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THE UNITED STATES AND THE STATUS OF JERUSALEM, 1947-1984

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THE UNITED STATES AND THE
STATUS OF JERUSALEM 1947-1984

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I. Introduction

The United States has been involved in the question of Jerusalem ever
since the American government assumed a major role in promoting adoption
of the Palestine Partition Resolution at the United Nations in 1947. The
continuing centrality of the Jerusalem issue in the Arab-Israeli dispute is
attested to by the references to Jerusalem in the 1982 Reagan Plan for Peace
in the Middle East. Even more significant is the fact that although the
Jerusalem issue did not figure in the text of the 1978 Camp David Agreements,
it was the subject of three separate letters appended to the Agreements by
Prime Minister Begin, President Sadat and President Carter. In fact, it is
no secret that the Camp David Talks nearly founded at the last minute over
the Jerusalem question. Moreover, it is noteworthy that the United States,
which signed the Agreements simply as a witness and not as a party, found
it necessary and proper to publicly define its position on the issue of Jeru-
salem. On no other issue did the American government feel compelled to
put forth an official independent viewpoint in the final documents.

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Department of American Studies, The Hebrew University of Jerusalem.

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Mrs. Marilyn Rosenberg for their invaluable help in preparing the manuscript
for publication.

1 The plan was announced on Sept. 1, 1982. For the text, see Weekly Compilation

For detailed discussion of the Reagan position on Jerusalem, see below, nn. 215 ff.
and accompanying text.

2 Known officially as A Framework for Peace in the Middle East. For the text, see

3 See, for example, the report of former Israeli Ambassador to Washington, Simcha
Dinitz, who was present at Camp David, Jerusalem Post, Sept. 19, 1979, p. 3.

See also below, Sec. X.

4 The text of the three letters reads as follows:—
The purpose of the present paper is to trace and analyze the diverse positions adopted by the United States on the status of Jerusalem since 1947.

II. The Conception and Abortion of Territorial Internationalization

The Palestine Partition Resolution, adopted by the General Assembly on November 29, 1947, provided for the establishment of Jerusalem as a "corpus separatum" under a special international regime to be administered by the Trusteehip Council of the United Nations. Thus, the city was to fall outside the jurisdiction of the Jewish and Arab states envisaged by the Partition Resolution. The three territorial units—Jerusalem and the two independent states—were to be linked in an economic union. The area assigned for the special international regime would extend beyond the then existing municipal boundaries of Jerusalem and would include surrounding villages and towns such as Bethlehem, some six miles to the south of Jerusalem, and Mount of Olives, four miles to the west of the city. According to the resolution, the Trusteehip Council would draw up and approve within five months a detailed Statute of the city which would remain in force, in the first instance, for a period of ten years. At the expiration of this period, the future status of Jerusalem would be determined by the United Nations. Israel and Jordan formally requested the United States to engage in the formulation of the Statute. The United States did not respond.

Carter to Sadat, September 22
Dear Mr. President:

I have received your letter of September 17, 1978, setting forth the Egyptian position on Jerusalem. I am transmitting a copy of that letter to Prime Minister Begin for his information.


Sincerely,

Jimmy Carter

Inquiries of Prime Minister Begin's office did not elicit an explanation as to why the Carter letter was addressed to President Sadat alone. But see below, n. 100 and accompanying text.


11 Distrust, the purpose of extending the boundaries thus was to include remote Holy Places within the precincts of Jerusalem. More accurately, however, it was clearly designed to balance the Jewish population of the city, Jerusalem proper, covering the Old City and the new section, had, in 1948, an overwhelming Jewish majority. For figures, see Moshe Aumann, "Jerusalem" (Jerusalem: Israel Digest, 1968) 30. See also Marie Syrkin, "Jerusalem Belongs to Israel," New Republic, Dec. 13, 1963. Redrawing the boundaries, as Jewish Agency representative M. Elisha said to U.S. representative B. Gerig, "watered down our [Jewish] majority to a fifty-fifty proportion." State of Israel, Political and Diplomatic Documents, December 1947–May 1948 (Jerusalem: Government Printer, 1979) 142. (Hereinafter cited as Israeli State Documents: Pre-state volume).

As Menahem Kaufman has written: "It would seem that the sponsors of the resolution wished to increase the proportion of Arabs in the population." This is why "the territory of the international zone included the Arab villages around Jerusalem", America's Jerusalem Policy, 1947–1948 (Jerusalem: Institute of Contemporary Jewry, Hebrew University, 1982) 8.
period, the Trusteeship Council would reexamine the whole scheme and determine whether revisions were in order. Only at that time would the residents of the city be permitted, by means of a referendum, to express their own views regarding modifications in the international regime. Jerusalem was to be administered by a Governor appointed by the Trusteeship Council and was to be demilitarized and neutralized. All residents of the city were to become free facta citizens of Jerusalem unless they opted for some other citizenship, such as that of the Jewish or Arab state. Free access to the Holy Places was to be secured for all persons.

The proposal for an international regime for Jerusalem, which originated in the majority report of UNSCOP (United Nations Special Committee on Palestine), was supported by the United States at every stage of the UN deliberations, including, of course, the final vote of November 29, 1947. It is important to note, however, that the primary concern of the US delegation to the United Nations was to ensure "adequate safeguards for the holy places" and not the institution of a territorial regime, as such. This becomes clear from a November 11, 1947 despatch to Washington detailing decisions taken by the delegation. The relevant portion on Jerusalem reads as follows:

There was considerable sentiment in the [UN] working group for a proposal that the international regime for the city of Jerusalem be limited to the ancient walled city of Jerusalem, with the new Jewish city being made a part of the Jewish state while the Arab city was incorporated in the Arab state. The international authority would exercise supervision over other holy places throughout Palestine. It was agreed that the American representatives in the working group should go along with the majority on this question, provided that adequate safeguards for the holy places were retained.

Ultimately, however, the UN working group resolved to adhere to the UNSCOP recommendation and extend internationalization to cover the entire area of greater Jerusalem; and this was the plan to which the United States gave its support.

In accordance with the relevant provision in the Partition Resolution, the

Thus, the United States, together with Sweden, took the initiative in proposing that the General Assembly accept the basic principles of the UNSCOP majority plan. UN Doc. A/AC.10/16, in GAOR, 2nd Sess., Ad Hoc. Pol. Cmte., Annex 6, Oct. 13, 1947.


12 See correspondence by Don Rusk, Director of UN Affairs in the State Department, to Secretary of State, March 22, 1948. FRUS 1948, pp. 750-751. In Kaufman's words, "the American announcement of policy reversal had rendered obsolete the notion of the constitution of the new Jerusalem enclave under UN administration." America's Jerusalem Policy, 1947-1948, p. 17.

13 See, for example, the discussion of such proposals, as reported in FRUS 1948, pp. 600-62, 871, and 912-14. See also H. Eugene Borie, The Jerusalem Question (Stanford, Calif.: Hoover Institution Press, 1971) 54-56; Michael Broh, Decisions in Israel's Foreign Policy (London: Oxford University Press, 1974) 21-22 and Kaufman, America's Jerusalem Policy, 1947-1948, pp. 16-39.

14 See FRUS 1948, pp. 996-97 and n. 1.
on November 29, 1947, Jerusalem had been the scene of violent Arab attacks on the Jewish population. After May 15, 1948, the city became the target of a giant two-winged attack launched by the Transjordanian Arab Legion from the north and the east and by Egyptian forces from the south.14 The latter threat was stalled by Israeli troops on the outskirts of Jerusalem; but the Legion, in a heavy onslaught, conquered the old Walled City, including the ancient Jewish Quarter. The Jewish population was banished from the Old City, and the holiest of Jewish shrines, the Western Wall of the Holy Temple, henceforth became inaccessible to Jews. Division of the city into two totally separate parts became a reality—with barbed wire and brick walls ultimately marking off the boundaries, or western part of the city, from the Jordanian, or eastern, sector, Mount Scopus, where the Hebrew University and Hadassah hospital buildings were located, became an Israeli enclave in the Transjordanian part of the city and was, for the next nineteen years, in a state of total desuetude and neglect. The only contact between Mt. Scopus and the western sector of the city was provided by the biweekly Israeli convoy which, under UN supervision, supplied the small Israeli garrison manning the enclave.

It should be noted that during the course of the conflict in 1948, the United Nations at no time took active steps to assert its authority over the city which had been scheduled to come under its jurisdiction upon the expiration of the British mandate. The world organization made no move to forestall the Arab invasion of the city, to defend its civilian population, or protect its Holy Places. Nor did the United States itself at any time propose direct UN intervention to safeguard Jerusalem or to institute UN authority there—despite the fervent appeals, both public and private, by Jewish Agency officials who were deeply concerned about the fate of the Jewish community in the Holy City. American policy at this point was essentially limited to


15 See Lorch, Edge of Sword, pp. 209-10.
had proposed, and the community of states had appeared willing to accept, the uncritical embrace of internationalization in favour of exclusive Arab control. Remarkably enough the Arab states found the Mediator’s suggestions no less objectionable. This was because the continued existence of Israel as an independent state was envisaged. Moreover, only Jordan stood to gain territorially from the new arrangements proposed, and this was no reason for the remaining Arab states to fall in line. Thus, in common with Israel, the Arab states rejected the Mediator’s proposals.  

American officials recognized that the UN Mediator’s suggestion on Jerusalem was wide of the mark if only because it could not serve as a basis for serious consideration by Israel. In any case, the United States at this stage continued to adhere to the scheme for the internationalization of Jerusalem and was not yet prepared to be swayed from this position either by the new factual situation in Jerusalem or by the novel suggestion of the Mediator. Once again, however, members of the U.S. delegation to the United Nations began canvassing the possibility of circumventing the internationalization scheme to the Old City alone. Secretary of State Marshall went even further and seemed to suggest in secret messages to the U.S. representatives abroad that Washington would not be averse to a different arrangement in Jerusalem in which the internationalization aspect would be sharply muted. Thus, in a top secret message dated August 12, 1948, to London, Marshall wrote:

Some degree of UN responsibility for administration of Jerusalem still appears essential, with provision for protection of holy places, free access thereto, and guaranteed transit rights to city... However, U.S. is giving some thought to possible advantages modified condominium principle under which Israel, future Arab state, and UN would share administrative responsibility for Jerusalem. Administrative board might

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30 See, for example, the remarks of the Syrian Acting Foreign Minister, as reported ibid. at 1216, n. 2.


32 See comments of Ambassador Phillip Jessup in memorandum of June 30, two days after the Bernadotte proposals appeared. FURS 1948, p. 1167. (But cf. Jessup’s earlier views, ibid. at 1089). See also ibid. at 1233. At this time Washington also supported Bernadotte’s scheme for the demilitarization of Jerusalem. Kaufman, America’s Jerusalem Policy, 1947–1948, pp. 54 ff.

33 See ibid. at 1167.

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27 Ibid., at 1308.


29 This divergent from the Partition scheme was subsequently sharply attacked in the General Assembly debates by the Soviet delegate. See GAOR, 3rd Sess., 1st Cmte., 2525th Mtg., Dec. 3, 1948, pp. 491, 496. See also the remarks of the Byelorussian delegate, ibid., 2116th Mtg., Nov. 24, 1948, p. 743; and of the Polish delegate, ibid., 27th Mtg., Nov. 25, 1948, p. 774.
obtained on other issues, it may be possible to place Jewish Jerusalem under an Israel trusteeship and Arab Jerusalem under a Transjordan trusteeship, the two to be coordinated by representatives of Jerusalem of UNTC. Trusteeship agreements would provide international guarantees of access to Jerusalem and protection of and access to holy places, etc. Such an arrangement would leave security and budgetary responsibility upon those primarily concerned and would go long way toward meeting prestige demands of both Jews and Arabs for Jerusalem. 34

Austin even suggested that "something along trusteeship line might be developed without formal trusteeship arrangements", although he conceded that this might lead to annexation, which the Bendorret report seemed to rule out. Austin noted that the Assembly was moving toward postponement of the issue until next year, by which time the Conciliation Commission would have drawn up detailed proposals. In the meantime, he recommended, the Assembly should establish the principle of UN control and "indicate that it understands the Bendorret proposal to mean... no integral annexation... maximum local autonomy, and some form of international guarantees of legitimate international religious interest." 35 Clearly, this marked a considerable departure from territorial internationalization.

Austin's ideas were reflected in a British draft resolution submitted to the General Assembly on November 18, 1948, 36 and ultimately incorporated, with but minor changes, in the General Assembly resolution on Palestine of December 11, 1948. 37 The resolution provided that the Jerusalem area should be "accorded special and separate treatment from the rest of Palestine and should be placed under effective United Nations control with the maximum feasible local autonomy for the Arab and Jewish communities." Final determination of the question, however, was postponed to the fourth Assembly session in 1949, by which time the Palestine Conciliation Commission (established by the same resolution) was to submit "detailed proposals for a permanent international regime for the Jerusalem area."

From the Assembly debates it emerges that the United States was deeply worried about the practical problems that would arise from UN assumption of an administrative role in an internationalized Jerusalem. In addition to difficulties of administration of an area caught between two sovereigns, and possibly hostile, states, there was the matter of finance. Who would supply

24 Ibid., at 1484.
25 Ibid., at 1485.
26 UN Doc. A/C.1/394.
27 G.A. Res. 194 (III).
the funds? Inevitably, it appeared that a permanent corpus separatum in Jerusalem would constitute a permanent financial drain on the resources of the members of the United Nations and especially the United States. For this reason, apparently, Washington was increasingly inclined to place primary emphasis on that phrase in the Bernadotte report on Jerusalem which advocated "maximum feasible local autonomy for its Arab and Jewish communities". Autonomy for the respective sectors of Jerusalem would whittle down the role of the United Nations to a nominal supervisory one, except in so far as the Holy Places were concerned. For the rest, the respective communities would administer their sectors as integral parts of the national states with which they were associated. This was the theme struck by Philip Jessup, U.S. Ambassador to the United Nations, in commenting on the British draft proposal during the Assembly debate. He concurred in the view that Jerusalem should be accorded "special treatment", but, at the same time, he expressed the belief that the area "should be integrated in so far as was consistent with its international character with the remainder of Palestine".88

Thus, by the end of 1948, American policy envisaged something other than a corpus separatum for Jerusalem. U.S. policymakers were not sure how best to achieve the goal of "safeguarding the Holy Places" and what role the World Body should fulfil in the City, but they felt no obligation to adhere rigidly to the notion of territorial internationalization as enunciated in the original Partition plan of 1947.

