

19/11/2018 01:38:11 PM

Ms Emily Gian
306 Hawthorn Road
Caulfield South
VIC 3162
AU

emily@zfa.com.au

ATT:427655 Letter from ZFA President Jeremy Leibler

Dear Prime Minister Morrison,
Please find attached a letter from the new President of the Zionist Federation of Australia, Jeremy Leibler in regards to relocating the Australian Embassy to West Jerusalem. Also attached, as mentioned in the letter, is an infographic that went out to your parliamentary colleagues earlier today.

Kind regards,
Emily Gian
Media and Advocacy Director
Zionist Federation of Australia

19 November 2018

The Hon Scott Morrison MP
Prime Minister
Parliament House
CANBERRA ACT 2600

Dear Prime Minister,

I have recently been elected President of the Zionist Federation of Australia, which is the roof body of all Zionist organisations throughout Australia.

I am delighted that my first act as President is to write to you in reference to two issues on which you have demonstrated principled conviction:- the location of Australia's Embassy in Israel

s 22

s 22

The Zionist Federation of Australia welcomes your recent announcement to review both of these foreign policy decisions and on behalf of the Jewish community in Australia, I thank you for your moral clarity in relation to both of these issues.

As you will appreciate, Jerusalem is and always has been the beating heart of the Jewish people; it has been the capital of the Jewish nation for over 3,000 years. West Jerusalem already functions as Israel's capital as it is home to Israel's Knesset, Supreme Court, government agencies and the President's and Prime Minister's Residences.

As a sovereign nation, Israel has the right to determine its own capital. Israel has determined Jerusalem to be that capital and a decision to relocate the Australian Embassy there will reflect what already exists in reality.

Next year, Australia and Israel will be celebrating 70 years of close diplomatic relations. However, as you have said on previous occasions, this relationship is underpinned by a shared commitment to the values of democracy, religious freedom and the rule of law. Officially recognising Jerusalem as Israel's capital would reaffirm your Government's already strong commitment to the State of Israel and its sovereignty.

s 22

Representing the Zionist Aims of Australian Jewry

President Jeremy Leibler • Chief Executive Officer Ginette Searle • Israel Office Director Yigal Sela •

Constituent Organisations State Zionist Councils of: ACT • New South Wales • Queensland • South Australia • Victoria • Western Australia

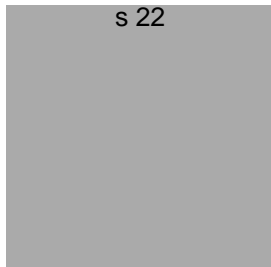
Affiliated Organisations: Ameinu • ARZA • Australian Forum of Russian Jewry • Australasian Union of Jewish Students • Australian Zionist Youth Council • Friends of Likud • Jewish National Fund Australia • Maccabi Australia • Mercaz Masorti Australasia • Mizrahi Organisation • National Council of Jewish Women Australia • Union for Progressive Judaism • United Israel Appeal Australia • Women's International Zionist Organisation • Youth Aliyah Australia •

Today, I have circulated to your parliamentary colleagues materials on behalf of the Zionist Federation to make the case for relocating Australia's Embassy. This infographic fact sheet is attached here for your information.

I would welcome the opportunity to meet with you and your colleagues to discuss this matter further.

Kind Regards,

s 22



Jeremy Leibler
PRESIDENT

From: [Philp, Jon](#)
To: s 22 ; s 22 s 22
Subject: Fwd: Relocating the Australian Embassy to West Jerusalem
Date: Friday, 23 November 2018 6:44:00 AM
Attachments: [image001.png](#)
[d5d54d32-6928-47c4-8247-2df66a3a3a4d.png](#)

Sent from my iPhone

Begin forwarded message:

From: "Parkinson, Martin" <Martin.Parkinson@pmc.gov.au>
Date: 22 November 2018 at 11:01:40 pm AEDT
To: s 47F
Cc: "Philp, Jon" <Jon.Philp@pmc.gov.au>, "Macdonald, Angela" <Angela.Macdonald@pmc.gov.au>, "Millar, Caroline" <Caroline.Millar@pmc.gov.au>
Subject: Re: Relocating the Australian Embassy to West Jerusalem

Dear Noa

Thank you for providing us with this material.

My colleagues and I will give this careful consideration as we think through these issues.

Best wishes

Martin

Dr Martin Parkinson AC PSM
 Secretary, Department of the Prime Minister and Cabinet

Sent from my iPad

On 22 Nov 2018, at 10:27 pm, s 47F wrote:

Dear Dr Parkinson

My name is Noa Bloch and I am the chair of public affairs at the Zionist Federation of Australia (ZFA), which is the roof body of all Zionist organisations throughout Australia.

I am writing to you in relation to the Government's decision to review the location of Australia's Embassy in Israel. Earlier this week, our president - Jeremy Leibler - wrote to the Prime Minister in support of this announcement and thanked him for showing strong moral clarity on this important matter. Mr Leibler also wrote an op ed in support of the Government's

announcement which was published in today's Daily Telegraph.

Given the extent of the misinformation circulated in relation to the proposed Embassy move, the ZFA this week emailed materials and an infographic to all parliamentarians to make the case for relocating the Embassy. Additionally, the ZFA has launched a social media campaign. Our posts have already reached over 13,700 people collectively.

I have attached to this email a copy of Mr Leibler's op ed and the infographic for your consideration.

Mr Leibler and I would welcome the opportunity to meet with you and your colleagues to discuss this matter further, at a time of convenience.

Kind regards

Noa Bloch

s 47F

s 47F

<image001.png><d5d54d32-6928-47c4-8247-2df66a3a3a4d.png>

From: [Peter Wertheim](#)
To: [Philp, Jon](#)
Cc: s 22 ; actadmin@actjc.org.au
Subject: RE: Middle East Policy Review [DLM=For-Official-Use-Only]
Date: Monday, 26 November 2018 8:37:43 PM

Dear Jon

Just confirming that Alex Ryvchin and I will attend the meeting with Dr Parkinson at 3:45-4:45pm on Wednesday 28 November 2018 at 1 Bligh Street, Sydney NSW 2000. Alex and I are co-CEOs of the ECAJ.

Kind regards

Peter

Peter Wertheim AM | co-Chief Executive Officer
phone: 02 8353 8500 | m: 0408 160 904 | fax 02 9361 5888
e: pwertheim@ecaj.org.au | www.ecaj.org.au



**Executive Council of
Australian Jewry**

From: Philp, Jon [mailto:Jon.Philp@pmc.gov.au]
Sent: Monday, 26 November 2018 4:41 PM
To: Peter Wertheim ; actadmin@actjc.org.au
Subject: Middle East Policy Review [DLM=For-Official-Use-Only]

For Official Use Only

Mr Anton Block,
 President
 Executive Council of Australian Jewry
 c/o Mr Peter Wertheim,
 Co-Chief Executive Officer
 Executive Council of Australian Jewry

Dear Mr Block,

As you are aware, the Prime Minister announced on 16 October 2018 that the Government would examine the merits of moving Australia's embassy to Israel to West Jerusalem, in the context of our support for a two-state solution.

As part of the review, the Prime Minister has asked that a panel of senior officials, including the Secretary of the Department of the Prime Minister and Cabinet, Dr Martin Parkinson, consult with relevant community groups. I would like to invite three senior representatives your organisation to meet with Dr Parkinson and me to share your views on this issue. Specifically, we are interested in your views on how we can use this review to support Australia's interests in the Middle East and our continuing support for a durable and resilient two-state solution.

This meeting would be just with your organisation and would take place at the Commonwealth Parliamentary Office at 1 Bligh Street, Sydney NSW 2000 at 3:45-4:45pm on Wednesday 28 November 2018. If you have any questions, please contact s 22 at

s 22

or

s 22

For your interest, I have attached a copy of the Prime Minister's 16 October 2018 media release on this issue. I am sure you understand the sensitive nature of this issue and would be grateful for your discretion on these consultations.

Jon Philp | First Assistant Secretary

National Security and International Policy Group | Department of the Prime Minister and Cabinet
p s 22
m s 22
e: jon.philp@pmc.gov.au | www.dpmc.gov.au
One National Circuit Barton ACT 2600 | PO Box 6500 CANBERRA ACT 2600

IMPORTANT: This message, and any attachments to it, contains information that is confidential and may also be the subject of legal professional or other privilege. If you are not the intended recipient of this message, you must not review, copy, disseminate or disclose its contents to any other party or take action in reliance of any material contained within it. If you have received this message in error, please notify the sender immediately by return email informing them of the mistake and delete all copies of the message from your computer system.

MEDIA RELEASE

16 Oct 2018

Prime Minister, Minister for Foreign Affairs

The Australian Government has today made a number of important announcements in support of Australia's interests in the Middle East and our continuing support for a durable and resilient two-state solution. As a package, these announcements reinforce our commitment to efforts towards resolution of the Israeli-Palestinian conflict, further strengthen our valuable relationship with Israel, and will review Australia's policy in relation to Iran's nuclear program.

In making these announcements, the Government underlines its enduring commitment to the Middle East Peace Process, and to a two-state solution that allows Israel and a future Palestinian state to exist side-by-side, in peace and security, within internationally recognised borders. We will continue to encourage both sides to continue dialogue and negotiations towards a peaceful settlement. The Government reaffirms its commitment to constructive engagement with Iran.

First, Australia will vote no in the upcoming UN General Assembly resolution on the Palestinian Authority chairing the G77. This draft resolution seeks to confer an official status on the Palestinian Authority it does not have, and therefore has the potential to undermine efforts to bring parties together to work towards a peaceful settlement.

Second, the Government will carefully examine the arguments put forward by Australia's former Ambassador to Israel, Dave Sharma, that we should consider recognising Jerusalem as the capital of Israel, without prejudice to its final boundaries, while acknowledging East Jerusalem as the expected capital of a future Palestinian state. Specifically, the Government will examine the merits of moving Australia's embassy to West Jerusalem, in the context of our support for a two-state solution. Any decision will be subject to a rigorous assessment of the potential impact of such a move on our broader national interests.

Third, given Australia's increased engagement with Israel on defence and security matters, the Government will appoint a resident Australian Defence Attaché in Tel Aviv and has invited Israel to appoint its own resident Defence Attaché in Canberra.

Fourth, the Government will review, without prejudice, Australia's approach to the Joint Comprehensive Plan of Action (JCPOA), to determine whether our current policy settings remain fit for purpose. The review will reassess whether the Plan remains the best vehicle to address the international community's concerns about Iran's nuclear ambitions. The Government aims to finalise and announce the findings of this review by December this year.

From: s 22
To: [Peter Wertheim](#)
Cc: s 22 ; s 22 ; s 22
Subject: RE: Jerusalem [DLM=For-Official-Use-Only]
Date: Wednesday, 28 November 2018 12:04:16 PM

For Official Use Only

Dear Peter

Thank you, we have printed them off and put them in a pack for Dr Parkinson today. s 22
 (cc'd) will send through details on a point of contact at the DFAT state office shortly.

Cheers

s 22

s 22 | Adviser

Department of the Prime Minister and Cabinet

p s 22 | e. s 22

PO Box 6500 CANBERRA ACT 2600

The Department acknowledges the traditional owners of country throughout Australia and their continuing connection to land, sea and community. We pay our respects to them and their cultures and to their elders both past and present.

From: Peter Wertheim

Sent: Wednesday, 28 November 2018 11:29 AM

To: s 22

Cc: s 22 ; s 22

Subject: Jerusalem

Importance: High

Dear Tom

Further to your telephone call just now please find attached the following documents. I would be grateful if you would pass them on to Dr Parkinson in advance of our teleconference this afternoon.

- Results of YouGov survey on the question of Jerusalem. The survey was commissioned by our organisation and was carried out by YouGov in mid-February 2018, before the issue became mired in Australian party politics. The person at YouGov who was in charge of the poll was s 47F
- Map showing the location of predominantly Arab and predominantly Jewish neighbourhoods in the part of Jerusalem that Israel captured during the 1967 war; and a photo depicting divided Jerusalem during the period from 1948 to 1967

I look forward to hearing from you.

