation [Israel] of those U.S. citizens born in Jerusalem and only use the word "Jerusalem. The State Department, the agency responsible for issuing passports refused to implement this 2002 decision and continued its previous policy claiming that this Congressional decision was contrary to the principles of Separation of Powers between the Executive and legislative branches. The U.S. Supreme Court, in *Zivotofsky v. Kerry*, upheld the State Department's stance, that the authority on making political decisions as to the status of Jerusalem is the President's and the Executive branch and not of the Congress.<sup>84</sup> This was viewed by political analysts as a grave blow to the Israeli Government's position on the status of Jerusalem both in the western and Eastern parts of the city.

For many years the issue of the place of the American Embassy in Israel had a permanent place on the American-Israeli agenda and also in the internal American political scene. On the transfer of the embassy there were political, ideological and personal considerations of numerous actors: political systems in the U.S., Israel and in the Arab states; the Vatican, the pro-Israel Lobby [AIPAC], American-Moslem organizations and of numerous Evangelical and other Christian organizations.<sup>85</sup>

---

<sup>82</sup>See items (13) and (14) in Jerusalem Embassy Act of 1995. Pub Law 104-45. Nov 8, 1995. 104 stat,398. *Cong. Rec.* Vol. 141(1995), Oct23, 24.

<sup>83</sup> U. S. House of Representatives Resolution (Senate Concurring), H. Con. Res 152, June 5, 2007. [Jewishvirtuallibrary.org/house-resolution-commoraing-reunification-of-Jerusalem-2007](http://Jewishvirtuallibrary.org/house-resolution-commoraing-reunification-of-Jerusalem-2007); See also, Foreign Relation Authorization Act, Fiscal year 2003, *116 stat.*1350, section 214; *Zivotofsky v. Clinton*. 152 S. Ct.1421, 1425, (S. Ct, 2012)

<sup>84</sup>*Zivotofsky v. Kerry*. 576 U.S. 1059 (2015)

<sup>85</sup> See, Supra Note 80.

In the past four decades this issue became more relevant because the extensive Congressional preoccupation with the subject. In 1984, Congress adopted Resolution 352 supporting the transfer of the Embassy from Tel-Aviv to Jerusalem. The Senate added a Proclamation to the Diplomatic Security Act stating that the U.S. Embassy in Israel must be in Jerusalem and not in any other place.<sup>86</sup> Four years later, in 1988, Congress approved the funds for two buildings one in Tel-Aviv and one in Jerusalem, with the understanding that the President could choose which one of them would serve as the official American Embassy in Israel.<sup>87</sup> In 1990, Congress passed Resolution 290 that declared that the unified Jerusalem is the capital of Israel.<sup>88</sup> In 1993, Congress passed a regulation 3474 that ruled that the U.S. must cast an automatic veto on any U.N. Resolution that described Jerusalem as "occupied territory".<sup>89</sup>

In 1995, Congress passed the Jerusalem Embassy Act that stated that that the U.S. had to establish its embassy in Jerusalem by May 1999 - the date, that according to the Oslo Agreements, the permanent Israeli-Palestinian Agreements had to be concluded. The fact that the negotiations were still taking place caused President Bill Clinton and later President George W. Bush to postpone the implementation of the law. The most significant legislation concerning Jerusalem was The Jerusalem Embassy Act of 1995 that stipulated that the U.S. had to recognize Jerusalem as the capital of Israel and that the American Embassy had to be moved from Tel-Aviv to Jerusalem no later than May 31, 1999.<sup>90</sup> This Law passed with great majorities in both houses of Congress. In the House the vote was 347 for 37 against and in the Senate 93 for and only 5 against.<sup>91</sup>

Following the passage of this act Jerusalem began to be identified in American official governmental documents and internet sites as the capital of Israel. Despite that the Embassy remained in Tel-Aviv. According to the Law the President could decide to postpone the transfer of the embassy every six months. This was done for the first time in 1999 and repeatedly till 2009, when Barack Obama assumed the presidency when his decision was accompanied by a statement that the American Administration intended to start the process of transferring the embassy to Jerusalem. The postponement occurred because the law in question, it was explained by the White House, was contrary to the prerogatives of the president. The White House claimed that Congress did not have the authority to obligate the president where to place an embassy.