In 1949, the United States, as one of three members of the Palestine Conciliation Commission,89 was heavily involved in the drafting of the Commission's proposals on Jerusalem.90 However, even before this task got under way, the United States was compelled to define its stand on the decision of Israel to convene the Knesset in Jerusalem. Israel's parliamentary elections were held on January 25, and the First Knesset was to convene in Jerusalem on February 14.91 The members of the diplomatic community, including the U.S. ambassador, were invited to attend the opening. In the face of conflicting advice on the matter—acceptance of the invitation was urged by James G. McDonald, U.S. Ambassador to Israel,92 while both the

89 The other two were Turkey and France.
91 See ibid., at 739.
92 See ibid., at 739-40.
93 Ibid., at 718, n. 2; 736-38, 740-41.
94 Ibid., at 741, n. 1. The decision was confirmed by President Truman on February 10, Idem.
95 Ibid., at 739.
96 Ibid., at 891.
Thus the United States was not prepared to recognize Israeli or Jordanian sovereignty in Jerusalem, but neither was it asserting exclusive UN jurisdiction over the city. Washington was prepared to accord Israel and Jordan rights which fell short of actual sovereignty and entailed a measure of international supervision and involvement. In the U.S. view, the legal status of the city would be sui generis, with the authority of each party defined by the international instrument to which the United Nations, Israel, and Jordan would subscribe. This fact is underlined in an exchange of correspondence between Secretary of State Acheson and Cardinal Francis Spellman of New York. Cardinal Spellman had expressed fears lest the granting of local autonomy to Israel and Jordan might enable these states to invoke Article 2(7) of the UN Charter, which preserves the right of member states to be free of UN intervention in their domestic affairs, so as to deny the rights of the United Nations in the area. To this Acheson replied:

We have no intention of recognizing the sovereignty of any state in the Jerusalem area. The type of international regime which we have in mind would involve the distribution of governmental powers among the three authorities concerned, namely the two adjacent states and the United Nations authority. It will not be an application of the concept of sovereignty in the usual sense, but will rather be a matter of a precise definition of the location of respective governmental powers. In the present case those rights of the adjacent states in the area will be those defined in an agreement to which they are parties, they will clearly be in no position to deny the rights of the United Nations, which will be defined in the same instrument.

This concept formed the basis of the Conciliation Commission's draft Instrument on Jerusalem completed on September 1, 1949. The Commission premised itself on the "full and permanent authority" of the United Nations over Jerusalem and sought to prescribe the limits of Israeli and Jordanian authority in the city. The Instrument stipulated that these two states would exercise authority in their respective "zones" by virtue of the powers "delegated" to them. The fact that the city would be neutralized and demilitarized under a UN-appointed Commissioner and subject to an International Tribunal of three judges meant that each part of Jerusalem would be governed by two jurisdictions—a UN jurisdiction and a Jordanian or Israeli one—the latter derived from the former.

The Conciliation Commission's proposals, which, in effect, amounted to a modified form of territorial internationalization, failed to satisfy either the

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47 Ibid., at 1296.

Arahs or the Israelis. The two states directly involved, Israel and Jordan, completely rejected the notion of territorial internationalization. Indeed, King Abdullah was opposed to internationalization in any form and warned that Jerusalem would be internationalized "only over his dead body."46 The Israelis did not express their opposition in the same graphic manner. Actually, they were in favour of a form of internationalization limited to the Holy Places, i.e., functional internationalization, which they defined in the following terms:

An international regime applying to the whole city of Jerusalem but restricted functionally, so that it would be concerned only with the protection of the Holy Places and not with any purely secular aspects of life and government.47

Jordan and Israel were not alone in finding fault with the Conciliation Commission's modified internationalization scheme. Despite the backing

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46 NY. Times, Oct. 9, 1949. See Bobik, The Jerusalem Question, p. 74. It is clear that Abdullah's fierce opposition to any notion of internationalization was in no way a consequence of the Israeli attitude. The assertion by Cattan that it was concocted disregards the documentary record. Henry Cattan, Jerusalem (London: Croom Helm, 1981) 64.
47 GA14/6, 3rd Sess., 2nd Part, Ad Hoc Pol. Comm., 45th Mtg., May 5, 1949, pp. 223-234. It is to be noted that apart from rejecting the notion of territorial internationalization, the Israelis took exception to two additional features of the Conciliation Commission's report. For one thing, they denied that the United Nations possessed "full and permanent authority" over Jerusalem. Secondly, they were outraged by the Commission's proposal that the demographic composition of the city be frozen in its present form. This suggestion was dismissed as "an insidious proposal ... reminiscent of discriminatory practices elsewhere in the world". UN Doc. A/AC.31/FL.34. In a separate legal brief delivered to Member States, Israel furnished an answer to the question: "What legal authority does the United Nations possess with respect to Jerusalem?" After an extensive analysis the brief concluded that, since the Partition Resolution was never carried out, the United Nations possessed no sovereignty or other form of legal authority in Jerusalem; it merely possessed "a special and widely recognized interest" in the city. In light of this fact, "the degree of legal authority which the United Nations may exercise in Jerusalem in the future" would depend on a specific grant of authority from the states now "in effective control of the area". Nov. 4, 1949. British Foreign Office Doc. FO 371/73566. It is noteworthy that the legal advisers of the British Foreign Office, in secret memoranda, accepted the validity of the Israeli argument. "In so far as it demonstrates that the United Nations does not have sovereignty over Jerusalem, this Opinion is incontestable." J.B.S. Fawcett, Nov. 7, 1949; acquiesced in by G.G. Fitzmaurice, Nov. 8, 1949. "Generally Mr. Elan's paper seems to me to be pretty good law and pretty good common sense." W.E. Beckett, Nov. 16, 1949. British Foreign Office Doc. FO 371/73566.
which it received from the three states comprising the Commission—the United States, France and Turkey—the Commission’s scheme met with little general favour. It fell between two stools—complete territorial internationalization, on the one hand, and complete autonomous rule by the states actually exercising authority in the city, on the other. As a result, it satisfied no one. In fact, during the 1949 General Assembly deliberations, the Commission’s plan failed to receive even any serious interest at all; this time only two solutions were vying for the support of the UN members—a reversion to full territorial internationalization as enunciated in the original Plan, and a new attempt to satisfy international concern over the Holy Places through functional internationalization. While the former was supported by the Arab, Catholic and Soviet blocs, the latter was endorsed by most western Protestant countries. The functional approach was reflected in a joint Swedish-Dutch draft resolution which would require Israel and Jordan to enter into certain pledges regarding the Holy Places. The United Nations would appoint a Commissioner to exercise supervision over the Holy Sites on behalf of the world body and ensure freedom of access to, and non-interference with, the religious shrines; but jurisdiction and administrative control of the respective sectors would be left to the states concerned. There would thus be a territorial dimension to internationalization. Without, expressly saying so, the United States during 1949–1950 gravitated toward the functional camp.

Although the United States was not prepared to take the lead and actually promote functional internationalization, it repeatedly indicated it would accept this kind of solution of the Jerusalem problem if it were acceptable to the majority of the Assembly and to the states directly involved. At the same time, the United States incessantly condemned the demands of the territorial-internationalization camp, which it labelled as totally unrealistic. Thus, in the 1949 Assembly debates, the U.S. delegate criticized the proposal to constitute Jerusalem a corpus separatum as an attempt “to establish a system of government which not only did not fulfil the aspirations of the population of the region, but, on the contrary, was obviously incompatible with those already established.” But not The Trusteeship Council, he stated, did have at its disposal, any more than other UN organs, “the force...to impose such a solution upon the parties concerned.” The U.S. delegate also cautioned his fellow delegates that the financial burden involved in administering “the continuing secular activities of Jerusalem...might easily exceed...”

52 UN Doc. A/1227, Dec. 9, 1949.
54 Ibid.
56 Ibid., Ad Hoc Pol. Ctte., 57th Mtg., Dec. 9, 1949, p. 344. A secret British Foreign Office document of September 25, 1949, reveals the true nature of the U.S. stand at this session of the General Assembly. In a brief for the United Kingdom delegation to the United Nations, it is said: “The United States Embassy have shown us copies of correspondence between President Truman and Cardinal Spellman on this subject. President Truman’s letter says that there are very grave doubts in American official circles as to the possibility of enforcing full internationalization. The Foreign Office share these doubts, although it is true that it had been useless and impolitic to air them publicly. Meanwhile His Majesty’s Government have been in correspondence with the United States Government about the lines on which a final Palestine settlement might be reached. In this correspondence the proposal in regard to Jerusalem was stated as follows: ‘There should be a partition of Jerusalem for administrative purposes with international supervision particularly of the holy places...’ The proposal above is now agreed Anglo/U.S. policy, but this is of course strictly confidential since His Majesty’s Government have not ceased to support the principle of full internationalization in public...The paramount necessity at present is for a peaceful settlement in Palestine which will restore the situation in the Middle East to normal. This settlement should not be helmed owing to the international presence upon an ideal solution for Jerusalem which is unpractical...There should be international supervision of the holy places and of the line of demarcation between Israel and Jordan in the Jerusalem area. Easy movement between the two parts of Jerusalem should be assured.” British Foreign Office Doc. 371/75543.
resolution furthermore directed the Trusteehip Council not to allow "any actions taken by any interested Government... to divert it from adopting and implementing the Statute of Jerusalem". This last directive revealed the extent to which the General Assembly's actions on the issue of Jerusalem were marked by a rigid adherence to formulae regardless of the actual situation prevailing in Jerusalem. Despite its deep misgivings about the possibility of implementing such a scheme in Jerusalem in the face of Israeli and Jordanian resistance, the United States resolved to participate faithfully in the work of the Trusteeship Council.  

Jordanian resistance to the Assembly resolution was manifested in a series of steps taken by King Abdullah, including a move toward proclaiming a unified kingdom on both sides of the Jordan River. On December 10, 1949, he sent a telegram to the United Nations in which he announced his unalterable opposition to international control. In another statement he declared "he would use force if necessary to oppose implementation of the internationalization of Jerusalem." On December 13, he issued a decree dissolving the Jordanian Parliament and calling for elections throughout the kingdom, including east Jerusalem. He declared himself "ready to die" to defeat implementation of the internationalization scheme. Israel similarly felt compelled to respond with an immediate and unequivocal affirmation of its position on Jerusalem requested by the U.S. Government to demonstrate restraint. In a statement issued two days after the Assembly vote, Ben Gurion declared: "Jerusalem is an inseparable part of Israel and her eternal capital. No UN vote can alter this historic fact." The Knesset thereupon convened in Tel Aviv and resolved to move its seat to Jerusalem and to accelerate the transfer of government departments to Jerusalem. In his remarks to the Knesset on December 13, 1949, Ben Gurion stated:  

This decision [of the General Assembly] is utterly incapable of implementation—if only because of the determination and unalterable opposition of the inhabitants of Jerusalem themselves... For the State of Israel there has always been and always will be one capital only—Jerusalem the Eternal. Thus it was 2,000 years ago—and thus it will be, we believe, until the end of time.  

On December 14, 1949, Ben Gurion made arrangements for the transfer of his office from Tel Aviv to Jerusalem, and two days later he set January 1, 1950, as the deadline for the transfer of the rest of the government offices to Jerusalem, with the exception of Defence, Police, and Foreign Affairs. On January 23, 1950, the Knesset adopted a resolution which declared: "With the creation of a Jewish State Jerusalem again became its capital."  

Israel's proclamation compelled the United States to define its position. In a secret State Department memorandum it was acknowledged that nothing in the 1947 or 1949 Assembly resolutions prohibited the establishment of the capital of Israel in Jerusalem; it was merely likely to be construed "as contrary to the spirit of the resolution." As a result, Washington decided not to go beyond notification to Israel that the United States "considers particularly unfortunate any step or course of action... likely to prejudice or complicate settlement of [the] Jerusalem question", especially when the matter was under study by the Trusteehip Council. At the same time, the Secretary of State issued the following explicit instructions for the attention of the U.S. Embassy in Tel Aviv and the U.S. Consul General in Jerusalem:  


69 See N.Y. Times, Dec. 11, 1949. See also Bovis, The Jerusalem Question, p. 80; and FRUS 1949, p. 1553.  

70 Jerusalem Post, Dec. 12, 1949.  


72 Jerusalem Post, Dec. 12, 1949.  

73 See message sent by Secretary of State to U.S. Embassy in Israel, Dec. 9, 1949, in FRUS 1949, p. 1551.  


75 Bovis, The Jerusalem Question, p. 82.  

76 Jerusalem Post, Dec. 12, 1949.  


78 Bovis, The Jerusalem Question, p. 82.  


80 Ibid., at 1555.
1. US does not recognize sovereignty of Israel in Jerusalem...  
2. US continues to support principle [of] internationalization of Jerusalem along lines [of] modified regime such as that proposed by PCC (Palestine Commission for Conciliation of Claims).  
3. Dept does not desire Emb[assy] Tel Aviv to conduct official business in Jerusalem with Israel Central Govt officials who may move there. For[et al] Office in Tel Aviv provides normal means [of] contact [of] Israeli Govt...  
4. Dept continues [to] desire that Amb's [Ambassador's] visits to Jerusalem for unofficial purposes be restricted to absolute minimum.  
5. No objection contact by Cons[ul] Gen[eral] in Jerusalem with such Israeli ministries as may be in Jerusalem, on routine consular affairs affecting Jerusalem area only. [But],... shld [should] make clear to Israeli officials that Emb[assy in Tel Aviv] continues to be sole US diplomatic representation near Israeli Govt.

Ten days later, on January 13, 1950, the State Department Legal Adviser presented a legal memorandum on the status of the U.S. Consulate in Jerusalem.

He had been asked to advise what stand the United States should take if Israel, in view of its position in Jerusalem, should request the U.S. Government to apply to Israeli authorities for exequatur for American consular officials in Jerusalem.

He advised that "the United States, as a Member of the United Nations, should not take any steps with respect to the functioning of American consular officers in Jerusalem which would recognize the sovereignty of any national state in that area." This, however, would not preclude the United States from maintaining consular officers in Jerusalem "by agreement with the Israeli or Jordan Government, on a de facto basis and without exequatur." 

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72 An exequatur is a written authorization by the state receiving a consul permitting him to exercise his consular functions.
73 FBIS 1950, p. 860-89.
74 Ibid., at 868. This opinion also concluded that "the General Assembly resolution of December 9, 1949, providing for a special international regime for Jerusalem, was based implicitly on the theory right to determine the status and future government of Jerusalem." In support of this conclusion, the memorandum presented a chain of reasoning which the legal adviser himself conceded was "a complicated one, certainly not free from serious doubts and difficulties," at 868. Particularly open to challenge was the following claim: "Although the Rostow for Jerusalem which the United Nations Trusteeship Council drafted pursuant to the November 29 resolution was not placed in opera-
at least one of the states heretofore demanding territorial internationalization. Already on April 17, 1950, the Soviet Union had notified UN Secretary General Trygve Lie that it was withdrawing its support from the Assembly resolution on Jerusalem adopted the previous year, and would accordingly not participate in Trusteeship Council discussions on the drafting of the Jerusalem Statute.79 The defection of the Soviet bloc meant that the Catholic and Arab blocs alone would be incapable of summoning the necessary two-thirds majority required to pass the resolution. Two divergent approaches were presented for Assembly consideration. One draft resolution called for the appointment of a committee which would engage in negotiations directed to achieving territorial internationalization; the other endorsed functional internationalization.