Kind regards

Peter

Peter Wertheim AM | co-Chief Executive Officer

phone: 02 8353 8500 | m: 0408 160 904 | fax 02 9361 5888

e: pwertheim@ecaj.org.au | www.ecaj.org.au

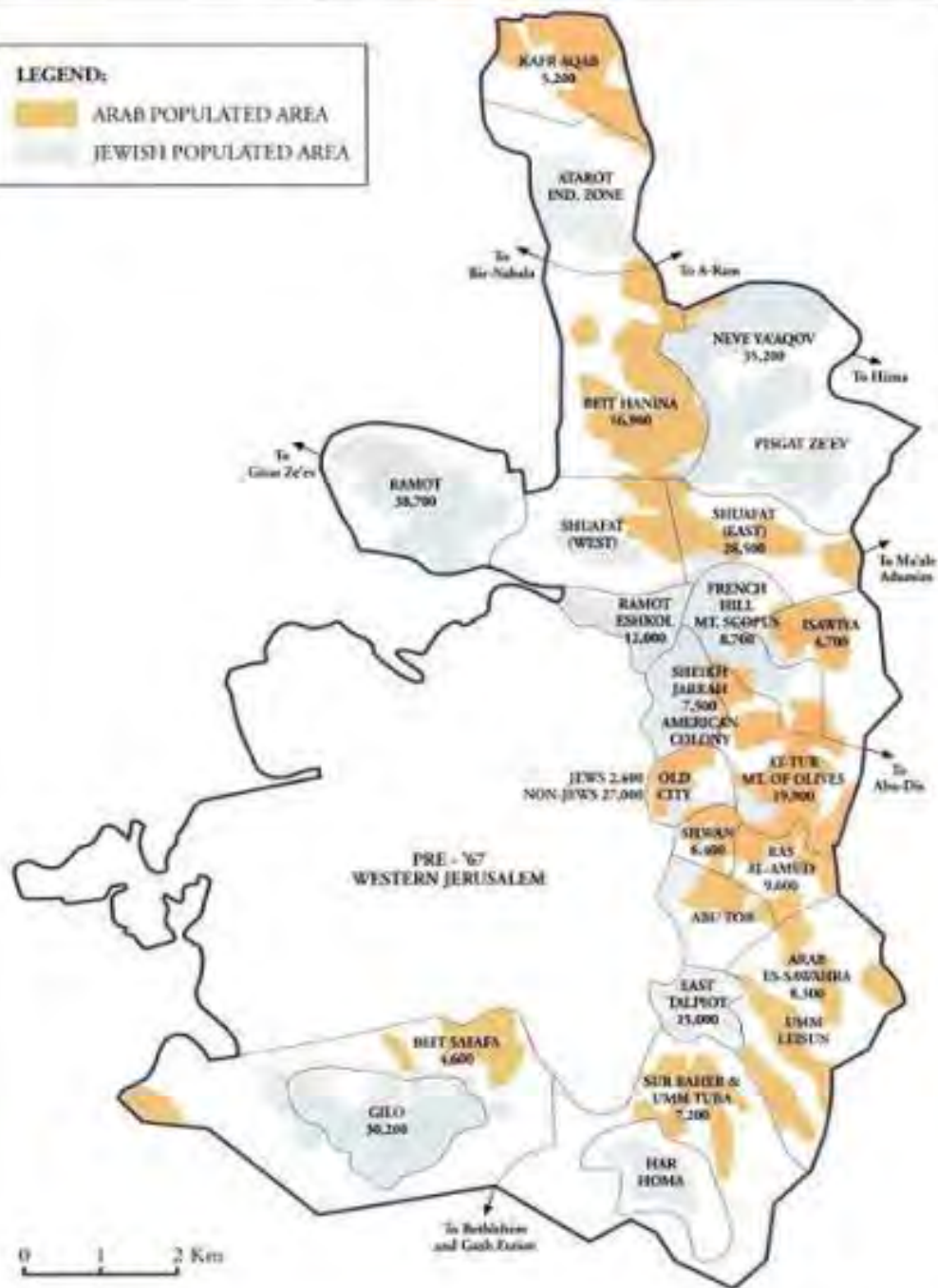


**Executive Council of
Australian Jewry**

JERUSALEM: DISTRIBUTION OF JEWISH AND PALESTINIAN POPULATION BEYOND THE PRE-1967 BORDER

LEGEND:

- ARAB POPULATED AREA
- JEWISH POPULATED AREA





	Total	Sex		Age					Generation			Marital Status		Children		Work Status		
		Male	Female	18-24	25-34	35-49	50-64	65+	Millen-nials	Gen X	Baby Boomer	Marr-ied	Not Marr-ied	Yes	No	Full Time	Part Time	Not Working
RESPONDENTS	1205	614	591	138	215	332	293	227	353	332	386	746	459	400	805	439	222	544
WGHT SAMPLE (000s)	19268	9392	9876	2272	3555	4998	4533	3910	5827	4998	6071	11841	7427	6297	12971	6819	3548	8901
	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%
A14. Australia recognise Jerusalem as the capital of Israel																		
Yes	7660	3793	3867	998	1264	1759	1743	1896	2262	1759	2468	4953	2707	2649	5011	2673	1527	3461
	40%	40%	39%	44%	36%	35%	38%	49%	39%	35%	41%	42%	36%	42%	39%	39%	43%	39%
No	4025	2387	1638	556	702	978	839	949	1258	978	1261	2133	1891	1044	2981	1472	653	1900
	21%	25%	17%	24%	20%	20%	19%	24%	22%	20%	21%	18%	25%	17%	23%	22%	18%	21%
Don't know	7583	3212	4370	718	1589	2261	1951	1064	2307	2261	2342	4754	2829	2604	4979	2674	1369	3540
	39%	34%	44%	32%	45%	45%	43%	27%	40%	45%	39%	40%	38%	41%	38%	39%	39%	40%
TOTALS	19268	9392	9876	2272	3555	4998	4533	3910	5827	4998	6071	11841	7427	6297	12971	6819	3548	8901
	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%

Banner 2 *BY* A14. Australia recognise Jerusalem as the capital of Israel

BASE: WGHT SAMPLE (000s)

WEIGHTS: Age/Sex/Area/Party Support

RESPONDENTS WGHT SAMPLE (000s)	Total	State					Capital City		Education			Party Support				Household Income		
		NSW/ACT	Vic/Tas	Qld	SA	WA	Yes	No	Year 12	TAFE	Univer- sity	Labor	Coali- -tion	Green	One Nation	< \$50K	\$50K- \$99K	\$100K+
	1205	393	338	240	110	124	817	388	394	382	417	516	245	115	115	408	355	266
	19268	6564	5387	3862	1417	2038	12334	6934	6368	6032	6664	6037	4675	2202	2210	6581	5623	4105
	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%
A14. Australia recognise Jerusalem as the capital of Israel																		
Yes	7660	2675	1875	1671	625	815	4983	2678	2461	2595	2551	2172	2388	569	1089	2784	2196	1560
	40%	41%	35%	43%	44%	40%	40%	39%	39%	43%	38%	36%	51%	26%	49%	42%	39%	38%
No	4025	1456	1192	721	280	376	2654	1371	1194	954	1753	1285	850	810	473	1332	1169	973
	21%	22%	22%	19%	20%	18%	22%	20%	19%	16%	26%	21%	18%	37%	21%	20%	21%	24%
Don't know	7583	2433	2320	1470	513	847	4697	2886	2713	2483	2360	2580	1438	823	648	2465	2257	1572
	39%	37%	43%	38%	36%	42%	38%	42%	43%	41%	35%	43%	31%	37%	29%	37%	40%	38%
TOTALS	19268	6564	5387	3862	1417	2038	12334	6934	6368	6032	6664	6037	4675	2202	2210	6581	5623	4105
	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%

From: s 22
To: [Peter Wertheim](#)
Cc: s 22
Subject: Jerusalem [DLM=For-Official-Use-Only]
Date: Wednesday, 28 November 2018 2:15:12 PM
Attachments: [image001.png](#)

For Official Use Only

Dear Peter

We have further details on your teleconference with Dr Martin Parkinson this afternoon. Thank you again for your flexibility with this, and we apologise for any inconvenience caused by today's changes.

Your point of contact at the DFAT Sydney State Office is s 22, who can be reached on s 22. She has asked if you could come directly to Level 13 at 9 Castlereagh Street, Sydney, when you arrive. On Level 13 you will be able to dial s 22 on the phone in reception for someone to provide you with access to the office. You can also contact s 22 directly.

Please let me know if I can provide any further information, or answer any questions.

Kind regards

s 22

s 22 | Adviser

International Division | Department of the Prime Minister and Cabinet

p s 22

e. s 22 | w. www.pmc.gov.au

One National Circuit Barton ACT 2600 | PO Box 6500 CANBERRA ACT 2600



The Department acknowledges the Traditional Custodians of Country throughout Australia and their continuing connection to land, waters and community. We pay our respect to their Cultures, Country and Elders both past and present.

From: [Philp, Jon](#)
To: jjones@aijac.org.au; CRubenstein@AIJAC.org.au
Subject: AIJAC Invite [DLM=For-Official-Use-Only]
Date: Thursday, 29 November 2018 10:46:31 PM
Attachments: [16 Oct Media Release.docx](#)

For Official Use Only

Dr Colin Rubenstein AM,
 Executive Director
 Australia Israel & Jewish Affairs Council
 Mr Jeremy Jones AM,
 Director of International & Community Affairs
 Australia Israel & Jewish Affairs Council
 Dear Dr Rubenstein and Mr Jones,

I am writing a quick note to confirm arrangements and provide a little background before our meeting with your organization tomorrow. As you are aware, the Prime Minister announced on 16 October 2018 that the Government would examine the merits of moving Australia's embassy to Israel to West Jerusalem, in the context of our support for a two-state solution.

As part of the review, the Prime Minister has asked that a panel of senior officials, including the Secretary of the Department of Home Affairs, Mr Mike Pezzullo, consult with relevant community groups. As the head of the Task Force addressing this issue in the Department of Prime Minister and Cabinet, I will join Secretary Pezzullo in meeting Mr Jones and your other representatives to discuss your thoughts on this matter. Specifically, we are interested in your views on how we can use this review to support Australia's interests in the Middle East and our continuing support for a durable and resilient two-state solution.

This meeting will of course be just with your organisation and will take place at the Home Affairs Sydney office tomorrow at 26 Lee Street, Haymarket NSW 2000 at 8-9am. If you have any questions and for any follow-up points, please contact s 22 at s 22 or s 22.

For your interest, I have attached a copy of the Prime Minister's 16 October 2018 media release on this issue. I am sure you understand the sensitive nature of this issue and would be grateful for your discretion on these consultations.

Best regards

Jon

Jon Philp | First Assistant Secretary
 National Security and International Policy Group | Department of the Prime Minister and Cabinet
 p. s 22
 m. s 22
 e. jon.philp@pmc.gov.au | www.dpmc.gov.au
 One National Circuit Barton ACT 2600 | PO Box 6500 CANBERRA ACT 2600

MEDIA RELEASE

16 Oct 2018

Prime Minister, Minister for Foreign Affairs

The Australian Government has today made a number of important announcements in support of Australia's interests in the Middle East and our continuing support for a durable and resilient two-state solution. As a package, these announcements reinforce our commitment to efforts towards resolution of the Israeli-Palestinian conflict, further strengthen our valuable relationship with Israel, and will review Australia's policy in relation to Iran's nuclear program.

In making these announcements, the Government underlines its enduring commitment to the Middle East Peace Process, and to a two-state solution that allows Israel and a future Palestinian state to exist side-by-side, in peace and security, within internationally recognised borders. We will continue to encourage both sides to continue dialogue and negotiations towards a peaceful settlement. The Government reaffirms its commitment to constructive engagement with Iran.

First, Australia will vote no in the upcoming UN General Assembly resolution on the Palestinian Authority chairing the G77. This draft resolution seeks to confer an official status on the Palestinian Authority it does not have, and therefore has the potential to undermine efforts to bring parties together to work towards a peaceful settlement.