---

<sup>86</sup> Diplomatic Security Act, 1984. See, Dante C. Fascell, "Combatting International Terrorism: The Role of Congress". *Georgia Journal of International Law*. Vol. 16, 1986, 655-670.

<sup>87</sup> *Congressional Record*, Vol. 134, part 13, July 26, 1(88, 18739).

<sup>88</sup> H. Con. Res. 290, "In Support of the unified status of Jerusalem", 101<sup>st</sup> Congress (1989-1990).  
Congress.gov/bill/101<sup>st</sup>-congress/house-concurrent-resolution/290

<sup>89</sup> U.S. Congress, Regulation 3474, 1993.

<sup>90</sup> P.L. 104-45, Jerusalem Embassy Act of 1995.

<sup>91</sup> Dori Gold, *The Battle Over Jerusalem*. [Hebrew] Tel-Aviv: Yediot Aharonot, 2008.

This revived the debate concerning the statutory interpretations of the prerogatives of Congress and those of the President, in the field of foreign affairs.

In 2001, Congress appropriated 50,000,000 dollars for constructing an American embassy in Jerusalem. On September 20, 2002, one month before the Congressional elections, a proposal was presented in Congress that included a section that called on the President to implement the 1995 Congressional Act that called for the transfer of the Embassy to Jerusalem. An identical call was issued by Congress in 2003 but it did not result in any Presidential action.<sup>92</sup>

In 2014, John Kerry, Obama's Secretary of State, offered the "Kerry Plan", a framework for Israeli-Palestinian peace. In that plan, Kerry proposed that East Jerusalem would become the capital of the future Palestinian state. It called for a phased Israeli withdrawal from the West Bank with unprecedented security arrangements in the strategic Jordan Valley; the Israeli withdrawal was not to include certain settlement blocs that would be compensated with Israeli territory; the Palestinians were to recognize Israel as the nation state of the Jewish people and the Palestinians will not include any right of return of Palestinian refugees into Israel proper.<sup>93</sup>

On December 6, 2017, President Donald Trump announced the American recognition of Jerusalem as the capital of Israel and directed to commence the planning of the transfer of the American Embassy from Tel-Aviv to Jerusalem. The Israeli press referred to this declaration as the "Jerusalem Speech" or the "Jerusalem announcement".<sup>94</sup>

The proclamation was welcomed joyfully in Israel; Benjamin Netanyahu, the Prime Minister of Israel welcomed the decision and praised Trump's action. The reaction in the Palestinian Authority was angry. Most of the international community maintained its refusal to recognize Jerusalem as capital of Israel. Close to two-thirds of the nations supported a censure of the American proclamation in a vote in the U.N. General Assembly.<sup>95</sup> The official ceremony of the transfer of the American Embassy to Jerusalem was held on May 14, 2018.<sup>96</sup>

---

<sup>92</sup> Section 214 of the Foreign Relations Authorization Act of 2003.

107<sup>th</sup> Congress Public Law 228. United States Foreign Relations Authorization Act, Fiscal 2003, section 214, "United States Policy with respect to Jerusalem as capital of Israel, 116 stat 1366.

<sup>93</sup> *New York Times*. January 28, 2014. <https://nyti.ms/1fas76w>

<sup>94</sup> Text of the Proclamation "Recognizing Jerusalem..." see Proclamation 9683 of December 6, 2017.

"<https://www.govinfo.gov/content/pkg/FR-2017-12-1/pdf/2017-26832.pdf#page=1>"; "Presidential Documents" *Federal Register*. Vol. 82, No. 236, December 1, 2017.

<sup>95</sup> United Nations General Assembly Resolution ES-10L/L.22

"Defying Trump, U.N. General Assembly Condemns U.S. U.S. Decree on Jerusalem". *New York Times*. December 21, 2017.