American policy at the 1950 Assembly session closely followed the approach outlined in the above-mentioned position paper. Thus, in his address to the Assembly, the U.S. delegate called on the World Organization to refrain from taking decisions on Jerusalem opposed by both Jordan and Israel and which would involve the international community in "responsibilities not corresponding to its interests in Jerusalem."80 The United States continued to uphold the principle of internationalization of Jerusalem but considered "there was no practicable way to implement a statute ... opposed by the people of Jerusalem." The Swedish proposal for functional internationalization, he declared, represented "a valuable contribution to the solution of the problem." Israel had already indicated its acceptance of the proposal, and it was disappointing to the American delegation that Jordan, out of fear for its sovereignty, was not also willing to help.81 In an effort to overcome Jordanian opposition, the U.S. delegate announced that his country would co-sponsor an amendment to the Swedish draft resolution which would allow for immediate partial implementation of the functional scheme, allowing further details to be filled in at a subsequent date through negotiations.82 This initiative reflected a consistent American position not to take the lead in promoting a permanent solution but to aid in facilitating a temporary arrangement.

80 UN Doc. AJAC.3/6/L.71, Dec. 12, 1950. This draft resolution was sponsored by Belgium.
83 Ibid., at 496.

Despite the efforts of the United States and other western states, the Assembly failed to accept the Swedish proposal, amended or otherwise. Nor was the requisite majority found for the draft resolution endorsing territorial internationalization. The reversal in the Soviet position on Jerusalem sealed the fate of the maximalist draft resolution. In the final vote on December 15, 1950, it received only 30 votes in favour, 18 against, and 9 abstentions.85 No other resolution was adopted in its place. For the first time since 1947, the General Assembly had failed to adopt a resolution on Jerusalem in its annual session. In effect, this signalled the end of the road for the campaign to achieve the territorial internationalization of Jerusalem. Technically speaking, the 1948 and 1949 Assembly resolutions calling for some variety of internationalization were still on the books, but in fact they were dead letters. In any event, they lacked binding force since they were but recommendations of the Assembly.86 Moreover, in the view of many UN representatives, they were no longer viable even as recommendations since it was neither possible nor justifiable to impose an international regime on unwilling populations. The end result was that the search for a solution of the Jerusalem issue based on the principle of internationalization was suspended, and the international community proceeded to adjust itself to the de facto situation which obtained in the Holy City.87

A review of American policy from 1947 to 1950 reveals that the United States was never wedded to the territorial internationalization scheme as an exclusive solution to the Jerusalem problem. For the United States the key issue was protection of the Holy Places, and the territorial aspect was only a means of achieving that goal. Thus, even prior to Assembly adoption of the Partition Resolution in 1947, the American delegation evinced concern over the administrative and financial difficulties that would arise if the United Nations assumed responsibility for the administration of Jerusalem. Once the Partition Plan fell apart as a result of Arab opposition, and the city became divided between two sovereign states, elements of self-determination were added to the earlier practical factors militating against a UN-imposed regime in Jerusalem. These factors led the United States to opt...
for a modified form of internationalization which would accord considerable local autonomy to the two states immediately concerned. At the same time, however, the United States, at least at this point, was not prepared to recognize the sovereignty of the two states in their respective sectors in Jerusalem. For this reason Washington took exception to moves designed to confirm the sovereign authority of either state in its sector of Jerusalem, such as the convening of the Parliament there, or the proclamation of the city as the national capital. By the same token, Washington resolved to maintain a consultative role in Jerusalem with its scope of operations limited to the affairs of the city and whose members would not apply for, or receive, exequatur from either Jordan or Israel.

While adhering to this legal position out of conviction that the resolutions of the General Assembly required it, the American government was more and more convinced that territorial internationalization was impossible to attain. Instead, the United States favoured a move in the direction of functional internationalization, whereby the sovereign authority of the two states concerned would be reserved, while an international regime designed to protect the Holy Places would be instituted. The United States was not willing to take the initiative in promoting this solution but repeatedly indicated that it would be prepared to accept such a solution if it was supported by the requisite majority in the United Nations and accepted by both Jordan and Israel. In short, any arrangement which would fulfill the key purpose of protecting the Holy Sites and was acceptable to the international community would command the support of the United States. For American policymakers there was nothing sacred in internationalization; rather, internationalization was but a tool to serve what was needed.

III. The Interlude, 1951-1967

From 1951 to 1967 the United Nations took no action with regard to the status of Jerusalem. If Jerusalem represented a problem, it was a problem which engaged little, if any, international interest or concern. As one writer has said, "the question of Jerusalem was conspicuous only by its absence from discussion in the UN."

The status quo, it would seem, was tolerably acceptable to the international community, if only because no practical alternative was available.

Given the inability of the international community to interfere in the affairs of Jerusalem, Israel and Jordan steadily consolidated their hold on the sectors under their control and proceeded to manifest there attributes as they saw fit.
The following aide-memoire was delivered to the Israeli Government on July 9, 1952:

The Government of the United States has noted with concern the decision and announcement of the Israeli Government on May 4, 1952, to move the Foreign Office to Jerusalem.

The Government of the United States has adhered and continues to adhere to the policy that there should be a special international regime for Jerusalem which will not only provide protection for the holy places but which will be acceptable to Israel and Jordan as well as the world community.

Since the question of Jerusalem is still of international importance, the U.S. Government believes that the United Nations should have an opportunity to reconsider the matter with a view to devising a status for Jerusalem which will satisfactorily preserve the interests of the world community and states directly concerned. Consequently, the U.S. Government would not view favorably the transfer of the Foreign Office of Israel to Jerusalem.

The Government of the United States also wishes to convey that in view of its attitude on the Jerusalem question, it has no present intention of transferring the Ambassador of the United States and his staff to Jerusalem.

The actual removal of the Israeli Foreign Ministry from Tel Aviv to Jerusalem took place a year later, in July 1953. Secretary Dulles indicated that the United States regretted the Israeli move since “it would embarrass the United Nations, which has a primary responsibility for determining the future status of Jerusalem”. He recalled that “the presently standing U.N. resolution about Jerusalem contemplates that it should be to a large extent at least an international city rather than a purely national city”.

Despite the removal of the Foreign Ministry to Jerusalem, for several reasons:


97 See “The Jerusalem Question”, pp. 93-94; and Brocher, “Jerusalem: Israeli Political Decisions” (1951), p. 22 maintain that Israel delayed the move for a year to gauge international reaction to the original announcement. Sensing that the repercussions would not be serious, Israeli decided to go ahead in 1953.

98 Dept. of State Bulletin, Aug. 10, 1953, pp. 177-78.

years thereafter, the Ministry continued to maintain a liaison branch in Tel Aviv. This enabled the American Embassy and other embassies to deal with the Israeli Government without the necessity of conducting business in Jerusalem. However, this arrangement came to an end in June 1962, when the Ministry, sensing that the boycott was waning, announced the closing down of the Tel Aviv liaison branch. Henceforth, the U.S. Embassy had no alternative but to conduct its business directly with the Foreign Ministry in Jerusalem. Washington (along with several other countries) officially protested the Israeli move and made clear that its contact with the Ministry in Jerusalem should not be construed as signifying any change in U.S. policy on Jerusalem. The United States continued to refuse to recognize Israeli sovereignty there.

Jordan’s actions in east Jerusalem likewise raised questions for American policymakers and prompted on occasion the lodging of reservations by the U.S. Government. As noted earlier, already in 1949 King Abdullah had indicated his intention of annexing the West Bank including east Jerusalem, to Jordan. On December 1, 1948, a mass meeting of Arab notables held at Jericho had adopted a resolution calling for the unification of both banks of the River Jordan into one kingdom with Abdullah as reigning monarch. Elections throughout the kingdom, embracing also east Jerusalem, were held on April 11, 1950. Given a turnout of 70%, on the West Bank, the results were portrayed as a referendum on the issue of the incorporation of the West Bank into the Hashemite Kingdom. The newly elected Jordanian Parliament unanimously approved a resolution of unification on April 24, 1950. The resolution was signed the same day by King Abdullah. Formal recognition of the union was accorded by the United Kingdom three days later on April 27, 1950. However, the British announcement expressly

98 See Bocht, The Jerusalem Question, pp. 93-94.
100 See text above, at n. 59, and Whiting, Digest of International Law, Vol. 2, pp. 1165-68.
declared that "pending a final determination of the status" of Jerusalem, "they are unable to recognize Jordanian sovereignty over any part" of the city. Nonetheless, Jordan was recognized as exercising de facto authority in the part of Jerusalem under its control. As a result, the Anglo-Jordanian Treaty of Alliance which, by the act of recognition was extended to the West Bank, expressly included east Jerusalem.698 Despite the urging of the United Kingdom, the United States refrained from according official recognition to any part of the Jordanian act of annexation.699 In a press conference on April 26, 1950, Secretary of State Acheson remarked that the "American attitude was that normally we had no objection whatever to the union of people who were mutually desirous of this new relationship...[but] in this case it had a bearing on the efforts...made through the United Nations to solve the Palestine matter...we were studying it from that point of view...that was all he could say about it at the present time." On the same day Washington notified Amman that it did "not contemplate making further public statements" on the union of Jordan and Arab Palestine.700

A secret State Department paper prepared at that time defined American policy in the following terms. The United States, the paper said,

was in favor of the incorporation of Central Palestine into Jordan but desired that it be done gradually and not by sudden proclamation. Once the action took place, the Department approved of the action "in the sense that it represents a logical development of the situation which took place as a result of a free expression of the will of the people... The United States continues to wish to avoid a public expression of approval of the union."

And, as for the issue of Jerusalem, Washington continued to adhere to its former position, as defined in a memorandum of April 17, 1950:

The United States has favored the principle of the internationalization of Jerusalem to the degree necessary to achieve agreement among the main parties in interest, and has supported United Nations efforts

198 This information is drawn from Whiteman, Idem, and Bovim, The Jerusalem Question, p. 88.
199 See FRUS 1950, pp. 454, 469, and 875.
200 Ibid., at 874-875 and n. 2; but cf. the remarks of Stuart W. Rockwell of the Office of African and Near Eastern Affairs, ibid., at 921. Israel protested the Jordanian action and declared it was "a unilateral act which in no way binds Israel". Foreign Minister Moshe Sharet, Duree, Hakneset, Vol. 5, p. 1282 (May 3, 1950).
201 FRUS 1959, p. 1096, n. 3.
Both governments directly concerned, that of Israel and that of Jordan, rejected internationalization thus in fact nullifying the United Nations Resolutions. The majority of UN member nations, including the United States and the Soviet Union, have continued to respect the United Nations Resolutions despite the de facto occupancy of the city of Jerusalem part by Israel and part by Jordan. As a result, an anomalous situation exists today embodied, in the case of the United States, by a Consulate General whose district is the "international city" and certain adjacent areas on the Jordanian side. Other nations which maintain similar establishments are the United Kingdom, Turkey, Italy, Spain, Greece and Belgium. Many other countries mark their respect for the internationalization resolutions by establishing embassies in Tel Aviv thus avoiding recognition of Jerusalem as the capital of Israel and, by implication, as Israel's de jure sovereign territory. 387

American policy, therefore, while not adhering to the internationalization thesis, nonetheless, refused to confer recognition upon the fact of a divided city. Washington continued to regard the city formally as one entity while conducting its affairs in the city on a more realistic basis. The United Nations, in the official American view, retained rights in Jerusalem. How far these rights went and to what extent they impinged on the authority of the two states exercising control in the city, did not require immediate answers. What was essential was that the United States register its protest at any sign of an assertion of sovereignty. Consequently, the American embassy continued to be located in Tel Aviv, even if diplomatic business was conducted in Jerusalem when necessary. No action was taken which might imply that the status of either east or west Jerusalem had been disposed of definitively. (In this regard, American policy did not distinguish between Israeli presence in west Jerusalem and the Jordanian presence in the eastern sector, even though there was considerable ground for doing so on the basis of the distinction between self-defence and aggression. International law attributes different consequences to these different modes of use of force.) In sum, from 1950 to 1967, U.S. policy steadfastly maintained that the status of the divided city had not been settled with finality.

Despite the unusual character of the divided city, the international community of states, no less than Jordan and Israel themselves, reached a

387 U.S. Consul General at Jerusalem (Franklin) to Secretary of State (Dale), idem. For a vivid account of the trials and tribulations of a U.S. Consul General in administering two offices in a divided Jerusalem and the anomalous nature of his task, see Evan M. Wilson, Jerusalem, Key to Peace (Washington, D.C.: Middle East Institute, 1970).

modus vivendi with reference to Jerusalem which enabled life to go on as close to normal as possible in the two sectors. As one writer has written: This ill-defined modus vivendi suited all the parties concerned (with the exception of the Arab States). Israel and Jordan exercised sovereign rights over their sectors of the city without any real outside challenge. Foreign governments were satisfied that Christian interests were secure and regarded internationalization as impracticable. For most it was also considered unnecessary, though some remained attached in principle to the U.N. resolutions. The three Western Powers were anxious to freeze the territorial status quo in order to preserve the armistice regime. Thus to the relief and satisfaction of all parties (except the Arab States) the question of the status of Jerusalem was, until June 1967, relegated to the background pending the conclusion of a final peace settlement. 388

IV. Reunification of the City in the Wake of the 1967 Six Day War
Following President Nasser's decision to blockade the Straits of Tiran and move forces into the Sinai, hostilities broke out between Egypt and Israel on June 5, 1967. 389 The same day, despite an Israeli appeal for mutual restraint, 390 Jordan launched an attack against the Israeli sector of Jerusalem, 388 Padon, "The Divided City," pp. 104-105.
389 See Sachar, A History of Israel, p. 643; Richard H. Pfoff, Jerusalem: Keystones of an Arab-Israeli Settlement (Washington, D.C.: American Enterprise Institute, 1969) 35; Alan Gross, "Frontier-Occupant: The Legal Status of Israel's Presence in the West Bank," (1973) 14 Harvard International Law Journal 8, 14-16. Foreign Minister Abish Eban, in an address to the General Assembly on June 19, 1967, described the events in the following terms: "Jordan was given every chance to remain outside the struggle. Even after Jordan had bombarded and occupied Israeli territory at several points, we still proposed to the Jordanian monarch that he abstain from any coordinating hostilities. I sent a message to him to this effect through General Odd Bull, the United Nations representative, at 12.30 p.m., some hours after the beginning of hostilities... Jordan tragically answered not with words but with a torrent of shells. Artillery opened fire fiercely along the whole front with special emphasis on the Jerusalem area. Thus Jordan's responsibility for the second phase of the concerted aggression is established beyond doubt. Surely this responsibility cannot fail to have its consequences in the peace settlement." GAOR, 5th Emerg. Spec. Sess., Pamm., 1526th Mtg., June 19, 1967, pp. 12-13.
which evoked an Israeli counter-attack. The outcome of the conflict was that Israel came into possession not only of the Sinai Peninsula, the Gaza Strip, and the Golan Heights, but of the entire area of what it calls Judea and Samaria (referred to by Jordan as its West Bank), as well as east Jerusalem. Israel immediately removed the barriers of brick and barbed wire separating the two parts of Jerusalem and proceeded to treat the city as one united municipal entity in regard to such services as water supply, telephone, and sanitation planning. It was followed by Knesset enactment of three laws on June 27, 1967. The first was the Law and Administration Ordinance Amendment Act which provided that Israeli "law, jurisdiction and administration... shall extend to any area of Eretz Israel [Land of Israel] designated by the Government by order." The second effected an amendment to the 1934 Municipalities Ordinance Act to enable the Minister of the Interior to expand by proclamation the area of a municipal corporation to include any area designated under the Law and Administration Ordinance Act. And finally, the third law provided for the protection of the Holy Places and for unhampered freedom of access to them. The next day, June 28, 1967, the Minister of the Interior, on the basis of the revised Law and Administration Ordinance Act, designated an area embracing east Jerusalem and outlying areas as part of the municipal City of Jeru-"}


114 Writers have experienced considerable difficulty in selecting a neutral term for the area of the former Palestinian mandate which was under Jordanian control between 1948 and 1967 when the area was referred to in diplomatic correspondence as "area of the Jordanian administration" or "administration Jordanian." It is generally regarded as undesirable to use the term "West Bank," which is a geographical term and does not refer to the area during the period under discussion, as a geographical term to describe the area concerned during the entire period with which this paper deals, i.e., 1947-67 to the present.