Second, the Government will carefully examine the arguments put forward by Australia's former Ambassador to Israel, Dave Sharma, that we should consider recognising Jerusalem as the capital of Israel, without prejudice to its final boundaries, while acknowledging East Jerusalem as the expected capital of a future Palestinian state. Specifically, the Government will examine the merits of moving Australia's embassy to West Jerusalem, in the context of our support for a two-state solution. Any decision will be subject to a rigorous assessment of the potential impact of such a move on our broader national interests.

Third, given Australia's increased engagement with Israel on defence and security matters, the Government will appoint a resident Australian Defence Attaché in Tel Aviv and has invited Israel to appoint its own resident Defence Attaché in Canberra.

Fourth, the Government will review, without prejudice, Australia's approach to the Joint Comprehensive Plan of Action (JCPOA), to determine whether our current policy settings remain fit for purpose. The review will reassess whether the Plan remains the best vehicle to address the international community's concerns about Iran's nuclear ambitions. The Government aims to finalise and announce the findings of this review by December this year.

From: [Peter Wertheim](#)
To: [Philp, Jon](#); s 22
Cc: s 22
Subject: RE: Jerusalem [DLM=For-Official-Use-Only]
Date: Tuesday, 4 December 2018 8:58:15 PM

Thank you, Jon. Looking forward to hearing from you in due course.

Peter

Peter Wertheim AM | co-Chief Executive Officer
phone: 02 8353 8500 | m: 0408 160 904 | fax 02 9361 5888
e: pwertheim@ecaj.org.au | www.ecaj.org.au



Executive Council of
Australian Jewry

From: Philp, Jon [mailto:Jon.Philp@pmc.gov.au]
Sent: Tuesday, 4 December 2018 7:00 PM
To: Peter Wertheim ; s 22
Cc: s 22
Subject: RE: Jerusalem [DLM=For-Official-Use-Only]

For Official Use Only

Dear Peter

Thanks again for meeting with us last week. As Dr Parkinson said, we are keen to ensure the views of the community are taken into account in the Review, so your own summary record is most helpful in making sure we get it right.

We hope to finalise the Review within a short period of time, and will write to you again once the Prime Minister has decided on a course of action.

Regards

Jon

Jon Philp | First Assistant Secretary
National Security and International Policy Group | Department of the Prime Minister and Cabinet
 p s 22
 m. s 22
e: jon.philp@pmc.gov.au | www.dpmc.gov.au
One National Circuit Barton ACT 2600 | PO Box 6500 CANBERRA ACT 2600

From: Peter Wertheim <pwertheim@ecaj.org.au>
Sent: Tuesday, 4 December 2018 12:30 PM
To: Philp, Jon <Jon.Philp@pmc.gov.au>; s 22
 s 22
Cc: s 22
Subject: RE: Jerusalem [DLM=For-Official-Use-Only]

Importance: High

Gentlemen

My thanks to both of you and Dr Parkinson for taking the time to confer with me last Wednesday. I attach a confidential summary of the conversation for your assistance.

Kind regards

Peter

Peter Wertheim AM | co-Chief Executive Officer
phone: 02 8353 8500 | m: 0408 160 904 | fax 02 9361 5888

e: pwertheim@ecaj.org.au | www.ecaj.org.au



Executive Council of
Australian Jewry

From: [REDACTED] s 22

Sent: Wednesday, 28 November 2018 12:04 PM

To: Peter Wertheim <pwertheim@ecaj.org.au>

Cc: [REDACTED] s 22 [REDACTED] s 22

[REDACTED] s 22 ; [REDACTED] s 22

Subject: RE: Jerusalem [DLM=For-Official-Use-Only]

For Official Use Only

Dear Peter

Thank you, we have printed them off and put them in a pack for Dr Parkinson today. [REDACTED] s 22
(cc'd) will send through details on a point of contact at the DFAT state office shortly.

Cheers

[REDACTED] s 22

[REDACTED] s 22 | Adviser

Department of the Prime Minister and Cabinet

p. [REDACTED] s 22 | e. [REDACTED] s 22

PO Box 6500 CANBERRA ACT 2600

The Department acknowledges the traditional owners of country throughout Australia and their continuing connection to land, sea and community. We pay our respects to them and their cultures and to their elders both past and present.

From: Peter Wertheim <pwertheim@ecaj.org.au>

Sent: Wednesday, 28 November 2018 11:29 AM

To: [REDACTED] s 22

Cc: [REDACTED] s 22 ; [REDACTED] s 22

[REDACTED] s 22

Subject: Jerusalem

Importance: High

Dear [REDACTED] s 22

Further to your telephone call just now please find attached the following documents. I would be grateful if you would pass them on to Dr Parkinson in advance of our teleconference this afternoon.

- Results of YouGov survey on the question of Jerusalem. The survey was commissioned by our organisation and was carried out by YouGov in mid-February 2018, before the issue became mired in Australian party politics. The person at YouGov who was in charge of the poll was [REDACTED] s 47F
- Map showing the location of predominantly Arab and predominantly Jewish neighbourhoods in the part of Jerusalem that Israel captured during the 1967 war; and a photo depicting divided Jerusalem during the period from 1948 to 1967

I look forward to hearing from you.

Kind regards

Peter

Peter Wertheim AM | co-Chief Executive Officer

phone: 02 8353 8500 | m: 0408 160 904 | fax 02 9361 5888

e: pwertheim@ecaj.org.au | www.ecaj.org.au



Executive Council of
Australian Jewry

IMPORTANT: This message, and any attachments to it, contains information that is confidential and may also be the subject of legal professional or other privilege. If you are not the intended recipient of this message, you must not review, copy, disseminate or disclose its contents to any other party or take action in reliance of any material contained within it. If you have received this message in error, please notify the sender immediately by return email informing them of the mistake and delete all copies of the message from your computer system.

IMPORTANT: This message, and any attachments to it, contains information that is confidential and may also be the subject of legal professional or other privilege. If you are not the intended recipient of this message, you must not review, copy, disseminate or disclose its contents to any other party or take action in reliance of any material contained within it. If you have received this message in error, please notify the sender immediately by return email informing them of the mistake and delete all copies of the message from your computer system.

From: Colin Rubenstein
To: Philp Jon s 22
Subject: Material on Jerusalem and International law for the PM's Jerusalem Embassy panel
Date: Wednesday, 5 December 2018 5:20:28 PM
Attachments: berkowitz_jerusalem_web_covers.pdf
 Kontorovich_Testimony_11082017.pdf

Dear Jon Philp,

As discussed, AIJAC has assembled some further information which we hope will be interest to the panel on the status and history of Jerusalem, with a particular focus on the international law dimension. While some of these articles focus on the US debate prior to the Trump Administration's decision to move the US Embassy in Israel to Jerusalem, their arguments generally apply identically to Australia's current policy on the subject.

I include below or as attachment the following:

1. An article on the "Legal Status of Jerusalem" by Australian professor of international law Greg Rose from last December (first item below). AIJAC further suggests that any further questions related to international law and Jerusalem could be addressed to Prof. Rose, given his expertise and the fact that he has already made a study of these issues.
2. A longer study of "[The Status of Jerusalem in International and Israeli Law](#)" by Israeli lawyer, lecturer and author Shmuel Berkowitz from earlier this year. (Attached as a pdf)
3. Written [testimony by US international law expert Prof. Eugene Kontorovich](#) from Northwestern University School of Law to "U.S. House of Representatives Committee on Oversight & Government Reform, National Security Subcommittee" in their hearing on the subject of : "Moving the American Embassy to Jerusalem: Challenges and Opportunities" from Nov. 2017. (Attached as a pdf).
4. Prof. Kontorovich's article, "Russia Recognizes Jerusalem as Israel's Capital. Why Can't the U.S.?" from the *Wall Street Journal*, published May 14, 2017.(second article below).
5. An article by Israeli academic expert in International Law Prof. Avi Bell of Hebrew University, entitled, "Flaw In U.S. Policy: Even the PLO recognizes Israel's right to West Jerusalem", originally published in the *New York Jewish Week*, on June 17, 2015, (third article below).

AIJAC also recommends to the committee two books focused on international law and Jerusalem:

Jerusalem in America's Foreign Policy, 1947-1997.

by Shlomo Slonim. The Hague, London, Boston: Kluwer Law International, 1998.

Sovereignty Over the Old City of Jerusalem: A Study of the Historical, Religious, Political and Legal Aspects of the Question of the Old City

Jacques Paul Gauthier, Verlag nicht ermittelbar, 2007.

Can I add that AIJAC stands ready to provide any further assistance, information, recommendations or testimony that the committee may require.

Many thanks for your consideration.

Best wishes,

Colin Rubenstein

Dr. Colin Rubenstein AM

Executive Director

Australia/Israel & Jewish Affairs Council (AIJAC)

Phone: (03)-9681-6660

Fax: (03)-9681-6660

Mobile: 0418-339-721-----

<http://www.internationalaffairs.org.au/australianoutlook/legal-status-jerusalem/>

The Legal Status of Jerusalem: Is Trump Right?

13 DEC 2017

By Professor Gregory Rose

ANALYSIS

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

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

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

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

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

The Israeli claim

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

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

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

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

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

The United Nations' claim

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

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

Jordan's claim

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

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

The Palestinian claim

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

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

Actual legal status

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

Jerusalem is depicted on medieval maps as the meeting point of Africa, Asia and Europe, reflecting its geostrategic centrality.

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

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

[Gregory Rose](#) is a professor with the School of Law at the University of Wollongong.

This article is published under a Creative Commons Licence and may be republished with attribution.

<https://www.wsj.com/articles/russia-recognizes-jerusalem-as-israels-capital-why-cant-the-u-s-1494795684>

Russia Recognizes Jerusalem as Israel's Capital. Why Can't the U.S.?

Trump must soon decide whether to move the embassy. Doing so would help promote peace.

By Eugene Kontorovich May 14, 2017 5:01 p.m. ET

[233 Comments](#)

ETTY IMAGES

President Trump's visit to Israel next week is expected to lead to some announcement about his Jerusalem policy. The trip will coincide with celebrations of the 50th anniversary of the city's reunification after the Six Day War. Only days after the visit, the president will have to decide between waiving an act of Congress or letting it take effect and moving the U.S. Embassy to Jerusalem from Tel Aviv—as he promised last year to do if elected.

Jerusalem is the only world capital whose status is denied by the international community. To change that, in 1995 Congress passed the Jerusalem Embassy Act, which mandates moving the U.S. Embassy to a “unified” Jerusalem.

The law has been held in abeyance due to semiannual presidential waivers for “national security” reasons. President Obama’s final waiver will expire June 1.

There’s no good reason to maintain the charade that Jerusalem is not Israeli, and every reason for Mr. Trump to honor his campaign promise. The main arguments against moving the embassy—embraced by the foreign-policy establishment—is that it would lead to terrorism against American targets and undermine U.S. diplomacy. But the basis of those warnings has been undermined by the massive changes in the region since 1995.

While the Palestinian issue was once at the forefront of Arab politics, today Israel’s neighbors are preoccupied with a nuclear Iran and radical Islamic groups. For the Sunni Arab states, the Trump administration’s harder line against Iran is far more important than Jerusalem. To be sure, a decision to move the embassy could serve as a pretext for attacks by groups like al Qaeda. But they are already fully motivated against the U.S.

Another oft-heard admonition is that America would be going out on a limb if it “unilaterally” recognized Jerusalem when no other country did. An extraordinary recent development has rendered that warning moot. Last month Russia suddenly announced that it recognized Jerusalem as the capital of Israel.

Note what happened next: No explosions of anger at the Arab world. No end to Russia’s diplomatic role in the Middle East. No terror attacks against Russian targets. Moscow’s dramatic Jerusalem reversal has largely been ignored by the foreign-policy establishment because it disproves their predictions of mayhem.

To be sure, Russia limited its recognition to “western Jerusalem.” Even so, it shifted the parameters of the discussion. Recognizing west Jerusalem as Israeli is now the position of a staunchly pro-Palestinian power. To

maintain the distinctive U.S. role in Middle East diplomacy—and to do something historic—Mr. Trump must go further. Does the U.S. want to wind up with a less pro-Israel position than Vladimir Putin's?