[Nytimes.com/23017/12/21/world/middle-east/ trump-jerusalem- united-nationws.html](https://www.nytimes.com/2017/12/21/world/middle-east/trump-jerusalem-united-nationws.html)

<sup>96</sup> "U.S. Recognizes Jerusalem as Capital of Israel," *Jerusalem Post*. May 15, 2018. [The date chosen was no accident. On May 14, 1948 the state of Israel was established and immediately the U.S. was the

Trump's "Jerusalem Declaration" did not recognize the unified Jerusalem as capital of Israel as some in Israel were quick to describe but it was a significant historic act. This move was highly significant as for the first time it crystalized Jerusalem (at least, West Jerusalem) as the recognized capital of Israel. Some nations, such as Guatemala, moved their embassy to Jerusalem, whereas several other nations opened economic liaison offices there. Australia's Prime Minister Scott Morison, made a symbolic show of limited support for the American-Israeli stance on Jerusalem by declaring that Australia now recognizes West Jerusalem, being the seat of the Knesset and many of the institutions of government, as the capital of Israel: " We look forward to moving out embassy to West Jerusalem when practical... and after final status determination". The Prime Minister added that in the Interim Australia would set up a defense and trade office in West Jerusalem.<sup>97</sup>

During the American presidential elections campaign, in 2016, candidate. Trump announced his intention, if elected, to transfer the American Embassy from Tel-Aviv to Jerusalem. In the past, numerous presidential candidates made similar promises during their elections campaigns but once they assumed the Presidency they failed to act on their promises. Therefore, many were surprised by Trump's proclamation. In the proclamation the American President stated: "The foreign policy of the United States is grounded in principled realism, which begins with honest acknowledgement of plain facts". The "plain facts" that President Trump referred to and elaborated on were - - "Today, Jerusalem is the seat of Israel's government - the home of Israel's parliament, the Knesset; its Supreme Court; the residence of the Prime Minister and President; and the headquarters of many of its government ministries. Jerusalem is where officials of the United States, including the President, met their Israeli counterparts. It is therefore appropriate for the United States to recognize Jerusalem as Israel's capital".<sup>98</sup> The "reality" that President Trump described was that all Israeli official institutions are located in West Jerusalem and in his proclamation the U.S. did not recognize Israeli sovereignty over East Jerusalem. It was clear from Trump's statement that the U.S. did not recognize the Israeli annexation of East Jerusalem after the Six Days War (1967): " Today's actions – recognizing Jerusalem as Israel's capital and announcing the relocation of our embassy – do not reflect a departure from the strong commitment of the United States to facilitating a lasting peace agreement. The United States continues to take no position on any final status issues. The specific boundaries of Israeli sovereignty in Jerusalem are a subject to final status negotiations between the parties

---

first nation to recognize it].

<sup>97</sup> Bbc.,com/news/world-australia 46576716, 16Dec2018.

<sup>98</sup> Proclamation 9683 "Recognizing Jerusalem..." supra note 90.

**Mentalities/Mentalités Volume 34, Number 1, 2020**

**ISSN- 0111-8854**

**@2020 Mentalities/Mentalités**

All material in the Journal is subject to copyright; copyright is held by the journal except where otherwise indicated. There is to be no reproduction or distribution of contents by any means without prior permission. Contents do not necessarily reflect the views of the editors.

[in the Israeli-Palestinian dispute]. The United States is not taking a position on boundaries or borders".<sup>99</sup>

The practical interpretation of President Trump's statement was that there was no change in the American official position on the subject of the boundaries of Israeli Sovereignty in Jerusalem. The American recognition of Jerusalem as capital of Israel applied only on this part of Jerusalem that in reality most Palestinians and most Arab states realized and reluctantly accepted Israeli sovereignty - West Jerusalem. Trump's proclamation should have moderated the responses in both Israel and outside Israel. The limited significance of Trump's statement was ignored and in essence the extremely joyful and angry responses were not justified. Elements in Netanyahu's government, including the Prime Minister himself, made use of Trump's proclamation in order to bolster Netanyahu's position at home. In Israel, there were some that even compared Trump's Proclamation to the century old Balfour Declaration that recognized the right of the Jewish People to establish a national home in Palestine. A comparison that only one element in it was similar – the recognition of a leading world power in the right of the Jewish People for a national home in Palestine and the recognition of a great power of the right of the Jewish state to determine the location of its capital city. Some even went further and saw in it a Biblical dimension.<sup>100</sup>