115 Law and Administration Ordinance Amendment Act (Amendment No. 11) Law, 5727-1967. For text, see 21 L.S.I. 75. Republished in Medrini, Israel's Foreign Relations, Vol. 1, p. 245.


The administrative unification of the city was thereby formally completed. The Israeli action on Jerusalem provoked some sharp criticism at the United Nations. It is to be noted, however, that all efforts to get the World Body to brand Israel as the aggressor in the Six Day War, failed of adoption, both in the Security Council and in the General Assembly. Nonetheless, a Pakistani draft resolution on Jerusalem was adopted by the General Assembly on July 4, 1967 by a vote of 99 to 0 with 20 abstentions (including that of the United States). Israel did not participate in the vote. In this resolution the Assembly expressed its deep concern at the situation in Jerusalem resulting from "the measures taken by Israel to change the status of the City", considered the measures "invalid", and called upon Israel to " rescind" these measures. For its part, Israel maintained that its moves in Jerusalem were administrative and not political and that no act of annexation had been undertaken.

The term "annexation" used by supporters of the resolution is out of place. The measures adopted relate to the integration of Jerusalem in the administrative and municipal spheres, and furnish a legal basis for the protection of the Holy Places in Jerusalem. The points were made by Israeli Foreign Minister, Abba Eban, in an official reply to a letter from UN Secretary General U Thant regarding the

118 Jerusalem (Enlargement of Municipal Area) Proclamation, 5727-1967. For text, see L.S., No. 2065, June 28, 1967, pp. 2694-95. The new borders were not identical with those of the 1947 Partition Resolution.

119 On the subject of self-defence in the context of the Six Day War, see Amos Shapiro, "The Six-Day War and the Right of Self-Defence", (1971) 6 L. R. 65-94. In the light of the unenlightened state of the Security Council or General Assembly to accept any proposal which branded Israel as an aggressor, Shapiro concludes that "the United Nations record on this matter... provides solid support for Israel's claim to have acted in legitimate exercise of its right of self-defence". Ibid., at 80. See also Shalti Rosenme, "Directions for a Middle East Settlement—Some Underlying Problems", in Haldeman, Middle East Crisis, pp. 55-96 and Nathan Pfenberg, Studies in International Law (Jerusalem: Magnes Press, 1979) 598-85.

Assembly resolution on Jerusalem. Israel recognized that the international interest in Jerusalem derived from "the presence of the Holy Places" there, the letter stated; "and Israel does not doubt its own will and capacity to secure the respect of universal spiritual interests." Israel "has forthwith ensured that the Holy Places of Judaism, Christianity and Islam be administered under the responsibility of the religions which hold them sacred."

The United States, as indicated above, was one of the twenty states to abstain in the Assembly vote on the Jerusalem resolution. Earlier, the United States had rendered its first official pronouncement on the subject of Jerusalem in the wake of the Six Day War. On June 19, 1967, barely a week after the fighting had ended, President Lyndon Johnson had outlined "five great principles of peace" for the Middle East. In the course of his speech he asserted: "There...must be adequate recognition of the special interest of three great religions in the holy places of Jerusalem." It has been noted that the President did not demand recognition of the "special interest of three great religions in Jerusalem" as such, but only in the holy places of Jerusalem. This carefully guarded language suggests that he distinguished between the secular administration of the city of Jerusalem, on the one hand, and the religious administration of the respective holy shrines, on the other. Such an approach was consistent with the position enunciated by the United States in the Assembly debates of 1949 and 1950 in favor of functional internationalization.

A similar note was struck in two further American expressions of policy on Jerusalem at that time. The first was a statement issued on June 26, 1967 by the State Department taking exception to the Israeli move to unify Jerusalem administratively. This action, the State Department statement said, "cannot be regarded as determining the future of the holy places or the status of Jerusalem in relation to them". The second was made on July 2, by Ambassador Arthur Goldberg in the course of the Assembly debates. In enumerating various steps toward the establishment of peace, he stipulated:

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.

In each case, the "status of Jerusalem" is qualified by the term "in relation to them"; i.e., the Holy Places. U.S. policy, apparently, did not see any international interest or concern in Jerusalem except in connection with the Holy Places.

On July 14, 1967, Ambassador Goldberg had occasion to deliver a major policy address to the General Assembly on the subject of Jerusalem. In the face of Israel’s refusal to restore the status quo ante as called for by the Assembly’s July 4 resolution, Pakistan had introduced a new draft resolution deploring Israel’s stand and reiterating the call to Israel to rescind all measures taken. The United States abstained and, in explaining the U.S. vote, Ambassador Goldberg stated:

The resolution does not fully correspond to our views, particularly since it appears to accept by its call for rescission of measures that the administrative measures which were taken constitute annexation of Jerusalem by Israel, and because we do not believe the problem of Jerusalem can realistically be solved apart from the other related aspects of Jerusalem and of the Middle East situation...In Jerusalem there are transcendent spiritual interests. But there are also other important issues. And we believe that the most fruitful approach to a discussion of the future of Jerusalem lies in dealing with the entire problem as one aspect of the broader arrangements that must be made to restore a just and durable peace in the area.\(^{100}\)


198 Ambassador Goldberg also noted that the United States had voted for a Latin-American draft resolution (UN Doc., A/12, 321(Rev. 1) "which dealt with Jerusa-

""m as one of the elements involved in a peaceful settlement in the Middle East", Ibid., at 10. The Latin-American draft resolution would also have had the Assembly "resolve...as in earlier recommendations, the desirability of establishing an international regime for the city of Jerusalem, to be considered by the General Assembly at its twenty-second session". There was never any explanation of the U.S. vote and thus the intention of Washington in supporting this clause.
In April-May 1968, the Security Council was seized for the first time with the problem of the status of Jerusalem. On the basis of a Jordanian complaint alleging that Israeli acts in Jerusalem were designed to change the status of the city, Pakistan (at this time with the support of Senegal) sponsored a draft resolution which noted that Israel had acted "in contravention" of the July 1967 General Assembly resolutions, deplored this fact, considered that all legislative and administrative measures taken tending to change the legal status of Jerusalem were invalid, and urgently called upon Israel to rescind all such measures. The Pakistani draft resolution was adopted, with the United States (and Canada) abstaining. In the debate Ambassador Goldberg reiterated the U.S. view that the problem of Jerusalem could not "be dealt with realistically apart from other aspects of the situation in the Middle East," the United States, he indicated, did not condone the Israeli action.

We have been prepared to declare... that unilateral actions and measures by Israel cannot be accepted and are not recognized as altering or prejudging the status of Jerusalem, and we have been ready to call upon Israel to refrain from such actions. At the same time, we have regarded it as essential that the Council should call upon all parties to avoid all acts that might prejudice efforts to achieve a just and lasting peace in the area. In January 1969, the Nixon administration replaced the Johnson administration. Later that year, when the issue of the status of Jerusalem arose before the Security Council as a result of a Jordanian complaint about Israeli action in the city, it was evident that American policy on this issue had undergone a significant, even radical, change. For one thing, the new administration had on internationalization is not clear. The resolution was never adopted. Subsequently, in discussing the legal implications of Security Council Resolution 242 (Nov. 22, 1967), Ambassador Goldberg wrote: "A most significant omission in the Resolution is any specific reference to the status of Jerusalem and the Resolution's failure to recognize the internationalization of the city. The logical inference from this omission is that 242 was intended to recognize the situation prior to the United Nations Security Council Resolution 242 and the Prospects for Peace in the Middle East," (1971) 12 Columbia Journal of Transnational Law 192. See also n. 155, below.


obviously resolved to abandon its predecessor's policy of abstaining on questions relating to the status of Jerusalem. Indeed, a strongly condemnatory tone toward Israel on the Jerusalem question was introduced. Thus, the new U.S. Ambassador to the United Nations, Charles A. Yost, joined in voting for a Security Council resolution on July 3, 1969, which was far more sharply critical of Israel than any previous UN resolution on the subject. According to the resolution, the Security Council,

Reaffirming the established principle that acquisition of territory by military conquest is inadmissible...

Deplores the failure of Israel to show any regard for the resolutions of the General Assembly and the Security Council...

Censures in the strongest terms all measures taken to change the status of the City of Jerusalem...

Confirms that all legislative and administrative measures taken by Israel which purport to alter the status of Jerusalem, including expropriation of land and properties thereon, are invalid and cannot change that status.

The resolution "urgently" called upon Israel "to rescind forthwith" all measures taken, and determined that "in the event of a negative response or no response from Israel", the Security Council would reconvene "without delay" to consider what further action should be taken. The Secretary General was requested to report to the Council on the implementation of the resolution. In addressing the Council on July 1, Ambassador Yost defined American policy in the following terms:

The United States considers that the part of Jerusalem that came under the control of Israel in the June war, like other areas occupied by Israel, is occupied territory and hence subject to the provisions of international law governing the rights and obligations of an occupying power. Among the provisions of international law which bind Israel, as they would bind any occupier, are the provisions that the occupier has no right to make changes in laws or in administration other than those which are

127 A New York Times editorial of July 1, 1969 foresawed the change in the American position. The editorial, entitled "O Jerusalem," stated: "Although the United States has declared it does not recognize any unilateral actions affecting the status of Jerusalem", American decisions have abstained from past United Nations resolutions on this subject. If the United States is to play an effective role in promoting a Middle East settlement, this country must make clear its commitment to a settlement of the Jerusalem question that recognizes the rights of Arabs and the interest of the world community in this age-old city of contention".

temporarily necessitated by his security interest, and that an occupier may not confiscate or destroy private property.\textsuperscript{134}

Two things, in particular, stand out in the Yost statement viewed in relation to the text of the Security Council resolution. First, the United States now regarded east Jerusalem as occupied territory subject to the provisions of the 1949 Fourth Geneva Convention. Second, the United States was implicitly calling for a return of some measure of Jordanian authority in east Jerusalem. Whatever was not spelled out in the Yost statement of July was clarified in the Rogers Peace Plan announced by the American Secretary of State on December 9, 1969:

We believe Jerusalem should be a unified city within which there would no longer be restrictions on the movement of persons and 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 Christian communities. And there should be roles for both Israel and Jordan in the civic, economic, and religious life of the city.\textsuperscript{135}

The formulation of the last sentence in this paragraph seemed to imply that the administration of the city would be shared—with the authority of both Jordan and Israel extending to the political and economic spheres, as well as the religious. While stressing the need for a unified city, the Rogers Plan, by its terms, could very well spawn a redifision of the city.

Although not many realized it at the time (or since), the Yost-Rogers approach represented a radical departure from the policy of the preceding administration.\textsuperscript{136} Neither Lyndon Johnson nor Arthur Goldberg nor any State Department official had referred to east Jerusalem as “occupied territory” or advocated a restoration of Jordanian authority with a possible redifision of the city. In the statements of the Johnson administration, emphasis was always placed on safeguarding the Holy Places which, it was implied, could be accomplished by means of functional internationali-

\textsuperscript{134} SCOR, 1483rd Mtg., July 1, 1969, p. 11.
\textsuperscript{136} Strangely enough, the Yost address before the Security Council did not even produce an Israeli protest. The Rogers Plan was vigorously criticized by the Israeli government: see Jerusalem Post, Dec. 12, 1969. On December 15, 1969, Prime Minister Golda Meir officially endorsed the Plan in a major policy speech to the Knesset, ibid., Dec. 16, 1969. For the text of her address, see Divrel HaKnesset, vol. 56, pp. 192 ff. On December 22, 1969, the plan was officially rejected by the Israeli government: Jerusalem Post, Dec. 23, 1969.
armistice lines dividing Jerusalem were no longer viable. In other words, Jerusalem was not to be divided again.

This is a far cry from Ambassador Yost's statement that we conceived East Jerusalem to be occupied territory, to be returned to Jordanian sovereignty....

When George Ball, my immediate successor, visited Amman on July 18, 1967, he quoted King Hussein as having said he personally recognized that there must be flexibility on the question of Jerusalem and that there could be no return to the pre-June 1967 status. This statement is in the reporting telegram of Ball's visit to King Hussein.

I write this note to set the record straight and also because I do not want my name used in defense of a policy that I do not approve.

Arthur J. Goldberg
Washington, March 6, 1980.137

Beyond the discrepancy between the Nixon and Johnson policies, the Nixon administration's call for a restoration of some form of Jordanian authority in Jerusalem would appear to be at variance with the U.S. legal position on Jerusalem since 1948.

In the matter of Jordanian rights on the West Bank, the argument has been made (but never by the United States) that the 1949 armistice agreement between Israel and Jordan, coupled with the 1950 Jericho petition of Arab notables for Arab Palestine to be joined to Transjordan, brought about a situation whereby Jordan (as the new state was now called) became not only de facto, but the legitimate, sovereign authority in the West Bank and east Jerusalem. These acts, it is said, constituted a form of expression of self-determination.137a According to this interpretation, UN resolutions since 1967 calling for the return to the status quo ante in east Jerusalem refer to the restoration of Jordanian authority there. The Nixon policy was never explained on the basis of this thesis. Moreover, the thesis is not free of difficulties and has, therefore, been vigorously challenged.137b The primary difficulty with this thesis is that the entire international community of states, including all Arab states, refused to accord recognition to the act of 137 N.Y. Times, March 12, 1980, p. 26.
137a The primary exponent of this thesis is Yoram Dinsein in a series of articles in (1971-1975) 27 HaRatzli 5-11, 519-22.
137b See the replies of Yehuda Z. Blum, (1971-1972) 27 ibid. 315-24 and (1972-1973) 28 ibid. 183-90. Blum points out that the armistice agreement was concluded without prejudice to territorial rights. It was clearly stated that the demarcation lines were not to be construed as political boundaries. This point is noted by Dinsein himself in his article, "The United Nations and the Arab-Israeli Conflict," in Mozes, The Arab-Israeli Conflict, vol. 2, p. 463.

annexation. Pakistan was the sole state to recognize Jordanian sovereignty in east Jerusalem.138 But in any case, the thesis could not possibly hold for the United States. For, as noted above, Washington steadfastly refused to accord recognition, or even express public approval, of Jordan's act of annexation of the West Bank, and it made clear that no claim of sovereignty was tenable for east Jerusalem. The U.S. position throughout the years 1959-1967 clearly belies the assertion that self-determination had been applied to the West Bank and east Jerusalem. As noted earlier, the United States studiously refused to go beyond dealing with the situation in Jerusalem on a practical basis and repeatedly objected to any manifestations of sovereignty either by Israel or Jordan. For this reason, Washington had adamantly refused to transfer its embassy from Tel Aviv to Jerusalem. Moreover, for some 22 years the United States had maintained a single Consulate General in Jerusalem and had not applied for equestriars for its consuls in Jerusalem to either Israel or Jordan. The Consulate General was unattached to the U.S. Embassy in either Tel Aviv or Amman and, in fact, reported directly to the State Department in Washington. Given this situation and the previous conduct of the United States, it was difficult to understand on what grounds the Nixon administration was positing that Israel was an occupying power in east Jerusalem and that a measure of Jordanian authority should be restored there. Paradoxically, when the city was in fact divided, the United States insisted on seeing it as one unit, with one Consul General. Now, when the city was in fact unified, Washington was presenting a program whose logical outcome could be a redivision of the city.