The American response to real attacks against U.S. embassies has always been to send a clear message of strength. After the 1998 al Qaeda bombings of U.S. embassies in Kenya and Tanzania, Washington did not shut down those missions. Instead it invested in heavily fortified new facilities—and in hunting down the perpetrators.

Moving the embassy to Jerusalem would also improve the prospect of peace between Israel and the Palestinians. It would end the perverse dynamic that has prevented such negotiations from succeeding: Every time the Palestinians say “no” to an offer, the international community demands a better deal on their behalf. No wonder no resolution has been reached. Only last week, Palestinian Authority President Mahmoud Abbas insisted that new negotiations “start” with the generous offer made by Israel's Prime Minister Ehud Olmert in 2008. Relocating the embassy would demonstrate to the Palestinian Authority that rejectionism has costs.

If Mr. Trump nonetheless signs the waiver, he could do two things to maintain his credibility in the peace process. First, formally recognize Jerusalem—the whole city—as the capital of Israel, and reflect that status in official documents. Second, make clear that unless the Palestinians get serious about peace within six months, his first waiver will be his last. He should set concrete benchmarks for the Palestinians to demonstrate their commitment to negotiations. These would include ending their campaign against Israel in international organizations and cutting off payments to terrorists and their relatives.

This is Mr. Trump's moment to show strength. It cannot be American policy to choose to recognize a capital, or not, based on how terrorists will react—especially when they likely won't.

Mr. Kontorovich is a department head at the Kohelet Policy Forum and a law professor at Northwestern University.

An aerial photograph of Jerusalem, showing the Old City walls, the Dome of the Rock, and various religious and historical buildings. The city is densely packed with buildings, and the walls of the Old City are clearly visible. The title is overlaid on the top half of the image.

The Status of Jerusalem in International and Israeli Law

Shmuel Berkowitz



Jerusalem Center for Public Affairs

The Status of Jerusalem in International and Israeli Law

Shmuel Berkowitz



Jerusalem Center for Public Affairs



Read this book online:

<http://jcpa.org/legal-status-jerusalem-international-israeli-law/>

Cover photo by Tomer Peled.

© 2018 Jerusalem Center for Public Affairs

13 Tel Hai St., Jerusalem, 9210717 Israel

Email: jcpa@netvision.net.il

Tel: 972-2-561-9281 | Fax: 972-2-561-9112

Jerusalem Center Websites:

www.jcpa.org (English) | www.jcpa.org.il (Hebrew)

www.jcpa-lecape.org (French) | www.jer-zentrum.org (German)

www.dailyalert.org

The Jerusalem Center for Public Affairs is a non-partisan, not-for-profit organization.

ISBN: 978-965-218-140-4

Contents

Chapter One:	
The Importance of Jerusalem to Judaism, Christianity, and Islam	5
Chapter Two:	
The Legal Status of West Jerusalem	11
Section 1: Israel's gaining control of west Jerusalem and its transformation into the capital of Israel	11
Section 2: The status of west Jerusalem in the eyes of the United Nations, the world, and international law	16
Chapter Three:	
The Legal Status of East Jerusalem	19
Section 1: Israel's gaining control of east Jerusalem and Israeli legislation to protect the unification of the city	19
Section 2: International rejection of the unification of Jerusalem	25
Section 3: The U.S. position on the legality of the unification of Jerusalem and the status of east Jerusalem	33
Section 4: The position of the European Union regarding the status of Jerusalem	38
Section 5: The Palestinian Authority's position on the status of Jerusalem	42
Section 6: The dispute in international law over the legality of Israel's rule in east Jerusalem	44
Section 7: The unification of Jerusalem in the eyes of Israeli law	51
Section 8: The Old City as an "Antiquities Site"	52
Section 9: The Old City as a World Heritage Site	53
Chapter Four:	
General Summary	55
Notes	61
About the Author	70

Acknowledgments

I would like to express my gratitude to the Jerusalem Center for Public Affairs, led by Dr. Dore Gold, and the Center's Director General, Chaya Herskovic, for their readiness to publish my research and all of their dedicated assistance with this project.

I would also like to thank Judge Moshe Drori, vice president of the Jerusalem District Court, and Amb. Alan Baker, former Israeli ambassador to Canada and legal adviser to the Israel Foreign Ministry, who made several important, effective comments on this monograph, contributing to its improvement.

I am extremely grateful to Dr. Adv. Rachel Rimón for her faithful, excellent translation of the monograph into English, and to Lenny Ben-David for his professional, insightful editing.

Chapter One: The Importance of Jerusalem to Judaism, Christianity, and Islam¹

Due to the great sanctity that Judaism, Christianity, and Islam attribute to Jerusalem, this city has been at the center of the Arab-Israeli conflict for the past 100 years. Jerusalem is sacred to Judaism by virtue of the Temple Mount, which was the site of the three Jewish Temples: the First Temple, built by King Solomon, was dedicated in 960 BCE, and destroyed by the Babylonians in 586 BCE. The Second Temple, built by Jewish exiles returning to Jerusalem from Babylonia, was dedicated in 516 BCE. In the year 20 BCE, King Herod persuaded the Jews to allow him to demolish the Second Temple, which was small and modest, in order to replace it with a large and impressive structure. The Jews agreed; King Herod destroyed the Second Temple, and within one and a half years constructed in its place the largest and most beautiful temple in the world – which was dedicated in 19 BCE.² This was the Third Temple, destroyed by the Romans during the great Jewish revolt in 70 CE.

For Jews, this is the holiest place in the world, since the Divine Presence (*Shechinah*) rests there forever. According to Jewish tradition, the great stone, now in the Dome of the Rock, was under the “Holy of Holies” in the Jewish Temple. According to the Midrash (Rabbinic literature), this stone was the starting point of Creation. Since God founded the world on this stone, it became known in the Midrash as the “Foundation Stone.” The stone is also considered to be the center of the world. According to Jewish

tradition, the Temple Mount is also Mount Moriah, the site of Abraham's binding of Isaac on the rock.

Jerusalem was the capital of the Kingdom of Israel (during the reigns of King David and King Solomon in 1004 BCE–928 BCE), the capital of the Kingdom of Judah (928-586 BCE), and the capital of the Hasmonean Kingdom (167-63 BCE). Jerusalem was the capital of the Jewish people 1,000 years before it became sacred to Christianity and about 1,700 years before it became sacred to Islam. According to the Bible and the Jewish faith, Jerusalem is the city of choice, where the God of Israel chose to dwell forever on the Temple Mount. Jerusalem is mentioned 656 times in the Bible (and not even once in the Koran!). The Torah requires every Jew to make a pilgrimage to Jerusalem three times a year (on the festivals of Passover, Shavuot, and Sukkot). There is no such commandment in Christianity and Islam. Due to this background, Jerusalem has always been the most important city for the Jewish people, nationally, religiously, and historically.

It was against this background that after being exiled from the Land of Israel by the Babylonians (586 BCE), Jews throughout the world vowed to remember Jerusalem forever until they returned to its holy precincts: *"If I forget thee, O Jerusalem, let my right hand forget her cunning..."* (Psalms, 137: 5-6). Accordingly, Jews throughout the world yearned for 2,000 years to return to it: *"Next year in rebuilt Jerusalem"* (in the prayers of the Day of Atonement and at the end of the Passover Seder). In light of its holiness, Jews face the Temple Mount when praying in synagogues everywhere, including in Jerusalem: *"Return in mercy to Jerusalem Thine city and dwell there as Thy have promised; speedily establish therein the throne of David Thy servant, and rebuild it, soon in our days, as an everlasting edifice,"* (the *Amidah* prayer, recited three times each day).

For Muslims too, Jerusalem is holy because of the Temple Mount, which they call the *"Haram al-Sharif"* – the *"Noble Sanctuary."* For Muslims, the holiness of the Temple Mount originates from their belief that the Prophet Muhammad rose to heaven from the rock on the Temple Mount (the *"Holy of Holies"* in the Jewish Temple), met with Allah, and received the commandment to perform five prayers a day, and thereafter returned

to Mecca. Muslims also believe that this is the center of the world, the starting point of Creation, and the place of binding. However, according to Muslim tradition, it was not Isaac but Ishmael who was to be sacrificed by Abraham/Ibrahim.

To commemorate the Prophet Muhammad's ascent to heaven from the rock, as mentioned, they built the Dome of the Rock above this rock and inaugurated it in 691 CE. This structure was not built as a mosque and was never designed for public prayer. Indeed, the building only became a women's mosque in May 1952, and since then, women have prayed there every Friday.

The Muslims have built five mosques on the Temple Mount: the Dome of the Rock (691 CE), which has been used for the past 30 years as a women's mosque, the al-Aqsa Mosque (705 CE), the Al-Buraq Mosque (early twentieth century), the al-Aqsa al-Qadim Mosque (August 1989), and the Marwani Mosque ("Solomon's Stables") (December 1996). Due to this background, the Temple Mount/Haram al-Sharif is also sacred to Muslims, and for them, this is the third holiest site in the world, after the Holy Kaaba Mosque in Mecca and the Tomb of the Prophet Muhammad in Medina, Saudi Arabia. Therefore, everywhere, even in Jerusalem, Muslims pray with their faces turned toward Mecca.

For Palestinians, the Haram al-Sharif is also a national symbol. Its presence in east Jerusalem is the origin of their demand for the division of the city and the establishment of east Jerusalem as the capital of any future Palestinian state. This is the main reason for the refusal of the Palestinians, the Arab states, and other countries that support them to recognize the legality of the unification of Jerusalem by Israel and the legality of its sovereignty in east Jerusalem. They view this part of the city as "occupied territory," which in the future should be placed under their sovereignty as their capital city.

Jerusalem and the Temple Mount are also holy to Christianity, primarily because of events in the life of Jesus, which took place in the city. Jesus taught his disciples on the Mount of Olives, and there he prophesied the destruction of Jerusalem. On the Temple Mount, he was apprehended

and handed over to the Romans for heresy and attempted rebellion. He was tried and convicted at the Antonia Fortress, near the Temple Mount, and from there he was led along the “Via Dolorosa” to the place of his crucifixion and burial, where the Church of the Holy Sepulcher, the holiest place in the Christian world, was subsequently established. There, he was resurrected on the day following his burial, lived for two weeks, and ascended to heaven from the heights of the Mount of Olives. On Mount Zion, one may find the Cenacle (dining room) – the place of Jesus’ Last Supper (Passover Seder) – from which the Twelve Apostles set out to spread the message of Christianity to the world.

Despite this, the Christian countries, headed by the Vatican, have no political interest in Jerusalem and the Temple Mount and would have been satisfied with special status being accorded to the Holy Places, safeguarded by international guarantees. However, due to the economic and political ties of various countries with the Arab states, and their concern for the fate of the Christian communities in the Palestinian Authority and the Arab states, they too do not recognize the legality of Israel’s rule in east Jerusalem and the unification of the two parts of the city.

With the conquest or liberation of east Jerusalem by Israel in the Six-Day War in June 1967, the Christian and Muslim worlds were shaken both theologically and politically by the imposition of Jewish-Israeli rule over the most sacred places of Christianity and Islam in Jerusalem, particularly the Temple Mount/Haram al-Sharif (the third holiest site in the Muslim world), the Church of the Holy Sepulcher (the holiest site in the Christian world), and more. Consequently, the struggle for the political future of Jerusalem was renewed.

To strengthen Jerusalem from a security, economic, and demographic standpoint, Israel expanded the area of west Jerusalem (38 square kilometers) by incorporating Jordanian Jerusalem (6 square kilometers) and the lands of 28 villages and towns (64.5 square kilometers) in the West Bank of the Jordan River (Judea and Samaria). It also built 13 new Jewish neighborhoods there, applied its jurisdiction, administration, and laws to all of these territories, and called them “east Jerusalem.” The entire extended city was recognized in Basic Law: Jerusalem, Capital of Israel,

5740-1980 as the complete capital of Israel. In November 2000, this law was amended by the insertion of Section 5, which states, for the first time, that the territory of Jerusalem also includes all the areas that were incorporated into its jurisdiction at the end of June 1967. Section 6 was also inserted, stating that no authority within the jurisdiction of Jerusalem could be transferred “to a foreign body, whether political or governmental.” Likewise, Basic Law: Referendum, 5774-2014, stipulates that Israel’s sovereignty over part of its territory should not be waived unless the government has so decided and its decision is ratified by an absolute majority of members of the Knesset as well as in a referendum. It is clear that this provision is intended to make it difficult to partition Jerusalem between Israel and the Palestinians or renounce the sovereignty of Israel in the Golan Heights, in whole or in part.