The Palestinian Authority also made use of Trump's Proclamation but altered and perverted its meaning. This in order to strengthen its stature at home and in order to justify its opposition to negotiations with Israel under American auspices, claiming that Trump's act demonstrated again that the U.S. could not serve as an "honest broker" in the Israeli-Palestinian and the Israeli-Arab negotiations processes. Mahmoud Abbas (Abu Mazen), President of the Palestinian National Authority, condemned Trump's recognition of Jerusalem as the capital of Israel and declared that by doing this the U.S. "abandoned the peace process". Abu Abbas viewed Trump's Proclamation as "a reward for Israel that continues to build settlements in total disregard of International Law".<sup>101</sup>

---

<sup>99</sup> Ibid.; See also Oded Eran, "The U.S.'s President Recognition of Jerusalem as Israel's Capital" *Mabat Al (Overview)* [Hebrew]. INSS, issue 10, December 12, 2017.

<https://www.inss.org.il/he/publication/%D7%94%D7%9B%D7%A8%D7%AA-%D7%A0%D7%A9%D7%99%D7%90%D7%A8%D7%A6%D7%95%D7%AA-%D7%94%D7%91%D7%A8%D7%9%D7%AA-%D7%91%D7%989%D7%A8%D7%95%D7%A9%D7%9C%D7%9%D7%D-%D7%9B%D7%91%D7%9%D7%A8%D7%AA-%D7%9/>

<sup>100</sup> On this matter see Haggai Segal, "Like the Balfour Declaration: Trump's Recognition of Jerusalem is as a Miraculous Event", *Makor Rishon (Primary Source)* {Hebrew}. December 25, 2017.

<https://www.makorishon.co.il/opinion/63110/>

<sup>101</sup> Walla News, "Abu Mazen on Trump's Proclamation on Jerusalem: 'the U.S. Retreats from the Peace Process'" December 6, 2017. <https://news.wala.co.il/item/3117406>

The erroneous interpretations of the meaning of Trump's Proclamation found expression in the American media, there it became a vehicle to criticize Trump's foreign policy. Thomas Friedman, the influential *New York Times* writer that enjoys lacerating Trump wrote that in the thirty years that he covered the Middle East he never saw a President that gave so much for so little".<sup>102</sup> The Associated Press News Agency (AP) was more extreme and claimed that Trump "smashed" America's Middle Eastern foreign policy and destroyed America's ability to serve in the process of advancing peace in the Middle East.<sup>103</sup>

---

Over the years, American Presidents, candidates for the presidency, Congressional leaders and many others in the public sphere made use of the status of Jerusalem issue in the campaigns that they engineered. Despite their promises to change the status of Jerusalem once they reached positions of power that enabled them to act on their promises they found ways that enabled them to retreat from fulfilling their commitments. The Jerusalem status issue repeatedly was part of the confrontations between politicians and a play-toy in the American, Israeli, European, Jewish and Moslem political arenas. Every one of the actors mentioned put its imprints on the decision making process and on the public and communication networks that participated in struggles and debates that accompanied this issue.

---

On October 30, 2020, US Ambassador to Israel issued Menachem Zivitofsky the first ever U.S. passport to list "Israel" and not "Jerusalem" as place of birth for a U.S. citizen born in Jerusalem.<sup>104</sup> Critics claim that this move was an illegal action [after two U.S. Supreme Court rulings on the subject]. it was clearly a pre-election move by the Trump Administration to woo evangelical Christians.<sup>105</sup>

---

<sup>102</sup> Thomas L. Friedman, "Trump, Israel and the Art of Giveaway", *New York Times*. December 6, 2017. <https://www.nytimes.com/2017/12/06/opinion/trump-foreign-policy-giveaway.html>

<sup>103</sup> Mathew Lee and Bradley Klapper, "Trump Declares Jerusalem Israeli Capital, Smashing U.S. Policy", *AP*. December 7, 2017. <https://apnews.com/1d4e1824283f41ea84227/fa8e6ea7/Trump-declares-Jerusalem-Israeli-capital-smashing-US-policy>

<sup>104</sup> See supra note 1

<sup>105</sup> "US gives first passport with 'Israel' birthplace to Jerusalem-born teen" *Times of Israel*. October 30, 2020.