From a legal standpoint, Nixon did not deal with the new Nixon position. In particular, it is difficult to reconcile the U.S. statement of the legal position with earlier U.S. views relevant to the legal status of Jerusalem. In 1948, the United States, along with several other members of the Security Council, had viewed Jordanian entry into Palestine as illegal.139 Thus, in
considering King Abdullah's reply to questions submitted to him by the Security Council, the U.S. representative referred to Abdullah "as a ruler who is occupying land outside his domain . . . ."

The contumacy of that reply to the Security Council is the very best evidence of the illegal purpose of this Government in invading Palestine with armed forces and conducting the war which it is waging there. It is against the peace; it is not on behalf of peace. It is an invasion with a definite purpose. . . . Therefore here we have the highest type of the international violation of the law: the admission by those who are committing this violation.130

Subsequently, the United States, along with most states (the United Kingdom and Pakistan alone excepted), had refused to recognize Jordanian sovereignty over the West Bank. (And in the case of Jerusalem, only Pakistan had accorded formal recognition.)131 In view of many noted legal scholars, Jordan's status in the West Bank and Jerusalem was no more than that of a belligerent occupant.132 Neither the armistice agreement nor the purported annexation could change that status.133 (The armistice agreement had stipulated that none of its provisions would "prejudice the peace is rather remarkable in view of the fact that they are waging war."


130 Ibid., at 42-43. The text of the Jordanian reply is reproduced, ibid., at 42.

131 See text above, at no. 101 and 105.


rights, claims and positions of either Party" in the ultimate peace settlement, "the provisions of this Agreement being dictated exclusively by military considerations."134

If the United States considered Jordanian entry illegal, then in accordance with the principle ex turia non oritur ius (out of a wrong no right can arise), it quite properly did not feel free to recognize Jordan's purported annexation of the West Bank and Jerusalem in 1950. On the other hand, the United States implicitly viewed the Six Day War as a war of self-defense since Israel's entry into the West Bank and Jerusalem was not seen as an act of aggression subject to condemnation.144 The fact that no majority could be mustered to label Israel an aggressor, as desired by the Soviet Union and its Arab allies, showed that the U.S. view was shared by a large number of states at the United Nations as well. Since in the U.S. view, as it appears, Israel's entry into the West Bank and Jerusalem stood in marked contrast to the earlier Jordanian entry in 1948, America should perhaps, logically, have adopted the view espoused by Stephen M. Schwobel (currently U.S. Judge on the International Court of Justice), who concluded:

Having regard to the consideration that . . . Israel . . . [acted] defensively in 1948 and 1967 . . . and her Arab neighbors . . . [acted] aggressively in 1948 and 1967 . . . Israel has better title in the territory of what was Palestine, including the whole of Jerusalem, than do Jordan and Egypt. . . .

On this basis the United States would be entitled (and perhaps expected) to view Israel as having a status different from mere belligerent occupant. Moreover, it has been suggested by various eminent international law authorities that Israel's status in Jerusalem was different from Jordan's in yet another respect.145 Israel was, after all, the sole legitimate entity to be formed out of the Palestine mandate at the time of the expiry of the mandate. Furthermore, in Jerusalem the Jews had always formed a majority of the

134 See the extended debate between Yoram Dinstein and Yehuda Blum, on this question in No Peace, supra n. 119.


136 Schwobel, "What Weight to Conquest?", p. 346.

137 Stone, No Peace—No War, p. 40; Schwobel, "What Weight to Conquest?", pp. 346-47; Blum, "Status of Judea and Samaria," p. 294, n. 60; and Blum, Juridical Status of Jerusalem, p. 21.
city until Jordan's illegal entry in 1948, when the Jewish communities in the eastern sector, both within and without the old city, were evicted and banished. Thus, according to many commentators, bracketing together Israel's status in Jerusalem after 1967 with Jordan's status in the city before 1967 was misconceived.

Beyond that, there were serious grounds for questioning America's equating the position of Israel prior to 1967 in west Jerusalem with the position of Jordan in east Jerusalem in that same period. As Lauterpacht has noted, when Israeli forces in 1948 rallied to save the Jewish community in Jerusalem from destruction they were essentially engaged in defence against invaders. In effect, "the Arabs themselves legitimized the process by which Israel filled the vacancy in sovereignty in the areas which, in order to save their kin, the Israeli forces were obliged to defend and therefore to occupy."

It is on this basis—the legitimate filling of the sovereignty vacuum—that the legality of Israeli presence in the New City of Jerusalem in the period prior to the fighting of June 1967 may be seen as resting.147

In any event, since, according to the United States itself, there was apparently a qualitative difference between Jordan's presence in east Jerusalem prior to 1967 and Israel's presence there after 1967, the legal conclusion contained in the Yost statement as to the status of east Jerusalem is highly puzzling and questionable. The Yost statement appears open to objection on yet another ground. According to Yost, east Jerusalem, since it represented occupied territory, was subject to the provisions of 1949 Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War. However, in the view of most authorities, the term "belligerent occupant" as formulated in the Geneva Convention of 1949 "assumes that the former government was the lawful sovereign of the territory before its loss to the occupying power."148 In the words of von Glahn, "belligerent occupation as regulated by customary and conventional International Law presupposes a state of affairs in which the sovereign, the legitimate government of the occupied territories, is at war

147 Lauterpacht, Jerusalem and the Holy Places, p. 45.


with the government of the occupying forces".149 As explained by Blum, the assumption "of the concurrent existence in respect of the same territory, of both an ousted legitimate sovereign and a belligerent occupant lies at the root of all those rules of international law which, while recognizing and sanctioning he occupant's rights to administer the occupied territory, aim at the same time to safeguard the reversionary rights of the ousted sovereign".150 But, as noted earlier, according to most authorities, Jordan's status in the West Bank from 1948 to 1967 was at most that of belligerent occupant. The vast majority of states did not accept Jordan's claim to sovereign authority there; still less did they accept her claim to east Jerusalem. On this ground, Jordan lacked reversionary rights in Jerusalem, and it was therefore difficult to see how the Geneva Convention could apply there.

Other grounds have been adduced for considering the application of Article 49, paragraph 6 of the Fourth Geneva Convention quite inapposite to the circumstances of the presence of Israelis on the West Bank (including Jerusalem). Julius Stone has pointed out that Article 49 was designed to prevent fulfilment of "genocidal objectives". Thus, paragraph 6, which reads: "The occupying power shall not deport or transfer parts of its own civilian population into the territory it occupies", was designed to prevent "transfers for political and racial reasons". In particular, it was meant to prevent the repetition of such heinous crimes as were committed by the Nazis in stripping German Jews of their citizenship prior to their deportation to other lands. It has no relevance to the settlement of Israelis on the West Bank and certainly not to the case of Jerusalem. It would be highly ironic if a provision, drafted very much with the plight of the Jews under Nazi occupation in mind, were to prevent Jews from voluntarily returning to sites in their ancient homeland from which they were forcibly expelled but a few years earlier.151

In April 1978 the State Department decided to address some of the foregoing difficulties squarely. In the course of a statement prepared by the


Department's legal adviser for the congressional committees which were considering the issue of Israeli settlements on the West Bank, it was stated:

4. It has been suggested that the principles of belligerent occupation, including Article 49, paragraph 6, of the Fourth Convention, [relating to the displacement of the inhabitants of an occupied territory through the introduction of the occupant's own population] may not apply in the West Bank and Gaza because Jordan and Egypt were not the respective legitimate sovereigns of these territories. However, those principles appear applicable whether or not Jordan and Egypt possessed legitimate sovereign rights in respect of those territories. Protecting the reversionary interest of an ousted sovereign is not their sole or essential purpose; the paramount purposes are protecting the civilian population of an occupied territory and preserving permanent territorial changes, if any, until settlement of the conflict. The Fourth Geneva Convention, to which Israel, Egypt and Jordan are parties, binds signatories with respect to their territories and the territory of other contracting parties, and "in all circumstances" (Article 1), in "all cases" of armed conflict among them (Article 2) and with respect to all persons who "in any manner whatsoever" find themselves under the control of a party of which they are not nationals (Article 4).108

This statement, however, rather than providing an answer, only begs the question. There is no doubt that the convention applies "in all circumstances", and "in all cases", but only where the Convention by its own terms applies. The legal adviser's statement fails to distinguish between the aims of the Convention and the conditions for the application of the Convention. Whereas the aim of the Convention is the protection of the civilian population in the occupied area, the condition for the Convention to apply is the displacement of a sovereign power. Protection of a civilian population is a universal aim; it relates to the general observance of human rights. In contrast, the 1949 Geneva Convention would not apply, for example, to territory which is part of a contracting party's own territory. Or, to take a further example: If state A regains territory conquered from it by state B, state A is obviously not subject to the limitations of the Convention. As Meir Shamgar, former Attorney General of Israel explained:

There is no existing rule of international law according to which the Fourth Convention applies in each and every armed conflict whatever the status of the parties... The whole idea of the restriction of military government powers is based on the assumption that there had been a sovereign who was ousted and that he had been a legitimate sovereign. Any other conception would lead to the conclusion that France, for example, should have acted in Alasce-Lorraine according to rules 42-56 of the Hague Rules of 1907, until the signing of a peace treaty.109

Moreover, the Geneva Convention on Civilians applies where there is occupation, partial or total "of the territory of a High Contracting Party" (Article 2). But the position of the United States, as was made clear countless times, was that east Jerusalem did not constitute part of the territory of Jordan.110

Given the difficulties inherent in the Yost statement if the term "occupied territory" is taken to refer to "territory occupied from Jordan", it might be thought that instead it means "territory occupied from the United Nations". In other words, according to the United States, it might be argued, the World Organization retained a residual right of sovereignty in Jerusalem from 1948 to 1967 and Israel's entry into east Jerusalem constituted occupation of territory appertaining to the United Nations.111 Such an interpretation,

109 Gerhard von Glahn, in his most recent study, Law Among Nations, (New York: Macmillan, 4th ed., 1982) 678-79, cites four arguments presented by Israel to justify its settlement policy and to deny the applicability of Article 49 (6) to the West Bank and Jerusalem. According to von Glahn, the arguments are: (1) the Shamgar thesis (see above, in text, at n. 153); (2) the Bitan thesis regarding Jordan's aggression in 1948 (see above, in text, at n. 155); (3) the settlements are needed for national security purposes; and (4) the West Bank "represented traditional parts of the ancient homeland of the Jewish people, hence could validly be reclaimed by Jewish settlers". In conclusion, von Glahn says: "From a legal point of view, all four arguments fail in view of the clear wording of Geneva-IV, to which Israel is a party". Ibid, at 679. Remarkably enough, von Glahn does not address himself to the substance of the Israeli arguments "i.e., in what can only be regarded as an ex cathedra manner, pronounces" them all to be unacceptable.
110 It might be noted that the U.N. Committee on the Exercise of the Inalienable Rights of the Palestinian People, in a paper issued in 1979 and entitled "The Status of Jerusalem", pp. 18 and 20, contends that General Assembly and Security
quite apart from the fact that it would provide no grounds for according Jordan any rights in the city, would appear to have little basis in either fact or law. As noted above, even the legal adviser to the State Department refrained from asserting that the United Nations had ever acquired title over Jerusalem or had claims of sovereignty in the city. At most, he asserted that the General Assembly resolution of 1949 which provided for a special international regime for Jerusalem presumed that "Jerusalem remained at the disposition of the United Nations", even after the failure to instigate the Jerusalem Statute on May 15, 1948. He acknowledged, however, that the chain of reasoning presented was "complicated" and "certainly not free from serious doubts and difficulties". The reasoning was, in fact, quite untenable.

A major debate has arisen over the question whether the General Assembly Partition Resolution was binding in international law. In most instances, of course, the Assembly can adopt only recommendations which have no binding force. Some scholars maintain that the Partition Resolution was no exception to the general rule and the Assembly lacked competence to dispose of any part of Palestine. As Eliezer Lauterpacht has written:

The General Assembly was not able by resolution to dispose in a binding manner of the whole or any part of the territory of Palestine. Palestine was not the property of the U.N. to give or withhold as it pleased. The role of the U.N. was a restricted one. Its acquiescence in the termination by Britain of its obligations as Mandate was, a legal necessity. Moreover, the Assembly could, by putting forward a Council resolutions after 1967 which declare that Israeli actions tending to change the "legal status" of Jerusalem are "invalid" must be taken to reflect the legal status of the "corpus separatum" at the original Partition Resolution. (See also Castan, Jerusalem, p. 109.) Julius Stone demonstrates the unenforceability of this interpretation if only because not a single post-1967 U.N. resolution on Jerusalem over cites or refers to the Partition Resolution. Israel and Palestine, chap. 7 and p. 131. Stephen Schwebel also contends that U.N. "intervention of the Jerusalem question over the years" suggests that "the United Nations has acquiesced in the demise of internationalization". "The Middle East: Prospects for Peace," in Moore, Arab-Israeli Conflict, vol. 2, p. 139. See also supra n. 120. 116 See above, n. 14.

117 FRUS 1950, p. 687.


119 See discussion in Stimson, South West Africa and the United Nations, pp. 303-305.


plan which the interested parties might accept, provide the legal basis for the settlement of the future government of that country.

"The Partition, Resolution," he concludes, "did not have a legislative character." Other scholars maintain that the 1950 decision of the International Court of Justice in its advisory opinion on the Status of South West Africa confirmed that a mandate could be terminated only by joint action of the mandatory power and the United Nations. In such event, the resultant resolution had binding force in international law. This, they argue, was precisely what happened in the case of Palestine when the United Kingdom requested the United Nations to propose a solution for the Palestinian problem.

Even if one should adopt the latter interpretation of General Assembly powers in the matter of Palestine and confirm the Assembly's authority to join in the termination of the mandate, the Assembly resolution was certainly not self-executing. It was merely an "enabling" resolution, authorizing the establishment of two independent states and an international Jerusalem. The three entities would not arise of their own, springing forth from the flat of the General Assembly; rather, the Assembly instituted procedures whereby each of these entities might emerge when the mandate came to an end. The establishment of provisional governments in each of the states would be promoted with the aid of the U.N. Palestine Commission which would also delineate the boundaries of the two states and the City of Jerusalem.