Jerusalem is the largest city in Israel in terms of area (about 126 square kilometers) and population. Approximately 882,700 people live in Jerusalem today. In east Jerusalem live 327,700 Arabs and 214,600 Jews. The population in the Old City stands at 35,000 of whom 31,340 are Arabs and 3,660 are Jews.³

This is the background of the political, national, historical, religious, and legal struggle between Jews and Muslims and between Israel and the Palestinians, the Arab states, and their supporters regarding the political future of east Jerusalem, in general, and the Temple Mount in particular. Against this backdrop, only some of the countries of the world recognize the legality of Israel’s rule in west Jerusalem, and even this only on a *de facto* basis. This is apart from Russia, which on April 6, 2017, recognized western Jerusalem as the capital of Israel and eastern Jerusalem as the capital of the future state of Palestine, the United States, which only on December 6, 2017, recognized Jerusalem as the capital of Israel, and the Czech Republic, which on the same day recognized only western Jerusalem as the capital of Israel (as detailed in Chapter 3 below).

However, all other countries reject the legality of Israel’s rule in east Jerusalem, both *de facto* and *de jure*, and do not recognize united Jerusalem as the capital of Israel.

For this reason, no country in the world, including those with diplomatic relations with Israel, maintains an embassy in Jerusalem. To support their political position, the United Nations and these countries have developed a legal thesis whereby Jerusalem is “occupied territory,” illegally annexed by Israel from Jordan, in the course of a war with Jordan, contrary to the rules of international law. Therefore, the Palestinians, the Arab states, and the rest of the Muslim countries demand the transfer of east Jerusalem to a sovereign state of Palestine as its capital, should such a state be established in the West Bank after it is handed over by Israel to the Palestinians. As noted, other countries of the world have never recognized the legality of Israel’s rule in “east Jerusalem,” and maintain that its political status be decided only through negotiations between Israel and the Palestinians.

The following article is intended to provide an appropriate legal response to the worldwide repudiation of the legality of the rule of Israel in the whole of Jerusalem and the unification of the city, and completely refute it.

Chapter Two: The Legal Status of West Jerusalem

Section 1: Israel's gaining control of west Jerusalem and its transformation into the capital of Israel

On November 29, 1947, the UN General Assembly adopted a resolution (the "Partition Plan") on the future of the rule of Palestine), recommending its partition into two states – Jewish and Arab – with the exception of Jerusalem. In view of the holiness of Jerusalem to the three monotheistic religions, the UN General Assembly recommended that the city (including Bethlehem) be a "separate body" (*corpus separatum*) with an international administration under the auspices of the United Nations.⁴ The Arabs in the area and in the Arab countries expressed vehement opposition to the General Assembly resolution and on the very day following the adoption of the Partition Plan launched a war to thwart it. Initially, irregular Arab forces and gangs attacked the Jewish towns and villages throughout Eretz Yisrael, but after the declaration of the establishment of the State of Israel on May 14, 1948 (the "Declaration of Independence"), five Arab states invaded Israel with the aim of destroying the infant Jewish state. This was the "War of Liberation" or "War of Independence" of the State of Israel.

On July 7, 1948, Jordan and Israel signed a special agreement under the auspices of the United Nations regarding Mount Scopus. During the fighting, this area had remained a Jewish enclave within the territories occupied by the Jordanian army. The agreement stipulated that the Jewish enclave and the adjacent area of the Augusta Victoria Hospital,

which was under the control of the Jordanian army, become a neutral territory under UN protection. The agreement stated that Israeli civilian police would be allowed to guard the humanitarian institutions on the mount (Hadassah Hospital and the Hebrew University), and the guards would be replaced from time to time by a convoy escorted by the United Nations, which would be allowed to pass through the area under Jordanian control.⁵ On November 30, 1948, Col. Moshe Dayan, the Etzioni Brigade commander (the brigade fighting in Jerusalem), and Gen. Abdullah al-Tal, the commander of the Jordanian Legion in Jerusalem, signed a cease-fire agreement marking the Israeli positions with a green wax pencil (hence the name “Green Line”) and the line of the Jordanian positions in a red wax pencil, with a “no man’s land” in between.⁶

On August 22, 1948, al-Tal and Dayan met again to confer on Jerusalem’s no-man’s land (see photograph).



Jerusalem armistice map showing the “green line,” “red line,” and no man’s land between the two. (*Private map collection of Lenny Ben-David*)



Commander of Israel's Jerusalem Brigade, Col. Moshe Dayan, right, and Arab Legion Commander Abdullah Bey El-Tel, shake hands after a conference in a monastery in Jerusalem's no-man's land, Aug 22, 1948. Facing camera right, is Lt. Col. Ahmed Abd Aziz, commander of the Egyptian forces in the southern section of Jerusalem. A few hours after this picture was taken, Col. Aziz was ambushed and killed. (*AP Photo/Pringle*)

At the end of the war between Israel and Jordan, an armistice agreement was signed between the two countries on April 3, 1949, according to which Jerusalem was divided into two: the western part to be held by Israel and the eastern part to be held by Jordan, adopting the municipal border as determined in the map attached to the "honest truce agreement" referred to above.

The entire Old City, the neighborhoods to its north, and the Mount of Olives were in Jordanian territory. The western part of the city, as well as an enclave on Mount Scopus in the northeast of the city (according to the above agreement), were in the Israeli domain. A UN-controlled demilitarized zone was created in the High Commissioner's palace area (Armon Hanatziv), and the palace itself became the headquarters for the UN observers. A crossing point between the two parts of the city was established at the Mandelbaum Gate, operated by Israeli and Jordanian

customs officials and used mainly for the passage of diplomats and UN personnel, as well as the passage of Christian pilgrims on Christmas Day. Every fortnight a convoy of doctors, nurses, university workers, and police guards left for the Israeli enclave on Mount Scopus.

Jerusalem is not mentioned in the Declaration of Independence of May 14, 1948, almost certainly because the Israeli government did not want to officially contradict the Partition resolution (which had designated Jerusalem as an international city) and because of the ambiguity surrounding the borders of the state, which had been declared to be temporary in the Armistice Agreement signed at the end of the War of Independence between Israel and the Arab neighbors that had invaded it during the war.⁷

On August 2, 1949, a proclamation was issued by the IDF in Jerusalem regarding the application of Israeli law to the areas of Jerusalem held by the IDF on the aforementioned date,⁸ i.e., the area of west Jerusalem and other areas as follows:

The area encompassing most of the city of Jerusalem, part of its western suburbs and outskirts, and the roads connecting Jerusalem with the coastal plain, all within the boundaries of the red line marked on the map of Eretz Yisrael signed by me and bearing the date of 26 Tamuz 5708 (August 2, 1948) ...

On September 16, 1948, the Provisional Council of State enacted the Areas of Jurisdiction and Powers Ordinance – 5708 – 1948,⁹ stating in Section 1:

Any law applying to the whole of the State of Israel shall be deemed to apply to the whole of the area including both the State of Israel and any part of Palestine which the Minister of Defense has defined by proclamation as being held by the Defence Army of Israel.

Section 3 of the Ordinance gave retroactive effect to the IDF proclamation regarding the application of Israeli law to west Jerusalem.

Israel took a series of steps aimed at demonstrating its rule in west Jerusalem and turning it into the capital of Israel: On September 14, 1948, the Supreme Court was transferred to Jerusalem. On December 20, 1948, the government decided to transfer its institutions to Jerusalem. On December 31, 1948, the Jerusalem City Council was established. On January 25, 1949, the residents of Jerusalem participated in the elections to the Constituent Assembly of Israel.¹⁰ On February 2, 1949, the Military Government Council was dissolved, and the new government, following the Provisional Government, declared west Jerusalem an integral part of the State of Israel.¹¹

Following a debate of the UN General Assembly on the issue of Jerusalem and the Holy Places, on December 5, 1949, Israeli Prime Minister David Ben-Gurion in a special statement to the Knesset, *inter alia*, declared:

Jewish Jerusalem is an organic and inseparable part of the State of Israel, just as it is an integral part of Jewish history and belief. Jerusalem is the heart of the State of Israel... We cannot conceive that the United Nations will try to tear Jerusalem from Israel or impair the sovereignty of Israel in its Eternal Capital... Had we not been able to withstand the aggressors who rebelled against the U.N., Jewish Jerusalem would have been wiped off the face of the earth, the Jewish population would have been eradicated, and the State of Israel would not have arisen. Thus we are no longer morally bound by the U.N. resolution of November 29, since the U.N. was unable to implement it. In our opinion, the decision of 29 November regarding Jerusalem is null and void.¹²

At the end of the debate, the Speaker of the Knesset stated that “the entire Knesset is united in a declaration that Jerusalem is an inseparable part of the State of Israel, and no foreign rule may be imposed on it in any way.”¹³ In response to another resolution of the UN General Assembly on December 9, 1949, regarding the internationalization of Jerusalem [No. 303 (iv)], a debate was held in the Knesset on December 13, 1949, on “the transfer of the Knesset and the Government to Jerusalem.” In this debate, the Prime Minister declared that “*for the State of Israel there has and always will be one capital only – Jerusalem the Eternal. Thus it was 3,000 years ago – and thus it will be, we believe, until the end of time.*”¹⁴ At the end of the discussion,

the Knesset decided to move its seat from its temporary residence in Tel Aviv to Jerusalem,¹⁵ and as of December 26, 1949, it has only convened there.

On January 23, 1950, the Knesset issued a declaration stating that *“with the establishment of the State of Israel, Jerusalem has returned to be its capital.”*¹⁶

As an expression of the importance of Jerusalem as the capital of Israel, a series of Basic Laws established that the seat of government, the Knesset, the President, the Supreme Court, and the Israel Bar Association would be located in Jerusalem.¹⁷

Section 2: The status of west Jerusalem in the eyes of the United Nations, the world, and international law

There are four main opinions regarding the status of west Jerusalem in terms of international law.¹⁸ According to the first opinion, held by many Israeli and foreign jurists,¹⁹ following the conclusion of the British Mandate in Palestine, a vacuum in sovereignty was created in the area, including Jerusalem – which could only be filled through a legal process. The war waged by the Arabs of Holy Land and the Arab countries against the Jewish state with the aim of thwarting the UN Partition Plan constituted a flagrant violation of the Partition Plan and the rules of international law prohibiting the use of force (Article 2(4) of the UN Charter).

Nonetheless, the UN Charter recognizes two exceptions to the prohibition on the use of force: the use of force under certain circumstances, in accordance with a Security Council resolution (Article 106 of the Charter), and the use of force to realize the natural right to self-defense (Article 51 of the Charter). Therefore, seizure of western Jerusalem constituted the justified exercise by the State of Israel of its natural right to self-defense, and duly filled the vacuum in west Jerusalem with Israeli sovereignty.²⁰

According to the second view, sovereignty over Jerusalem is pending, and it has yet to be determined who is sovereign in the western part of the

city. This issue will be determined within the framework of the permanent settlement between Israel and the Arab states.²¹

According to the third view, the Palestinian people have been the legitimate sovereign in west Jerusalem since the period of the British Mandate.²²

According to the fourth view, the status of Jerusalem is as determined by the United Nations Partition Resolution (November 29, 1947), i.e., a "*corpus separatum*" under international rule, to be administered by the United Nations.²³

Israel, like Jordan, was accepted as a member of the United Nations without committing itself to complying with the UN resolution on the internationalization of Jerusalem.²⁴ However, to this day, the United Nations has not recognized even west Jerusalem as the capital of Israel, even though it has long abandoned the plan for the internationalization of the city.²⁵

At present, the entire world, apart from Russia, the United States, and the Czech Republic (details in Chapter 3 below) continue to refuse to officially recognize west Jerusalem as the capital of Israel. Even those countries that have diplomatic relations with Israel only recognize Israeli rule in west Jerusalem on a de facto basis. In practical terms, this position was expressed in the diplomatic boycott imposed in the distant past on west Jerusalem, situating the diplomatic missions of all the countries possessing diplomatic relations with Israel, including the United States, outside Jerusalem, usually in Tel Aviv. (However, the seat of the diplomatic missions of Bolivia and Paraguay are located in Mevasseret Zion near Jerusalem). New ambassadors of these countries were instructed to refrain from submitting their credentials to the President of the State of Israel in Jerusalem, as is customary. Foreign consuls stationed in the city refused to receive an *exequatur* from the Israeli Foreign Ministry in Jerusalem to carry out their duties in the city, as is customary. Other measures included the avoidance of contact with government officials in Jerusalem, refusal to sign international agreements in Jerusalem, absence from official ceremonies in Jerusalem, and more.

Over the years, the diplomatic boycott of Israel weakened, and the number of diplomatic missions based in west Jerusalem reached 18 out of the 38 foreign diplomatic missions in Israel in November 1975. According to international practice, diplomatic missions are usually located in the capital of the host country.²⁶ Thus, it was possible to infer from the location of certain diplomatic missions in Jerusalem that the countries establishing these missions recognized west Jerusalem as the capital of Israel. Nonetheless, all these missions left Jerusalem in 1980, following the enactment of Basic Law: Jerusalem, Capital of Israel, 5740-1980, and after the passage of UN Security Council Resolution 478 in August 1980 (see below).

With time, the diplomatic boycott imposed on west Jerusalem weakened even further and ultimately was abolished. For many years, the leaders and ministers of most countries that maintain diplomatic relations with Israel have been making official visits to west Jerusalem and have met with the President, Prime Minister, and government ministers in Jerusalem. Their ambassadors submit their credentials to the President of Israel at the President's Residence in Jerusalem and their consuls receive their *exequators* from the Foreign Ministry in Jerusalem. Various international agreements are signed in west Jerusalem.²⁷ All these developments can be seen as signs of "semi-official" or *de facto*²⁸ recognition of west Jerusalem as the capital of Israel. No claim has been made to apply the laws of occupation to this part of the city, as is customary in relation to occupied territory, and particularly the Regulations concerning the Laws and Customs of War on Land (annexed to the Fourth Hague Convention) of 1907, and the Fourth Geneva Convention of 1949 relative to the Protection of Civilian Persons in Time of War.²⁹

In view of all this, and particularly in light of the Palestinians' demand that the capital of a future Palestinian state be established exclusively in east Jerusalem, there is no justification, politically and legally, for almost the entire world, apart from Russia, the United States, and the Czech Republic, not to recognize western Jerusalem as the capital of Israel, particularly prior to 1967, before the dispute over the unification of the city and the legality of Israel's rule in east Jerusalem erupted.

Chapter Three: The Legal Status of East Jerusalem

Section 1: Israel's gaining control of east Jerusalem and Israeli legislation to protect the unification of the city

On June 5, 1967, the Six-Day War broke out. Early that morning, Israel tried to persuade Jordan not to intervene in the war. At first, it conveyed a message to Jordan via General Odd Bull, head of the UN observers in Jerusalem, and through the U.S. embassy in Amman, Jordan, assuring Jordan that Israel would not attack unless first attacked by Jordan. King Hussein, who believed Egypt's false reports of the Egyptian army's victories in battles with Israel, rejected Israel's promises and that very morning announced on the radio to his people that war had commenced. Immediately afterward, at about 11:30 am, the Jordanians opened fire with light arms, mortars, and cannon along the entire municipal border of Jerusalem. Jordanian tanks were moved into the West Bank and the hills overlooking Jerusalem, despite assurances given to the Americans by the Jordanians that the American-made armor would not cross the Jordan River. A tank battle took place in Jerusalem on the Tel el-Ful hilltop where King Hussein had begun to build a palace.

During the first day, about 20 residents of Jerusalem were killed by Jordanian fire, and many buildings were damaged, including the Knesset building and several Christian sites: the Dormition Abbey, the Church of St. Peter in Gallicantu, and the Franciscan Monastery on Mount Zion. In response, the IDF returned fire, paralyzing most of the sources of fire. At

approximately 1:00 pm, the Jordanians captured Armon Hanatziv and the surrounding area. However, within 40 minutes, an armored unit of the Israel Defense Forces (IDF) captured the High Commissioner's palace and its surroundings from the Jordanians.



Sign: Danger! Enemy territory ahead. Do not cross!

On June 7, 1967 (28 Iyar, 5727), IDF forces broke into the Old City and took control of it, completing the process of Israel gaining possession of Jordanian Jerusalem. At the end of June 1967, Israel applied its law, jurisdiction, and administration to east Jerusalem and unified the two parts of the city.³⁰ On June 27, 1967, the Knesset passed the Law and Administration Ordinance (Amendment No. 11) Law, 5727-1967,³¹ which amended the Ordinance by inserting Section 11B, which states: "*The law, jurisdiction, and administration of the state shall extend to any area of Eretz Yisrael designated by the government by order.*" By virtue of this section, on June 28,

1967, the government issued the Law and Administration Order (No. 1), 5727-1967,³² which declared that the territory of Eretz Yisrael as described in the schedule to the Order, is *“territory in which the law, jurisdiction, and administration of the State apply.”* The territory described in this schedule includes the Old City and the eastern and northern neighborhoods of the city, from Atarot in the north to Gilo, near Rachel’s Tomb in the south, and in the east – to the eastern slopes of Mount Scopus.³³

On June 27, 1967, the Knesset passed another law – the Municipalities Ordinance (Amendment No. 6) Law, 5727-1967.³⁴ This law empowered the Minister of the Interior to enlarge the jurisdiction of a particular municipality, in respect of which an order was issued pursuant to the amendment of the Law and Administration Ordinance. Accordingly, by virtue of this law, on June 28, 1967, the Minister of the Interior ordered the expansion of the municipal boundaries of the Jerusalem municipality in accordance with the boundaries set out in the above Law and Administration Order.³⁵

Thus, the municipal area of Jerusalem was extended to the east, north, south, and northwest, and enlarged from 38,100 dunams (prior to unification) to 108,500 dunams. In this way, Jerusalem became the largest city in Israel in terms of area.³⁶ The areas added to Jerusalem were: Jordanian Jerusalem (6,000 dunams) and areas taken from 28 villages in Judea and Samaria (64,500 dunams), within the municipal areas of Bethlehem, Bet-Jala, El Bira, and more. The entire area added to Jerusalem, as described here, has since been called “east Jerusalem.” The added areas were intended to enable the expansion of Jerusalem and the construction of new (Jewish) neighborhoods in the east in order to prevent any attempt to re-divide the city. Unusually, no map whatsoever was appended to the laws and order, and the boundaries of the extended area were described only by imaginary lines between points of reference; moreover, neither the laws nor the order mentioned the name “Jerusalem.”³⁷

The then-foreign minister, Abba Eban, tried to convince the UN Secretary-General, in a letter sent to him on July 10, 1967,³⁸ that no annexation had taken place but that these were merely “administrative measures” designed to benefit all the residents of the city and ensure freedom of worship and

freedom of access to the holy places. However, the United Nations was not convinced, and the General Assembly and Security Council reiterated that the measures taken by Israel to unify Jerusalem were illegal and called on Israel to rescind them.³⁹ UN Secretary-General U Thant sent the Swiss diplomat E. Thalmann, as his personal representative in Jerusalem, to examine how the city was being unified in practice. Thalmann visited Jerusalem in August 1967 and met, among others, with the prime minister, the foreign minister, and Muslim and Christian clerics. A report published by the UN Secretary-General,⁴⁰ based on Thalmann's reports, stated that the Israeli authorities had made it clear *"beyond any doubt, that Israel was taking every step to place under its sovereignty those parts of the city which were not controlled by Israel before June 1967... The Israeli authorities stated unequivocally that the process of integration was irrevocable and not subject to negotiation."*⁴¹

On January 25, 1999, the Knesset passed the Law and Administration (Revocation of Application of the Law, Jurisdiction, and Administration) Law, 5759-1999.⁴² According to Section 2 of this law:

A government decision, whereby the law, jurisdiction, and administration no longer apply to territory, requires the approval of the Knesset, which shall be given by a majority of its members.

According to Section 3:

A government decision approved by the Knesset, as provided in Section 2, also requires approval in a referendum, to be passed by a majority of the valid votes of the participants in the referendum.

In other words, it will not be possible to relinquish territories to which Israeli law applies, such as east Jerusalem, unless a government's decision on this matter is approved by a majority of votes, both in the Knesset and in a referendum. However, since this law provides that the section relating to the referendum will apply only when a Basic Law is adopted regulating the referendum in question, and such legislation has not yet been passed, the possibility of holding a referendum remains one on paper only, until the required law is enacted.

In order to enable the practical regulation of a referendum, as required to relinquish Israeli sovereignty in any part of its territory, on March 12, 2014, the Knesset adopted Basic Law: Referendum, 5774 – 2014.⁴³ The law applies to the entire territory of the State of Israel within the boundaries of the “Green Line” (the territory of the State of Israel according to the demarcation lines as set out in the Armistice Agreements with its Arab neighbors signed in 1949 following the War of Independence), as well as east Jerusalem and the Golan Heights.

The main section of this law is Section 1, which provides that should the government decide to sign an agreement that includes a renunciation of its sovereignty over a certain area of the territory of the State of Israel, then the agreement requires the approval of an absolute majority of Knesset members and additional approval in a referendum. According to the law, there is no need to hold a referendum to approve such a renunciation, if the concession agreement has been approved by a majority of 80 members of the Knesset. Section 5 of this law prohibits the amendment of the law save by “*a Basic Law adopted by a majority of the Knesset members.*” This provision, therefore, rectified the lack of entrenchment of Section 1 of Basic Law: Jerusalem, Capital of Israel, which provides that “*Jerusalem, complete and united, is the capital of Israel.*”

On July 30, 1980, at the initiative of MK Geula Cohen, Israel demonstrated its determination to defend the status of unified Jerusalem as the capital of Israel, by adopting Basic Law: Jerusalem, Capital of Israel, 5740-1980,⁴⁴ which declares that “*Jerusalem, complete and united*” is the capital of Israel.⁴⁵

The right-wing parties in Israel considered this measure insufficient, and at the initiative of MK Yehoshua Matza (Likud) and other Knesset members, for the first time expressly entrenched Israel’s sovereignty over Jerusalem and its municipal territory, including the entire area (64,500 dunams) added to it at the end of June 1967, in primary and Basic legislation. They did so on December 7, 2000, by amending Basic Law: Jerusalem, Capital of Israel, 5740-1980,⁴⁶ through the addition of three sections. The first, Section 5, enshrines in the Basic Law the extension of the municipal area of Jerusalem and the application of Israeli laws to the area added to Jerusalem at the end of June 1967.⁴⁷ This section states as follows:

The jurisdiction of Jerusalem includes, as pertaining to this Basic Law, among other things, all of the area that is described in the appendix of the proclamation expanding the borders of municipal Jerusalem beginning 20 Sivan, 5727 (June 28, 1967), as was given according to the Municipalities Ordinance.⁴⁸

The second section added, Section 6, is intended to prohibit in a Basic Law the transfer of any powers in Jerusalem to a foreign body, and states as follows:

No authority that is stipulated in the law of the State of Israel or of the Jerusalem municipality may be transferred either permanently, or for an allotted period of time, to a foreign body, whether political, governmental, or any other similar type of foreign body.