The role of the United Nations in relation to the future of Palestine had, in essence, two key aspects. For one thing, the Assembly, it is assumed, was qualified to authorize the mandatory power to terminate the mandate. The Assembly resolution could thus have binding effect in international law. But with the adoption of the resolution, or, at the very latest, with the termination of the mandate, the General Assembly became junctus officio in relation to the Palestine mandate. The limited role assigned the United Nations in reference to the termination of mandates is revealed from an examination of the operative part of the International Court's advisory opinion on South West Africa. The Court said:

"Lauterpacht, Jerusalem and the Holy Places, p. 16. Hossen agrees with Lauterpacht on this point. However, he endeavors to demonstrate that unilateral declarations by Israel bind it to a scheme for the internationalization of Jerusalem, Study on Jerusalem, pp. 20-21. The same argument is presented by Castan, Jerusalem, pp. 106-107. Feinberg effectively dismissed this argument, On An Arab Jurist's Approach, pp. 34-56.

The competence to determine and modify the international status of the [mandated] territory rests with the Union of South Africa acting with the consent of the United Nations.\(^{144}\)

In providing its consent the United Nations completed the task which the Assembly could have according to the advisory opinion. Subsequent action of the United Nations—the Security Council or the General Assembly—could only be taken in the context of preserving international peace.\(^{144}\)

With the end of the mandate, at the latest, there was no further “mandatory” role for the Assembly to play in former Palestine.\(^{144}\)

The other aspect of the Partition Resolution involving the United Nations was the role assigned under the resolution to the Trusteeship Council as the Administering Authority in Jerusalem. Within five months of the adoption of the Partition Resolution, the Council was to draw up and approve a detailed Statute for administering the city. The Council was also to appoint a Governor who would represent the United Nations in Jerusalem. But, as noted earlier, none of these procedures were ever fulfilled, and no steps were taken to establish the corpus separatum. At the crucial moment when the British mandate was terminated on May 15, 1948, the United Nations had taken no effective measures to assert authority—much less sovereignty—in Jerusalem. Thus, whatever role was originally envisaged for the United Nations in Jerusalem lapsed. Nor can it be said that the United Nations retained any “proprietary” right in the city after May 15. No such right was ever transferred from the League to the United Nations—nor could it have been since the League possessed only supervisory rights in relation to mandates. Moreover, the United Nations did not succeed to the assets or rights of the League of Nations in an automatic manner. Any transfer of authority or property from one World Organization to the other could only come about in a deliberate transfer. Even if the termination of the Palestine mandate was justly assigned to the United Nations operating in conjunction with the mandatory power, this in no way imparted a property right to the United Nations.\(^{144}\)

In sum, therefore, even if it is accepted that the Partition Resolution was binding when it was adopted, it lapsed after May 15 when the United Nations and the other parties concerned failed to implement the resolution.\(^{144}\)

The upshot was that from May 15 the United Nations had lost whatever potential authority it had been previously qualified to assert with regard to Jerusalem. On the subject of the mandate as an institution the General Assembly had become functus officio from either November 29, 1947, the date of the adoption of the Partition Resolution, or at the latest, the date of the termination of the mandate, May 15, 1948. And with regard to the operation of the Partition Resolution and the role of the Trusteeship Council thereunder, all this lapsed with its rejection by the Arabs and the failure of the United Nations to establish authority in Jerusalem after May 15. After that critical date the United Nations, as noted, could only operate to preserve the peace in the territory of the former mandate, Palestine, including Jerusalem, was in no way the private property of the United Nations to continuously dispose of as it saw fit.


\(^{144}\) Stone, in reaching a similar conclusion, cites the comment of U.S. Legal Adviser, Herbert Hannell, that the 1947 partition was never effective, Israel and Palestine, p. 65. See also ibid., at 101, 127-28; and see n. 155 above.
In the light of the foregoing analysis, it would be extremely difficult to assert that the referenced in the Yost statement to east Jerusalem as occupied territory was intended to refer to occupation from the United Nations. No one had claimed, and indeed no one could reasonably claim, that the United Nations retained any possessory title to Jerusalem.

Given the difficulty in rationalizing the American reference to east Jerusalem as "occupied territory"—since it manifestly had not previously been under either Jordanian or United Nations sovereignty—a third approach might present itself for consideration—namely, that the United States intended to say "occupied from its inhabitants." Besides certain legal conceptual difficulties that this interpretation would entail, it would hardly appear to coincide with the facts. If Jerusalem, as the United States and the United Nations have always maintained, is one entity, then account must be taken of the fact that the city had a Jewish majority for over a hundred years. Moreover, until Jordan's illegal entry into the city in 1948, Jews lived in both the Walled City and New Jerusalem, in both east and west Jerusalem. Israel could hardly be charged with occupying from its inhabitants a city which had a Jewish majority. Its possession throughout the city could not reasonably be labeled "belligerent occupation." From all angles, therefore,


145 Even if one should extend the concept of Jerusalem to the artificial "area" devised in 1947 by the United Nations so as to "balance" the Arab and Jewish populations in the city, by 1967 when Israel gained control of that area, there was already an absolute Jewish majority in greater Jerusalem. Interestingly enough, despite his support for the principle of self-determination, doubts whether application of the principle in Jerusalem will afford a solution to the problem, Study on Jerusalem, pp. 48-49. On the issue of self-determination generally, see Nitzan, Self-Determination in Law and Practice: The New Doctrine in the United Nations (Hague: Nijhoff, 1982).

146 It might be noted, however, that by 1967 the Arab population in east Jerusalem had been replaced by the Arabs of east Jerusalem were not limited to the Walled City, Nevi'a Yaaqov and Atarot, both conquered by the Arab Legion in its 1948 sweep toward the Old City, were thriving Jewish suburbs in the eastern section of the city.

177 The re-unification of Jerusalem in 1967 also had the effect of restoring access to the Mount Scopus enclave which, contrary to the Armistice Agreement, had been barred to foreign diplomats for nineteen years. The Hadassah Hospital and Hebrew University buildings located there were now given a fresh lease of life and this whole area of north-east Jerusalem was revived as an integral part of the city. See Michael Van Duyn, "Jerusalem," p. 50.

The Yost-Rogers reference to east Jerusalem as "occupied territory" would appear to be surrounded by considerable difficulty.

V. Camp David and Beyond

As noted above, the text of the Camp David Agreements contains no reference to Jerusalem; such reference was reserved for the "Exchange of Letters" appended to the instruments. The Carter letter declares that U.S. policy on Jerusalem remains as stated by Ambassadors Goldberg and Yost. It is instructive to examine the genesis and meaning of this formula.

When the Camp David talks opened on September 5, 1978, there was universal agreement among the participants—President Carter of the United States, President Sadat of Egypt and Prime Minister Begin of Israel—that Jerusalem should forever remain an undivided city with freedom of access for all to the Holy Shrines situated in the city. It appears, however, that this was the limit of agreement between the Israelis and Egyptians on the question of Jerusalem. Indeed, the very next day, on September 6, 1978, Sadat submitted a plan which, inter alia, called for Israel to "relinquish control" over east Jerusalem, and for Arab sovereignty and administration to be restored there. This was quite unacceptable to the Israelis. Given the deadlock on Jerusalem, as on other key matters, President Carter set about drafting an American blueprint for peace in the Middle East which he hoped would bridge the gap between the Egyptians and Israelis. The American plan, submitted to the parties on September 10, called both for the conclusion of a peace treaty between Egypt and Israel and for the institution of a five-year period of autonomous rule for the Palestinians in the West Bank and Gaza Strip. This five-year period was to be ceded by negotiations to settle the permanent status of the two areas. The Jerusalem clause, besides stressing the unity of the city and freedom of access, proposed "that the holy places of

175 Page 1
177 Carter, Keeping Faith, p. 340.
178 Ibid., at 364.
179 Ibid., at 371 f.
each faith should be under the administration and full authority of their representatives” and that “a municipal council drawn from the inhabitants should supervise essential functions in the city.” 177

Essentially, this clause reflected the Johnsson-Goldberg approach. There was no reference to Jerusalem as occupied territory and there was no suggestion that the secular administration of the city be divided. In fact, the provision for the adherents of each faith to be placed in charge of their own Holy Shrines closely paralleled the formulation of functional internationalization which Israel had long advocated and to which the United States had steadily gravitated since 1950. Little wonder, then, that Prime Minister Begin was more than willing to accede to the American formula. As Carter records, Begin told him the paragraph on Jerusalem “is a beautiful number”, “deeply appreciated and positive”. 178 Sadat, too, appears to have found it to be a satisfactory compromise to which, after some emendations, he could give his consent. 179

Subsequently, however, Sadat apparently had second thoughts. On September 14, he indicated to Carter that he could only accept the Jerusalem clause if provision was made for the flag of Islam to fly over Islamic holy places, although he acknowledged “that Begin would be reluctant to agree to this because of its symbolism of sovereignty.” 180 Nonetheless, Sadat remained adamant and Carter notes that only “with great pressure” was he able to induce Sadat, on the next to the last day of the Camp David conference, to accept the language evolved on Jerusalem. 181 Sadat’s acquiescence, how-

177 Ibid., at 374 and 388. Key features of the Jerusalem clause in the American plan closely paralleled certain recommendations of a 1975 Middle East Study Group convened by the Brookings Institution. According to the Report of this Study Group the Jerusalem question could only be resolved within the framework of a general settlement, if the following criteria, as a minimum, were fulfilled: (a) Jews should be unimpeded access to all the holy places and each should be under the custodianship of its own faith. (b) There should be no barriers dividing the city which would prevent free circulation throughout it. (c) Each national group within the city should, if it so desires, have substantial political autonomy within the area where it predominates.” Toward Peace in the Middle East: Report of a Study Group (Washington, D.C.: Brookings Institution, 1975). It might be noted that two participants in the Brookings Study Group were present at Camp David, namely, Zelig Shemtov, Director of the National Security Council, and William Quandt, the Council’s Middle East specialist. The latter, it is believed, had a major hand in drafting the Jerusalem clause in the American plan at Camp David.

178 Carter, Keeping Faith, p. 375.

179 Ibid., at 388.

180 Ibid., at 389.

181 Ibid., at 395.

ever, was given only on condition that “there would be an exchange of letters confirming the historic United States position that East Jerusalem was part of the West Bank.” 182

In accordance with this promise to Sadat, Carter now set about reversing the entire U.S. position on Jerusalem which had been incorporated into the text with the acquiescence of both parties. The President now proposed supplementing the Camp David agreement (embodying the paragraph on Jerusalem) with a letter to Sadat declaring that in the view of the United States east Jerusalem represented occupied territory “subject to the international law on occupied territories”. Instead of endorsing the unity of the city, with the religious needs of the different faiths being catered for through an agreement for auto-administration of the Holy Shrines, Carter was now endorsing quite the reverse—that Jerusalem was a city subject to two different legal regimes under international law.

It is important to note, however, that Carter was not prepared to give Sadat all that he was demanding. Sadat had stipulated that the letter reconform “the historic United States position that East Jerusalem was part of the West Bank”, But, no U.S. administration had ever espoused such a position. Even Yoss had only gone so far as to declare east Jerusalem “occupied territory”; he had never pronounced it part of the West Bank. The distinction is, of course, quite significant. In his draft letter to Sadat, Carter studiously avoided referring to east Jerusalem as an integral part of the West Bank; he contented himself with reiterating the term “occupied territory”.

Nonetheless, Carter’s step was quite an extraordinary one for an American President. For one thing, it meant that he would be exposing two incompatible lines of policy in one and the same document. While the Jerusalem paragraph in the body of the Agreement espoused functional internationalization and a united city, the letter to Sadat endorsed a separate status for east Jerusalem and, hence implicitly committed the United States to support two legal regimes in the city. If the first represented the Johnsson-Goldberg approach, the latter reflected the Nixon-Yost line. The two lines of policy were divergent and could not readily be reconciled.

But perhaps the most remarkable aspect of this whole episode is the apparently blatant manner in which Carter was prepared to commit the United States to a certain policy without full investigation of the record and a careful weighing of the implications of any new pronouncement. Carter does not seem to have consulted his legal advisers before making the pledge.

182 Emphasis supplied. Sadat, however, agreed, according to Carter, “that the Walling Wall should always be retained exclusively by the Jews”. Idem.
to Sadat and it is even possible that he accepted Sadat’s word for it that “America’s position on Jerusalem... had not changed since 1967.” 148

Certainly, Carter never seems to have appreciated the different nuances in American policy on Jerusalem since 1967. He frankly acknowledges: “Ambassadors Charles Yost, Arthur Goldberg and William Scranton had spoken on the subject [of Jerusalem], but I had never read all what they actually said.” 149 Only now did he ask for the texts to be brought to him for careful study.

Regardless of the import of any statements made by the U.S. ambassadors to the United Nations, Carter must surely have recognized that international law accorded a very different measure of legal commitment to a presidential pronouncement appended to an international treaty. There is no evidence that President Carter weighed this factor before undertaking to write the letter. Given the extraordinarily complex nature of the Jerusalem issue, particular caution was called for, but this seems to have been notably absent.

A further serious aspect of Carter’s switch was his failure to keep faith with the Israelis. He had induced them to accept the American formula on Jerusalem and was now, in effect, contradicting and nullifying his earlier stand by agreeing to the proposed letter to Sadat. Nor was the President unaware of the gravity of a breach of faith in the course of negotiations. Just a few days earlier at Camp David, Sadat had asked Carter to reverse himself on another matter, the question of the Palestinians, even though both sides had previously agreed on the terminology. In rejecting Sadat’s request, Carter wrote: “Our word of honor is at stake. After reaching agreement with you on this critical wording, I have let the Israelis know that we would stand by these very words, and for you to ask me to reverse myself is unacceptable.” 150

The President records that on the very first day of the Camp David conference he had assured Begin “that we would have no bilateral secrets, and that I would not give to Sadat nor to him any official United States proposals without discussing the unofficial drafts first with both sides.” 151 On the question of Jerusalem Carter did not fulfil his commitment. Even


149 Carter, Keeping Faith, p. 398.

150 Ibid., at 384. Secretary of State Vance in his account of this episode fails to note that Carter’s promise to Sadat reversed his earlier stand on Jerusalem and the implicit commitment to the Israelis. See Cyrus Vance, Hard Choices: Critical Years in America’s Foreign Policy (N.Y.: Simon and Schuster, 1983) 225-26.

151 Carter, Keeping Faith, p. 333.

after he had drafted the letter, he was not completely frank in informing the Israelis of the nature of the letter. Carter records:

On Jerusalem, I told the Israeli leaders that Sadat had accepted the paragraph as drafted for the Framework text, but he wanted a separate exchange of letters, so that each nation could make public its own different ideas as part of the official record. Israelis would not have to participate in the exchange, but could let their views be known if they preferred to do so. 152

Of course, Sadat had not insisted on the exchange merely in order to give voice to Egypt’s stand; Sadat’s undisguised purpose, as Carter frankly acknowledged, was to have the United States “recapitulate” its (ostensible) stand on east Jerusalem.