Ostensibly, this provision could be seen to contradict Israel's commitment to Jordan in Article 9.2 of the peace treaty of October 26, 1994,⁴⁹ to give *"high priority to the historic Jordanian role"* in the Muslim holy sites in Jerusalem, in negotiations on a final status agreement in Jerusalem. However, a close examination of this section shows that there is no contradiction: Israel did not undertake to give Jordan any authority even in the Muslim holy sites in Jerusalem, but only *"When negotiations on the permanent status will take place, Israel will give high priority to the Jordanian historic role in these shrines"* (see pages 45–47 below). With all this, it is an open secret that in reality, and particularly since the peace treaty with Jordan, Jordan is afforded special status on the Temple Mount, and the government of Israel seeks to coordinate all its activities at the site with Jordan. Pursuant to this, a number of decisions by the Israeli government regarding this holy site (holy to Judaism, Christianity, and Islam) have been coordinated with Jordan, such as the ban on Jewish and Arab ministers and MKs entering the Temple Mount, imposed by Prime Minister Netanyahu in October 2015.⁵⁰

The third section that was added, Section 7, states that the two sections mentioned above should not be modified *"except by a Basic Law passed by a majority of members of the Knesset."* It is interesting to note that the original Basic Law: Jerusalem, Capital of Israel, did not contain entrenching provisions of any kind. In light of this, an entrenchment provision

was established in the new Section 7, as described above. However, it is puzzling that the Knesset enacted an entrenching provision only in respect of Sections 5-6 of the law, and did not see fit to entrench the rest of the original provisions, especially Section 1 of the law, which states that *“Jerusalem, complete and united, is the capital of Israel.”*

On January 2, 2018, the Knesset reinforced the entrenching provision in Section 7 above by increasing the majority required for amending Sections 5 and 6 of the Law to a special majority of 80 MKs.⁵¹ Likewise, Section 7 itself was entrenched: Whereas under the previous language an ordinary proportionate majority of MKs was sufficient (i.e. a majority of those present at the vote), Section 7 of the Law was amended so that any further amendment now requires a majority of 61 Knesset members, that is, a special and absolute majority. However, the consequence of this is that now it is possible to change the statutory requirement for a majority of 80 MKs, as a condition for relinquishing part of Jerusalem, even by a majority of only 61 MKs.

Section 2: International rejection of the unification of Jerusalem

The unification of Jerusalem, in general, and the legality of Israeli rule in east Jerusalem, in particular, have not been recognized by any country in the world. The United Nations, the European Community, and the Egyptian parliament adopted resolutions rejecting the status of united Jerusalem as the capital of Israel.⁵²

Basic Law: Jerusalem, Capital of Israel, was also harshly criticized by the major UN institutions: On August 20, 1980, the Security Council adopted Resolution 478 almost unanimously – only the United States abstained – condemned the enactment of the law, determined that the law contravened international law and posed a serious obstacle to achieving peace, and stated that it was invalid and void.⁵³ East Jerusalem was defined in the resolution as “occupied territory,” to which the Fourth Geneva Convention of August 1949 relative to the protection of civilians during wartime applied. In this resolution, the Security Council called on all countries

with diplomatic embassies in Jerusalem to remove them. The 18 countries, which held such embassies, accepted the decision and moved them out of the city. Following diplomatic pressure on Costa Rica, the latter returned its embassy to Jerusalem in 1982. In 1984, the embassy of El Salvador was also returned to Jerusalem. However, in the summer of 2008, following the Second Lebanon War and in order to improve their relations with the Arab countries, these two countries again withdrew their embassies from Jerusalem. Jerusalem thus became the only capital in the world without a single embassy.

On January 15, 1981, the UN General Assembly also adopted a resolution rejecting the declaration of complete Jerusalem as the capital of Israel and declaring Basic Law: Jerusalem, void.⁵⁴ Since then, on an annual basis, the Assembly has condemned Israel for the measures it has taken to change the status, character, cultural, historical, and religious heritage of Jerusalem, and in particular the Basic Law of Jerusalem and the declaration contained therein, regarding the status of complete Jerusalem as the capital of Israel, and has determined that they are null and void.⁵⁵

The International Court of Justice (ICJ), which is the principal UN judicial institution, issued an advisory opinion to the United Nations General Assembly in 2004,⁵⁶ in which it adopted the UN Security Council resolutions to the effect that east Jerusalem is not under Israeli sovereignty, but rather is “occupied territory” just like the rest of the West Bank (Judea and Samaria) and the Gaza Strip.⁵⁷

Noteworthy in this context is the recent Resolution No. 2334, adopted by the UN Security Council on December 23, 2016. This resolution “excels” in its harsh condemnation of Israel’s “settlement” policy in the territories occupied by Israel in 1967 (the “Six-Day War”) in the West Bank and east Jerusalem, and terms all these areas (including east Jerusalem) “occupied Palestinian territory.” In the resolution, the Security Council condemns “all measures aimed at altering the demographic composition, character, and status of the Palestinian Territory occupied since 1967, including east Jerusalem ...” and states that “the settlements established in these territories have no legal validity” and that they constitute a flagrant violation under international

law and a major obstacle to achieving a lasting peace based on the two-state solution. (Article 1)

The Council also “*underlines that it will not recognize any changes to the 4 June 1967 lines, including in Jerusalem, other than those agreed by the parties through negotiations.*” (Article 3 of the resolution) It should be noted that this article appeared here, for the first time, and was not included in previous UN resolutions. In other words, this was the first time that the United Nations had decided that the political future of the territories taken by Israel in June 1967, and the borders of Israel, would be determined solely by negotiation between the parties, the precise identities of which – apart from Israel – were not specified. The resolution was adopted by virtue of Chapter VI of the UN Charter and consequently was not obligatory and did not include the imposition of sanctions on Israel for its violation. The resolution was adopted by a majority of 14 of the 15 Council members and aroused great anger in Israel, since for the first time in many years the United States (under President Obama) had failed to veto such a resolution but merely abstained from voting, thereby enabling the resolution to pass.

Moreover, as a result of U.S. recognition of Jerusalem as the capital of Israel set out in President Trump’s declaration of December 6, 2017, Egypt submitted a draft resolution to the UN Security Council whereby the Security Council:

Stressing that Jerusalem is an issue to be resolved through negotiations, *expressing* deep regret at recent decisions concerning the status of Jerusalem, affirms that any decisions and actions which purport to have altered the character, status, or demographic composition of the Holy City of Jerusalem have no legal effect, are null and void ... and in this regard, calls upon all States to refrain from the establishment of diplomatic missions in the Holy City of Jerusalem....⁵⁸

Even though the name of the United States and its recognition of Jerusalem as the capital of Israel were not mentioned in the draft resolution, it was clear to all that the purpose of the resolution was to express the Security Council’s opposition to the U.S. recognition of Jerusalem as the capital of Israel. Fourteen of the 15 members of the Security Council voted in favor

of the Egyptian draft resolution. However, the resolution was vetoed by the United States.⁵⁹

The Palestinians and their supporters did not give up, and Turkey and Yemen rushed to submit an identical resolution to the UN General Assembly, in which no state has a right of veto. The debate on this resolution was held at the UN General Assembly on December 22, 2017. This time, the resolution was adopted by a large majority: Of the 193 UN member states, 128 voted in favor of the resolution; 9 states opposed (Israel, the United States, Guatemala, Honduras, Togo, and four Pacific island states: the Marshall Islands, Micronesia, Nauru, and Palau) and 35 states abstained.⁶⁰

In consequence of these resolutions, today too, though Israel maintains diplomatic relations with 159 countries (out of some 200 recognized countries), none (apart from Russia, the United States, and the Czech Republic) currently officially recognize Jerusalem as the capital of Israel, none maintain an embassy in Jerusalem, and they are represented by 88 embassies, all of which are located outside of Jerusalem.

There are 13 consulates operating in Israel on behalf of 11 countries: four are located outside Jerusalem (the Russian consulate in Haifa, the French consulate in Tel Aviv, the French consulate in Haifa, and the Egyptian consulate in Eilat), and nine consulates are located in Jerusalem (United States, Italy, Belgium, Great Britain, Greece, Spain, France, Sweden, and Turkey).⁶¹

It should be noted that France maintains three separate consulates in Israel: one in Haifa (37 HaGefen Street), one in Tel Aviv (1 Ben Yehuda Street), and one in west Jerusalem (5 Emile Botha St., near the King David Hotel). The French consulate in Jerusalem operates a Consular Affairs Department and Political Affairs Department.⁶²

The United States maintains a consulate on 18 Agron Street in west Jerusalem. Until about two years ago, the U.S. consulate operated a consular services branch on the Nablus route in east Jerusalem. However,

two years ago, the United States transferred its consular branch from east Jerusalem to 14 David Flusser Street in west Jerusalem. In addition, Spain also maintains a consulate in east Jerusalem (32 Machal St. in Sheikh Jarrah). Until two years ago, the Spanish consulate also operated a branch for consular services at 53 Ramban Street in west Jerusalem. However, two years ago, this branch was closed for renovations, which have yet to be completed.⁶³

The Vatican maintains an embassy in Israel, located at 1 Netiv Hamazalot Street in Jaffa-Tel Aviv. The Vatican has no consulate in Jerusalem. However, in east Jerusalem (on the A-Tur road leading to the Mount of Olives), one may find the seat of the Pope's Apostolic Delegation; this is the title of the representative of the Pope in countries that do not have official diplomatic relations with the Vatican. The Pope's Apostolic representation in Jerusalem was established on February 11, 1948, by Pope Pius XII, and was responsible for Catholic activities in Israel, Jordan, and Cyprus. Notwithstanding that diplomatic relations between Israel and the Vatican were established on December 30, 1993, and despite the opening of the Vatican's embassy in Jaffa, as mentioned, the Apostolic Delegation continues to live and work in Jerusalem and the occupied territories in the religious sphere only, by virtue of his status as papal emissary to the local Catholic Church. Accordingly, although the Apostolic delegate should not have diplomatic status in view of his purely religious functions, he does enjoy such status in Israel, as a gesture of respect by Israel towards the Pope, as is customary in international diplomatic practice.⁶⁴

All the foreign consulates operated in Jerusalem before the unification of the city in June 1967, and some were even active in the city during the Ottoman period. Since June 1967, Israel has not permitted any state to open a new consulate in Jerusalem, but only an embassy, in view of its desire to encourage recognition of Jerusalem as the capital of Israel and pursuant to the international diplomatic practice of embassies being located in the capital of the host country.

None of the foreign consulates in Jerusalem have submitted an official request (*exequatur*) to the Israeli Foreign Ministry to recognize them as consulates in view of their desire to refrain from performing an act (i.e.,

submitting an application to the Foreign Ministry) that would imply recognition by their countries of Jerusalem as capital of the State of Israel – contrary to their stated policy. Nevertheless, as the foreign consulates in Jerusalem are representatives of friendly countries with which Israel maintains diplomatic relations, Israel recognizes them *de facto* and grants them consular status and documentation under the Vienna Convention on Consular Relations, 1963.⁶⁵

Israel signed the Convention, although it has not ratified it, in light of its refusal to officially recognize the foreign consulates located in Jerusalem that decline to submit an official request to the Israeli Foreign Ministry to recognize them as consulates (*exequatur*). Nevertheless, as explained, Israel recognizes them *de facto*, and deals with them in accordance with the provisions of the Convention in view of the fact that the Convention reflects customary international law, which, according to the case law, constitutes an integral part of Israeli law in so far as it does not explicitly contradict the law of the State of Israel.⁶⁶

In principle, a consulate (as distinct from a diplomatic mission) deals solely with non-political matters. Article 5 of the Vienna Convention defines thirteen functions of a consulate, the key elements of which are:

- (a) “protecting in the receiving state the interests of the sending state and of its nationals, both individuals and bodies corporate, within the limits permitted by international law;”
- (b) “furthering the development of commercial, economic, cultural, and scientific relations between the sending state and the receiving state and otherwise promoting friendly relations between them in accordance with the provisions of the present Convention;”
- (c) issuing passports, visas, and travel documents to nationals of the sending state;
- (d) providing notarial services, verifying birth certificates, marriage certificates, death certificates, etc.

- (e) representing or ensuring the representation of the nationals of the sending state in legal proceedings in this receiving state, particularly in cases of detention and arrest.
- (f) assisting the citizens of the sending state, including the crew of vessels and aircraft registered in the sending state, in cases of distress and emergency.

The foreign consulates in Jerusalem serve the residents of Jerusalem (Jews and Arabs alike), the territories, and Gaza in all the above matters.