Unaware of the portent of the Carter letter and assuming that the Jerusalem paragraph in the body of the Agreement affirming the unity of the city accurately reflected American policy, Begin, and the Israeli delegation generally, were highly pleased at the outcome of the Camp David talks. As Dayan records: “On Jerusalem... the agreement would state only that it would remain ‘undivided’,... we were all very happy.” 153 This feeling lasted only so long as the Israelis had not seen the actual text of Carter’s draft letter to Sadat.

Once the actual text was revealed to the Israelis, on Sunday September 17, 1978, they declared they would not sign any agreement to which was attached a letter proclaiming east Jerusalem “occupied territory.” This they maintained, was simply a prescription for redividing the city. Carter’s surprise move provoked a crisis on the last day of the conference which threatened to make nought of the whole proceedings. 154 Ultimately Carter decided to forego any specific reference to Jerusalem’s status in his letter to Sadat and to state simply that the position of the United States on Jerusalem remains as stated by Ambassadors Goldberg and Yost at the United Nations. The reference to Goldberg could satisfy Begin and the reference to Yost could satisfy Sadat (in part)—but it is not clear that either they or Carter appreciated the full measure of dichotomy between the two approaches. At the same time, the previously accepted paragraph on Jerusalem, espousing functional internationalization, was eliminated from the body of the text. 155

187 Ibid., at 397.

150 Dayan, Breakthrough, p. 177.

151 Carter, Keeping Faith, p. 398; Dayan, Breakthrough, pp. 178-79. The depths of the crisis are described in considerable detail in the Dayan work.

150 This whole episode provides a possible answer to the question posed above at the end of n. 4: Why was the Carter letter addressed to Sadat only? Quite simply, Begin was opposed to the exchange of letters in the first place.
This formula, of course, averted the immediate crisis; it did not, however, resolve the question of the Jerusalem policy of the Carter administration. The contradiction which would have inhered in the Camp David Agreements if both the Jerusalem question and the legalistic concept of the West Bank had remained intact was now transferred on a different plane to the Carter letter in shorthand formula. By promising America's Jerusalem policy on both the Goldberg and Yost statements, Carter was setting at stage this stage his administration was not committed to any green line of policy on Jerusalem. The options remained open. Subsequent events, rather than clarifying matters, only served to deepen and compound the dichotomy.

The first occasion for the United States to elaborate its position on Jerusalem in the aftermath of the Camp David Accords came in response to a series of questions posed by King Hussein of Jordan in his quest for further clarifications.19 The Jordanian monarch had asked, inter alia: "Is Arab Jerusalem included in the West Bank?" The reply furnished by the State Department stated:

With respect to the negotiations envisaged in the Camp David Agreement, we believe a distinction must be made between Jerusalem and the rest of the West Bank because of the city's special status and circumstances. We could envisage, therefore, a negotiated solution for the final status of Jerusalem that could be different in character in some respects from that of the rest of the West Bank.

In reply to a further question of Hussein, it was said:

In these negotiations the United States will support proposals that will permit Arab inhabitants of East Jerusalem who are not Israeli citizens to participate in the elections to constitute the Self-Governing Authority and in the work of the Self-Governing Authority itself. It is probably not realistic to expect that the full scope of the Self-Governing Authority can be extended to East Jerusalem during the [five year] transitional period. Such an outcome would not however prejudice the final status of Jerusalem.

These replies of the State Department were, obviously, marked by a considerable degree of equivocation. While certain features were perfectly clear and not entirely novel, other aspects of the policy outlined were

We strongly believe that Jerusalem should be undivided with free access to the holy places for all faiths, and that its status should be determined in negotiations for a comprehensive peace settlement. It is noteworthy that the statement omitted any reference to east Jerusalem as occupied territory and in no way demanded a return of Jordanian civil authority to east Jerusalem. Moreover, since the retraction extended to each reference to Jerusalem contained in the resolution, presumably it also disavowed the assertion in the resolution that the Fourth Geneva Convention applied to Jerusalem. The whole thrust of the White House announcement was to deny that the United States bracketed east Jerusalem together with the West Bank under one rubric. The new White House retraction, in fact, paralleled very closely the Johnson-Goldberg line of placing emphasis on fulfillment of the religious needs of the international community in Jerusalem without disturbing the secular unity of the city. This episode, and the White House announcement in 1988, seem to indicate that the Carter administration had returned to the traditional American policy of seeking a solution to the Jerusalem issue through functional internationalization of the Holy Places. At the same time, it would seem to demonstrate that the President had resolved the doubts arising from the ambivalence of his Camp David letter by opting, or at least tilting to, the Goldberg line rather than the Yost approach, on the issue. Indeed, it may well be that the "flip-flop"...
This, however, was not the way Secretary of State Vance interpreted U.S. policy. In the wake of the U.N. fiasco both the Senate Foreign Relations Committee and the House Committee on Foreign Affairs extended separate invitations to Secretary Vance to appear before them and explain what had gone wrong. In an identical statement read to both committees the Secretary said: "The President understood that all references to Jerusalem would be removed before we would vote for the resolution, believing that in the present phase of the autonomy negotiations it would not be helpful to raise the issue of Jerusalem in a U.N. resolution concerning settlements".\(^{198}\) From the italicized phrase it is clear that the Department of State objected to adoption of the resolution only because of its timing, not on substantive grounds. The dichotomy between President Carter and his Secretary of State was headlined the next day in a front page New York Times report which read: "Vance says Carter Disavowed Vote in U.N. in View of Talks, Not Policy".\(^{199}\)

Secretary of State Cyrus R. Vance said today that President Carter disavowed the American vote against Israel in the United Nations Security Council three weeks ago not because the resolution violated American policy, but out of concern that it would upset the current negotiations on Palestinian self-rule.

Previously, the President had disassociated himself from the United Nations vote on the ground that it had violated key aspects of his policy toward Israel, particularly on Jerusalem. But Mr. Vance in effect, seemed to defend the wording of the original resolution by stating that it was consistent with all aspects of American policy. . .

Although Mr. Vance set out to demonstrate that he and President Carter were in agreement on what happened, he left the impression that he and the President regarded the vote differently. The distinctive viewpoint of the Secretary of State was revealed most glaringly in the course of the question and answer period before the Congressional committees. After declaring that it was the position of the Carter administration that east Jerusalem is "occupied territory", Secretary Vance was asked if he had seen Ambassador Goldberg's letter of March 12, 1980 to the New York Times which had averred that there was an essential difference between the Goldberg and Yost U.N. statements on this very matter. In reply, Secretary Vance said: "One [statement] expanded upon or built on the other. But together they state our policy". Thus Vance completely evaded the essential point made in the Goldberg letter—that the Yost U.N. statement constituted an abrupt break with previous U.S. policy on Jerusalem, and, in fact, amounted to a repudiation of Goldberg's own U.N. statement. Moreover, Secretary Vance offered no explanation as to why in his letter to Sadat, President Carter found it necessary to refer to both U.N. statements when the Yost statement included everything in the Goldberg statement and went beyond it.

At another point in his testimony the Secretary was asked how the United States could reconcile its call for a united Jerusalem with its designation of east Jerusalem as occupied territory, "which can lead to no other conclusion than that it is a divided city". In response, he said:

What that [the Yost statement] meant, very simply, was that it should be physically undivided; that never again should there be barbed wire between the various parts. It did not purport to say what the final political solution should be. It did not speak to the ultimate question of sovereignty. It talked to the question of what the city would be in terms of its physical characteristics.\(^{200}\)

"Our policy on this city [of Jerusalem] has remained consistent under the past four Presidents", declared the Secretary.\(^{201}\)

Adoption of this position by the Secretary of State prompted Congressmen to question the meaning and import of the American disavowal of the vote in the United Nations. If in the view of the Carter administration east Jerusalem was occupied territory and was actually included within the term "Arab territories occupied since 1967", why had the administration objected to the use of the express words "including Jerusalem" in the resolution? The administration's retraction on the Jerusalem aspect of the resolution, it was contended, made no sense. In the words of one Congressmen: "I am a little confused as to why this [reference to Jerusalem] is regarded as the real source of trouble in the resolution, since we agree, I think, that nothing is added by including references to Jerusalem".\(^{202}\)


\(^{199}\) March 22, 1980.

\(^{200}\) Senate Foreign Relations Committee Hearing, p. 28.

\(^{201}\) Ibid., at 13.

\(^{202}\) Ibid., at 8.

\(^{203}\) Congressman Bowen, House Committee on Foreign Affairs Hearing, p. 72. Congressman Findley charged that the retraction amounted to "repudiating superfluous words". Ibid., at 73. The Secretary was also asked why, on this
of the Carter administration. American policy on Jerusalem, however, was not appreciably clarified as a result of this attention.

The first instance was in April 1980 when President Carter took the occasion of Prime Minister Begin's visit to Washington to try and prevail on the Israeli leader to allow east Jerusalem Arabs to participate in the elections for the West Bank Self-Governing Authority.295 Begin, however, refused to yield on something which he claimed would inevitably undermine the physical unity of the city. Jerusalem, he declared, was the united eternal capital of the State of Israel and any suggestion that some of its residents came under a different status threatened the city's unity. The residents of Jerusalem were not part of the West Bank even for the limited purpose of establishing a self-governing authority.

The second occasion arose in August when the U.S. government was called upon to take a stand on Israeli legislation declaring Jerusalem the capital of the State. The Israeli move had been prompted by the March 1, 1980 Security Council call for the dismantling of settlements "in the Arab territories occupied since 1967 including Jerusalem"296 followed by a resolution of the Egyptian parliament in April declaring all acts in east Jerusalem "null and void".297 Domestic pressure in Israel built up for a suitable response which would make the Israeli position quite clear.298 On July 31, 1980 the Knesset passed a law declaring "Jerusalem in its entirety" the capital of Israel.299 In turn, the Security Council, on August 20, 1980:

See the report in the N.Y. Times, April 18, 1980, p. 10. See also Yousef Harif, Maariv (Hebrew), April 16, 1980. See also report of Begin letter to Sadat on the subject of Jerusalem, N.Y. Times, August 13, 1980, p. A.5.


See articles by former advisor to the Prime Minister, Shmuel Katz, Jerusalem Post, March 28, 1980, p. 7, and May 25, 1980, p. 7. A bill declaring Jerusalem the capital of Israel had been introduced into the Knesset several months earlier by M.K. Goush Cohen, a member of Tawun, a small right-wing party not associated with the government (at that time). This private member's bill had not yet received a first reading by March 1 and might well have remained unacted if not for the Security Council and Egyptian actions. In the face of such external challenges, the government and opposition joined ranks to pass the bill. For background analyses, see Green, The United States, Israel and the Middle East, in American Jewish Yearbook (1982) 157-29; and N.Y. Times, July 31, 1980, where the text of the bill is also reproduced. For excerpts, see following note.


The relevant text is as follows: "1. Jerusalem united in its entirety is the capital of Israel. 2. Jerusalem in the seat of the President of the State, the Knesset, and the Government, and the Supreme Court. 3. The Holy Places shall be protected from desecration and any other violation and from anything likely to violate

this the Secretary responded: "The President did feel... that in the present phase of the autonomy negotiations it would not be helpful to raise the issue of Jerusalem in a U.N. resolution concerning settlements."304 Secretary Vance had his cake and ate it too; he had fallen into a semantic trap of his own making. Given the Secretary's legal definition of the status of east Jerusalem, the retraction of the U.S. vote could not extend to the issue of Jerusalem, since the administration had no cause to take exception to the Jerusalem position enunciated in the resolution. So what did the President mean by his disavowal? The Secretary was compelled to fall back on the factor of "timing". But this made little sense under the circumstances. For one thing, the President did not mention "timing". He addressed himself to the substantive issue and declared categorically "the resolution was in violation of my policy". Moreover, it was curious logic to publicly retract a vote on Jerusalem so as not to offend Begin upon his imminent visit to the United States only to reaffirm publicly on substantive grounds the very policy which it was feared would give him offence, and this on the very eve of his visit. To add to the confusion, Secretary Vance found it appropriate to assert in his testimony that "the President knows every word that is in this statement which I read to you".305 This made a mockery of the President's disavowals of the U.S. vote.

Quite clearly, the Carter administration was talking out of both sides of its mouth. There was a sharp dichotomy between the statement issued by the White House and the testimony of the Secretary of State. Whereas President Carter in his statement and press conference had taken clear issue with the resolution on substantive grounds, the State Department was endorsing the very policy disavowed by the President. Whatever confusion had to date existed in the Carter administration's Jerusalem policy was now compounded by the divergent and contradictory statements of its chief spokesmen. In effect, U.S. policy was in disarray. If the Goldberg and Yost approaches were not readily reconciled—and Secretary Vance had not demonstrated how they could be reconciled—the differences between President Carter and his Secretary of State added a further element of obscu...
1980, resolved to condemn the Israeli move. A resolution was adopted, with only the United States abstaining, censoring Israel for its enactment of the "basic law" on Jerusalem and calling upon all member states maintaining diplomatic missions in Jerusalem to withdraw them from the city.\textsuperscript{211} U.S. Secretary of State Edmund Muskie, in declaring that Washington would not support the conditional resolution, said: "It fails to serve the goal of all faiths that look to Jerusalem as holy... We must share a common vision of this ancient city's future—an undivided Jerusalem, with free access to the holy places for people of all faiths... The question of Jerusalem must be addressed in the context of negotiations for a comprehensive, just and lasting Middle East peace... The status of Jerusalem cannot simply be declared: it must be agreed to by the parties. That is a practical reality. It will remain to decide this resolution or 100 more like it." He rejected the Security Council call for the withdrawal of diplomatic missions from Jerusalem (although the United States has never maintained its embassy there). "The provision", Muskie declared, "is not binding. It is without force and we reject it as a disruptive attempt to dictate to other nations."\textsuperscript{212} Despite its forceful tone, Muskie's statement did not really elucidate the American position on Jerusalem. The statement, it is true, made no reference to Jerusalem as occupied territory; but neither did it deny such a status. As one writer has said: "The Carter administration neither repudiated nor reaffirmed this [Yost] position in the summer of 1980."\textsuperscript{213} As President Carter's term of office drew to a close at the end of 1980, America's Jerusalem policy continued to be marked by a considerable degree of ambiguity or confusion. The President's letter appended to the Camp David agreement still stood; that U.S. policy was based on both the Goldberg and Yost statements. However, subsequent to that letter, in retracting the U.S. vote in the Security Council, the White House tilted in the direction of the Goldstein line which, by referring references to Jerusalem as occupied territory, implicitly endorsed the unity of the city under a single government. In contrast, Secretary of State Vance seemed to espouse the viewpoint that Jerusalem was subject to two different legal regimes, and Secretary Muskie did not dispel the mist surrounding U.S. policy.

\textsuperscript{211} Rice, 64748, August 20, 1980. For discussion and legal analysis, see note by Melinda Crane, "Middle East: Status of Jerusalem", supra n. 148 at 784-93.


\textsuperscript{213} With P. Tilma, The United States in the Middle East: Interests and Obstacles (Bloomington: Indiana University Press, 1982.) 169.

President Reagan's pronouncements on Jerusalem are noteworthy for the cautious approach they reflect. As a presidential candidate Ronald Reagan was on record as acknowledging Israeli sovereignty over all of Jerusalem.\textsuperscript{214} In his September 1, 1982 Peace Plan for the Middle East, President Reagan said: "We remain convinced that Jerusalem must remain undivided, but its final status should be decided through negotiations."\textsuperscript{215} In the private "Talking Points" which were communicated in an accompanying letter to Prime Minister Begin and Arab leaders, the President stated that the United States would support "participation by the Palestinian inhabitants of East Jerusalem in the election of the West Bank-Gaza authority" envisaged under the Camp David agreement.\textsuperscript{216} The distinction in U.S. policy between the two issues is clear. While the Reagan administration is committed to a unified city whose final status should be settled by negotiation, it does not consider that granting east Jerusalem Arabs voting rights would prejudice the question of status or threaten the unity of the city.\textsuperscript{217} It should, however, be noted that the voting suggestion was qualitatively on a different plane of policy from the call for a unified city; the latter constituted the Jerusalem "plank" in the President's speech; the former was consigned to the rubric of private "Talking Points." It is also significant that the Reagan Plan eschews any reference to east Jerusalem as an integral part of the West Bank, or even as occupied territory. An editorial in the New York Times aptly summed up the import of the paragraph in the Reagan Plan on the issue of Jerusalem. Mr. Reagan's proposals, it said, "promise a thinly disguised Israeli domination over all of Jerusalem."\textsuperscript{218} But the dichotomy between White House and State Department has apparently not escaped the Reagan administration either. Thus, although President Reagan's Plan places key emphasis on a unified Jerusalem and seems to espouse a policy of leaving the issue of the status of the city for the parties to decide, this has not deterred Secretary of State Schultz from labelling east Jerusalem as occupied territory. The occasion for this designation:

\textsuperscript{214} See Jerusalem Post, March 25, 1980, and Near East Report, March 26, 1980, according to which Reagan, in the course of a meeting with Jewish leaders, said: "I mean that the sovereignty is Israel's. An undivided city of Jerusalem means sovereignty for Israel over that city."\textsuperscript{215} See N.Y. Times, Sept. 2, 1982, p. A11.

\textsuperscript{216} Ibid., Sept. 9, 1982, p. A10.

\textsuperscript{217} See discussion above in text at n. 192.

\textsuperscript{218} Sept. 5, 1982. Nonetheless, the Israeli Government objected, inter alia, to the Jerusalem plank in the Reagan Plan, because of its suggestion for Arab residents to vote in the establishment of the Self-Governing Authority. Israel maintained that "the meaning of such a vote is the repudiation of Jerusalem into two authorities." Government Press Release, Sept. 2, 1982.

...
tion was a hearing before a subcommittee of the House Foreign Affairs Committee dealing with the status of the U.S. consulate in Jerusalem. A member of the committee wanted to know why this consulate does not report to the U.S. Embassy in Tel Aviv. In reply Secretary Schultz said: "I guess the reason historically is that the consulate is addressing itself to what is technically regarded as occupied territory." In the meantime, while the Reagan Administration was vacillating in its policy toward east Jerusalem, the U.S. Congress decided to involve itself in a different aspect of the Jerusalem question. The American embassy in Israel, it will be recalled, was from the very beginning in 1948, located in Tel Aviv (in common with most other embassies). Israel's action in 1950 in declaring Jerusalem its capital did not prompt the State Department to relocate the embassy in Jerusalem. As noted earlier, a secret State Department memorandum dated December 17, 1949, acknowledged that, while the establishment of Jerusalem as the capital of Israel might be construed as being contrary to the spirit of UN resolutions, it was not prohibited by these resolutions. Nonetheless, when Israel approached the United States on the matter, in 1950, Secretary of State Dean Acheson replied that the U.S. embassy could not be relocated from Tel Aviv since the Jerusalem question was "sub judice" at the United Nations. In 1951, a secret State Department Policy Statement (for governmental use only) recommended that "consideration should be given to moving the Embassy to Jerusalem after consultation with appropriate nations... since the UN General Assembly has reached no definite decision on Jerusalem." However, Secretary Acheson once again ruled that a decision in the matter would have to wait until after the General Assembly had considered the Jerusalem question at its next session. Since the Jerusalem issue was no longer taken up by the United Nations, in effect, the 1950 precedent was thus confirmed and maintained. Neither Acheson nor any other subsequent Secretary of State initiated the transfer of the U.S. Embassy from Tel Aviv to Jerusalem.

240 Alan J. Krzesko, an assistant legal adviser in the State Department has written a semi-official analysis of the Reagan Plan in which he cites the State Department view that east Jerusalem constitutes occupied territory. Notably, however, in discussing the text of the Reagan Plan, he implicitly recognizes that the Plan itself provides no endorsement of that view; cf. Krzesko's interpretation of the Yitzhak statement with his quotation from Secretary Vance. (Winter 1982-83) 49 Foreign Policy, 146-47 and 152-53.
241 See above in text at nn. 68-71.
242 Ibid.
243 Ibid., at n. 76.
244 Ibid., n. 95.
245 Ibid.

In early 1984, members of the U.S. Congress took note of the anomaly that the embassy in Tel Aviv was the only U.S. embassy in the world to be located elsewhere than in the capital of the host country. Even the U.S. Embassy in East Germany, which was first established in 1974, was located in east Berlin, although the United States refuses to acknowledge East German sovereignty over the city. A resolution was introduced into both houses of Congress (sponsored by Daniel Patrick Moynihan in the Senate and Jonathon Bingham in the House of Representatives) requiring the U.S. Embassy in Israel to be located in Jerusalem. Essentially, this question had nothing to do with the issue of the status of east Jerusalem, since the embassy could be located in the western part of the city. Nonetheless, the Reagan Administration vigorously opposed the Congressional move. For one thing, it was claimed that the step raised major constitutional questions and represented Congressional interference in the presidential prerogative of conducting the foreign policy of the United States. More pointedly, the Administration claimed that the resolution would undermine the role of the United States as a mediator in the Arab-Israeli dispute. The question of the status of Jerusalem is one of the fundamental issues Arabs and Israelis will have to resolve if there is to be peace between them. . . . A change in the U.S. position on the status of Jerusalem . . . would seriously impair our ability to play a constructive role . . . [in] the search for peace. . . . Moving our embassy to Jerusalem would be interpreted by many as prejudging the outcome of the negotiations, thereby seriously eroding our credibility as an honest broker. . . . We would not have achieved the Camp David Accords—which led to Israel's first peace treaty with an Arab state—if the U.S. had adopted the position of either Israel or Egypt on the subject of Jerusalem. . . . The status of Jerusalem must be resolved through negotiations.

These points were also made by Secretary of State George P. Schultz in a March 5, 1984, letter to the Chairman of the Senate Foreign Relations Committee.
Committee, Senator Charles H. Percy. He added: "We must also keep in mind that in the current environment, a move of our embassy would certainly fan Islamic extremism, possibly inciting a wave of violence against our citizens, diplomats and installations in the region."

President Reagan, in a press interview, on March 28, 1984, strongly hinted that he would veto any legislation calling for the transfer of the embassy to Jerusalem. He expressed regrets that the Jerusalem bill had ever been introduced into Congress. "It could undermine efforts to have a negotiated peace that will end once and for all the hostility between the Arab world and Israel."

A striking feature of the Reagan Administration's campaign against the Congressional initiative is the absence therein of any legal argument. There is no claim that interagency legal opposition to the transfer of the embassy from Tel Aviv to Jerusalem is that some move is barred by outstanding UN resolutions, either pre- or post-1967. Most notably, no one is suggesting that the August 20, 1980 resolution of the Security Council on Jerusalem was controlling. That resolution, it will be recalled, had condemned Israel unproclaiming Jerusalem "in its entirety" as its capital and called upon member states to withdraw their legations from the city. In fact, in its case against the embassy bill, the Reagan Administration has studiously avoided any reference to the United Nations. Nonetheless, this has not prevented it from citing precedents such as the 1952 and 1960 notes to Israel and Jordan respectively on the question of Jerusalem. These notes, it will be recalled, relied essentially on the "interest of the United Nations in the status of Jerusalem", as grounds for objection to "actions which confer upon Jerusalem the attributes of a seat of government of a sovereign state." If the UN interest today is no longer the determinative factor, then, of course, the earlier precedents which relied on that interest, are no longer pertinent. It is also interesting that administration spokesmen refrained from arguing that the transfer of the embassy to Jerusalem would amount to implicit recognition of Israel's "annexation" of east Jerusalem. This is particularly noteworthy since a former State Department official, Harold Saunders, in his appearance before the Senate Foreign Relations Committee, placed key emphasis on the implications of the Jerusalem bill on the status of east Jerusalem. He eschewing this line, the Administration has highlighted practical considerations such as the effect on the U.S. role in the peace process and the threats which it may spark to the safety of U.S. citizens and diplomats in Moslem areas. Implicit in the administration's approach is a recognition that the Congression step cannot be faulted on substantive, but only on tactical, grounds. (In this regard it might be borne in mind that President Reagan is also on record to the effect that the Israeli settlements on the West Bank are not illegal.)

Moving the embassy to Jerusalem is wrong, according to the Administration spokesmen, for its incidental implications and not for its essential quality. The foregoing analysis would tend to support the conclusion of the New York Times that the Reagan Administration is prepared to concede "a thinly disguised Israeli domination over all Jerusalem"; but clearly it wants the matter settled within the framework of an overall settlement of the Arab-Israeli dispute.

In the face of the strong Administration stand, the sponsors of the Jerusalem bill were prepared to modify their original proposal and present it as a concurrent resolution lacking the force of law. It would merely express the "sense of Congress" on the matter. The White House, however, was adamant and claimed that even a non-binding resolution would compromise America's position with the Arab world. At the moment, there seems little chance that the matter will be brought to a vote before the end of the 1984 Congression session. Reconsideration in a subsequent Congress would require that the bill be submitted anew.

This episode, over the relocation of the U.S. embassy, has highlighted once again that Washington is extremely wary of "rocking the boat" on the Jerusalem question. If the issue of the status of east Jerusalem is not settled in American eyes, neither is it opportune at this point to relocate the U.S. embassy in Jerusalem, even in the western part. Such a move could be interpreted as a form of open acknowledgment of Israeli sovereignty or authority over the entire city, something which could well jeopardize the peace process. Even if, in the final settlement, the United States would be prepared to acknowledge Israeli authority (conditional on satisfaction of the
Arab interest), it is not prepared to prejudge the issue before the parties have actually negotiated the matter. As the New York Times has suggested, Washington prefers to let the Jerusalem issue—in all its facets—lie low until other parts of the overall peace settlement fall into place.

VI. Summary and Conclusions

Ever since 1947 the issue of Jerusalem has posed legal and political difficulties for U.S. policy-makers. The age-old problem of ordering secular and religious relations in the Holy City has been complicated by the superimposition of the Arab-Israeli dispute.

The initial scheme of territorial internationalization, to which the United States gave its support, was undermined further controversy by making the city independent of the adjoining Arab and Jewish states scheduled to arise under the Partition Plan. This Plan, however, was aborted by the Arab invasion, and instead of an international city, Jerusalem emerged in the 1948 conflict as a metropolis divided between Jordan and Israel. By the end of 1948, the United Nations had already demonstrated that it had no intention of assuming the role assigned for it in administering the proposed corpus separatum. Territorial internationalization, for all intents and purposes, was dead. Slowly but surely the United States (in conjunction with other Western states) moved to safeguard the international interest in the Holy Shrines of the city by instituting some form of functional internationalization. Jordan and Israel would retain the secular administration of their respective sectors while each faith would administer its own shrines. The opposition of the Arab states and the Catholic Church frustrated these efforts, and, as a result, no international agreement on Jerusalem was concluded.

In the interval between 1950 and 1967 the United States refused to formally recognize Jordanian and Israeli authority in Jerusalem but did go along with a de facto arrangement which acknowledged their authority in the divided city. For consular/diplomatic purposes Washington continued to treat Jerusalem as a united city.

The 1967 war, which extended Israeli control over the whole of the city, posed a fresh dilemma for the United States involving the legal status of Israel's presence in east Jerusalem and the relationship of east Jerusalem to the West Bank. The Johnson administration resolved to highlight the need to preserve the unity of the city (and implicitly endorse functional internationalization) while leaving the question of the status of east Jerusalem to be settled in negotiations between the parties. Instead of emphasizing results, stress was placed on procedures. This approach spared the United States from taking sides and also avoided premature involvement in the adjudication of highly contentious and complicated issues of international law. The Nixon administration, however, rushed in where the Johnson administration had feared to tread and pronounced east Jerusalem "occupied territory". This pronouncement was marked with considerable ambiguity since it did not indicate from whom east Jerusalem had been occupied; the legal implications therefore remained unclear and problematic.

America's position on Jerusalem became further complicated at Camp David when President Carter, failing to appreciate the difference between the Johnson and Nixon approaches, sought to include both in the Accords hammered out between the parties. Israeli objections prevented inclusion of such a contradictory set of paragraphs in the agreement; nevertheless, a letter promising U.S. policy on both the Goldberg (Johnson) and Yost (Nixon) statements was appended to the Agreement. This left American policy on Jerusalem in a state of indeterminacy if not outright confusion. The disarray in American policy was only alleviated somewhat when a White House announcement, prompted by a mix-up at the United Nations, indicated that President Carter had implicitly opted for the Johnson approach of emphasizing Jerusalem's unity while postponing legal determination of the status question for the negotiations between the parties. At the same time, however, Carter did not accept the Israeli thesis that permitting the inhabitants of east Jerusalem to vote in the proposed autonomy elections for the West Bank authority would pre-empt the negotiations on Jerusalem's status. A similar approach—emphasizing Jerusalem's unity, even while endorsing voting rights for east Jerusalem—is evidenced in President Reagan's Plan for Peace in the Middle East. According to the New York Times, the Reagan Plan implicitly endorsed "Israeli domination over all of Jerusalem".

However, these presidential pronouncements must be balanced by State Department statements labelling east Jerusalem occupied territory and implicitly asserting that Jerusalem is subject to two different legal regimes. Both Secretary Vance (but not Muskie) and Secretary Schultz (but not Haig) must be deemed to have qualified presidential endorsements of a unified Jerusalem in both the physical and legal senses. It is not clear if this dichotomy between White House and State Department represents a product of deliberate ambiguity or of bureaucratic perplexity. Given the complex nature of the legal and political issues involved, it could well reflect the latter. But the inconsistency in policy, whether deliberate or not, tends to leave the current U.S. position on Jerusalem in a state of vacillation and inconclusiveness.

The strong reaction of the Reagan Administration to steps in the U.S.
Congress during 1984 to compel the transfer of the U.S. Embassy from Tel Aviv to Jerusalem, did not help clarify matters. While in principle the Administration might be inclined to ultimately accept a united Jerusalem under Israeli control, it is not prepared to have its hand forced in the matter. Even if the Administration could not fault the Congressional move on international legal grounds, it regarded it as dangerously ill-timed and ill-placed. The initiative, in Administration eyes, could well jeopardize the vital American role in the peace process, since the United States could be regarded as partial on one of the critical issues to be settled by negotiation between the parties. The attitude of the U.S. Administration on the place of Jerusalem in the peace process might be summed up by saying: "Until everything is settled, nothing is settled".