By virtue of their status, each consulate enjoys immunity in respect of its premises, while the consul and consular officials enjoy functional immunity (immunity confined to actions performed in the course of their consular duties as opposed to the full immunity enjoyed by diplomatic representatives), freedom of movement in Israel and the territories, diplomatic documentation, exemptions from income tax, customs and social security payments, as well as from VAT returns up to a certain amount.⁶⁷

In all political matters, Israel maintains contact only with the embassies of the countries maintaining diplomatic relations with it.

In contrast, in early June 2014, Australian Foreign Minister Alexander Downer declared in the Australian Parliament that the Australian government does not view east Jerusalem as “occupied territory.”⁶⁸

Moreover, on April 6, 2017, the Russian Foreign Ministry issued an official, historic, and surprising statement whereby Russia recognized west Jerusalem as the capital of the State of Israel and east Jerusalem as the capital of the future Palestinian state. The statement read as follows:

We reaffirm our commitment to the UN-approved principles for a Palestinian-Israeli settlement, *which include the status of east Jerusalem as the capital of the future Palestinian state*. At the same time, we must state that in this context *we view west Jerusalem as the capital of Israel ...* The concrete parameters of a solution for the entire range of issues regarding the status

of Palestinian territories, including Jerusalem, should be coordinated at the direct talks between the parties involved. Using its opportunities as a permanent member of the UN Security Council, a co-sponsor of the peace process, and an active member of the Middle East Quartet of international intermediaries, Russia will continue to provide assistance to the achievement of Israeli-Palestinian agreements. We will focus on ensuring free access to Jerusalem's holy places for all believers. (The emphasis is mine. S.B.)⁶⁹

For some reason, this surprising historic declaration received no significant attention from any country, including Israel; it failed to provoke any controversy or demonstrations and was not discussed at the United Nations, despite being of no less importance than the United States' recognition of Jerusalem as the capital of Israel on December 6, 2017 (see further Section 3 below), and perhaps even exceeding it.

As noted, on December 6, 2017, the United States recognized Jerusalem as the capital of Israel (see Section 3 below). It is reasonable to assume that in light of the position of the United States as a superpower and as the leader of the free world, other countries will follow suit and also recognize Jerusalem (or at least the western part of it) as the capital of Israel. Indeed, immediately after President Trump's statement, Czech President Milos Zeman declared that his country supported President Trump's declaration that the United States recognized Jerusalem as the capital of Israel and announced that *"he is considering transferring our embassy to Jerusalem, and that every country has the right to decide what its capital is."*⁷⁰ Nonetheless, the Czech Foreign Ministry hastened to make it clear that the Czech Republic recognized only west Jerusalem as the capital of Israel.⁷¹

On December 25, 2017, Guatemalan President Jimmy Morales also announced his decision to restore⁷² his country's embassy to Jerusalem and ordered his country's foreign ministry to prepare for this without setting a specific date for the transfer of the embassy.⁷³ Although the President of Guatemala did not declare his country's recognition of Jerusalem as the capital of Israel, such recognition is implicit in his decision, since according to accepted diplomatic practice, a foreign embassy is usually located in the capital of the host country.

Section 3: The U.S. position on the legality of the unification of Jerusalem and the status of east Jerusalem⁷⁴

During the UN General Assembly meeting held on July 14, 1967, the United States announced, through Arthur Goldberg, its ambassador to the United Nations, that it condemned the unification of Jerusalem, did not recognize it, and that the final status of the city would have to be determined by negotiations between the parties within the framework of a comprehensive solution to the Arab-Israeli conflict. In July 1969, in a speech at the Security Council, C. Yost, the U.S. ambassador to the United Nations, even called east Jerusalem “occupied territory” – like the rest of the territories occupied by Israel in the Six-Day War and reiterated that its political status would be determined solely by agreement between the parties concerned.⁷⁵

Subsequently, President Carter attached a letter to the Camp David Agreement (between Israel and Egypt dated September 17, 1978) stating that the U.S. position on Jerusalem remained as stated by its ambassadors to the UN.⁷⁶

Notwithstanding all this, ostensibly until today, only the United States has enacted legislation recognizing Jerusalem as the capital of Israel – doing so within the framework of the Jerusalem Embassy Act of 1995, which was passed by the U.S. Congress on October 24, 1995, and came into effect on November 8, 1995.⁷⁷ Section 3 of this Act states:

- A. Jerusalem should remain an undivided city in which the rights of every ethnic and religious group are protected;
- B. Jerusalem should be recognized as the capital of the State of Israel; and
- C. The United States Embassy in Israel should be established in Jerusalem no later than May 31, 1999.

It appears from the language of this section (the cumulative effect of the first two subsections) that the United States officially recognized unified Jerusalem as the capital of Israel. And indeed, the preamble to the resolution adopted by the two houses of the U.S. Congress on the occasion

of the 30th anniversary of the unification of Jerusalem stated that United States' policy is that *"Jerusalem should remain the undivided capital of Israel."*⁷⁸ According to the above-mentioned section, the U.S. embassy, located in Tel Aviv, was supposed to move to Jerusalem by May 1999.

The U.S. administration, headed by President Bill Clinton, was vehemently opposed to this legislation. However, the Act was passed with such a large majority (about 90 percent in both Houses of Congress), that it was apparent to the President of the United States that the exercise of his constitutional right to veto it would not prevent its enactment into law by the American Congress in a revote, as required following a presidential veto.⁷⁹ Accordingly, the President did not impose a veto on the Act, and it entered into force. The Act states that the U.S. State Department will be subject to severe financial sanctions in the form of significant cuts in its budget each year until 1999 (at which time half of its budget for the purchase and maintenance of buildings abroad would be frozen) if it failed to meet its obligations pursuant to the law to transfer the U.S. Embassy in Jerusalem by the aforementioned date.

However, under Section 7 of the Act, the President of the United States was granted the authority to postpone the transfer of the embassy to Jerusalem as of October 1, 1998, and to do so every six months, provided that he reported to the Congress that such deferral was necessary *"to protect the national security interests of the United States"* and specifying his reasons for this decision. Indeed, in a statement issued by the White House immediately after the adoption of the law in the U.S. Congress, President Clinton announced that he intended to use the authority granted by the law to postpone the transfer of the embassy to Jerusalem, even though his attitude to Israel and his position on Jerusalem had not changed. The President reiterated his position that building the U.S. embassy in Jerusalem, at that time, would cause serious damage to the peace process.⁸⁰ Since then, all U.S. presidents have repeatedly used this authority, every six months, to defer the transfer of the U.S. Embassy to Jerusalem. Likewise, on June 1, 2017, the current president, Donald Trump, signed an order deferring the transfer of the U.S. embassy to Jerusalem for six months, in complete contradiction to one of the main promises in his campaign for the U.S. presidency.

Moreover, representatives of the United States, like the representatives of other countries, continue to consistently avoid holding any official meetings in government offices or other Israeli institutions in east Jerusalem or visit east Jerusalem when accompanied by Israeli officials. This policy is inconsistent with the enactment of the “Jerusalem Embassy Act,” according to which the U.S. Congress declared (a declaration unprecedented in any other country) the United States’ recognition of Jerusalem as the undivided capital of Israel.

However, the legal significance of this declaration, as a valid expression of U.S. recognition of Israeli sovereignty in unified Jerusalem, is highly questionable. Respected U.S. jurists believe that the U.S. president (and not Congress) has sole authority under the U.S. Constitution to recognize states, including their capital cities. Accordingly, it is argued that Congress is also not authorized to order the transfer of the U.S. Embassy from Tel Aviv to Jerusalem since the location of the embassy implies recognition of Jerusalem as the capital of Israel, a power exclusively vested in the president.⁸¹ In my opinion, too, this law does not constitute U.S. recognition of Israel’s sovereignty in east Jerusalem or in an undivided Jerusalem as the capital of Israel. It merely declares the desired policy of the United States on this subject, as explicitly noted in the title of Section 3 of the Act: “Statement of the Policy of the United States.”

This is also clearly expressed in the language of the section itself, in the future tense in which it is phrased, and in the description of the desired situation, in contrast to the mere recognition of the present situation: *“Jerusalem should remain a united city ... and it should be recognized as the capital of the State of Israel.”* In other words, the law determines only the desired policy in this regard in the opinion of Congress and does not in itself constitute recognition of a unified Jerusalem as the capital of Israel.

In spite of the official policy of the United States not to recognize Israel’s sovereignty in east Jerusalem, it did recognize that east Jerusalem was an integral part of Jerusalem and under Israeli sovereignty for the purpose of the extradition of an American citizen, Joel Davis, who had been convicted in the United States of committing serious criminal offenses and fled to Israel.

In an extradition hearing in the Jerusalem District Court, counsel for Joel Davis argued that since the extradition treaty between Israel and the United States applied only to the territory of the State of Israel, and the defendant had been arrested in east Jerusalem, which was outside the territory of the State of Israel, at least according to the aforementioned position of the United States, the extradition treaty did not apply to him.

The court rejected this claim and ruled that the United States' insistence on the extradition request, even though it had learned that Joel Davis had been arrested in east Jerusalem, was "*an explicit statement that the extradition treaty applies to a wanted person in east Jerusalem.*"⁸²

In other words, in this case, the United States recognized east Jerusalem as part of the territory of the State of Israel.

A decisive legal expression of the United States' failure to recognize Israeli sovereignty in east Jerusalem was recently given in the U.S. Supreme Court's ruling of June 8, 2015, in the Menachem Zivotofsky case,⁸³ which occupied the U.S. courts at all levels for about 13 years.

This case concerned a Jewish child born in 2002 in Jerusalem, to a Jewish couple with American citizenship who lived in Jerusalem. Based on the Foreign Relations Authorization Act of 2002 (which defined Jerusalem as the capital of Israel), the child's mother asked the U.S. embassy in Israel to register in his American passport that he was born in Israel. The embassy officials refused to do so, and Menachem Zivotofsky's parents filed a lawsuit on his behalf against the U.S. Secretary of State, John Kerry, to register in their son's passport that he had been born in Israel since Jerusalem was within the territory of the State of Israel and under its sovereignty.

After a 13-year legal campaign, the U.S. Supreme Court handed down its ruling (close to the child's bar mitzvah) dismissing the parents' petition. According to this ruling, the 2002 Act was invalid as the President of the United States had exclusive authority to recognize foreign countries, including the territory over which they were sovereign. Therefore, in view of the position of U.S. presidents who refused to recognize Israeli

sovereignty in Jerusalem until this matter was settled in peace negotiations, the American administration would not be required to register in an American passport that Jerusalem was within the borders of the State of Israel – contrary to the consistent position of U.S. presidents.

However, a few hours after this writing, on December 6, 2017 there was a dramatic and historic shift in the White House’s policy regarding the status of Jerusalem: Despite the warnings of the European countries, Egypt, Saudi Arabia, and Jordan regarding the “*destruction of the political process*” and threats made by the Palestinian Authority, Hamas, and Hizbullah regarding “*the outbreak of a new intifada*,”⁸⁴ U.S. President Donald Trump announced in a special speech at the White House that the United States recognizes Jerusalem as the capital of Israel and that he had instructed the State Department to prepare for the transfer of the U.S. embassy from Tel Aviv to Jerusalem, without setting a date for this move.

The American president stated that the refusal of previous presidents to recognize Jerusalem as the capital of Israel and transfer the U.S. embassy to this city had not advanced the peace process and therefore this policy could not be continued. According to Trump, recognizing Jerusalem as the capital of Israel was in fact

...an important step in advancing the peace process and achieving a lasting agreement. Israel is a sovereign state, and like any other country, it has the right to determine its capital ... We are not taking a position on the issue of the permanent agreement, including the specific limits of Israeli sovereignty in Jerusalem ... These issues depend on the parties.⁸⁵

Yet, it should be noted that the U.S. president refrained from using the words “undivided” or “united” Jerusalem, in accordance with Israeli terminology, and did not address the Palestinians’ demand to establish their capital in east Jerusalem. Additionally, he did not address the current borders of Jerusalem and left them for negotiation between the “parties.”

In other words, this was a sophisticated formulation that referred to the positions of both sides: on the one hand, explicit recognition of Jerusalem as the capital of Israel, and on the other, refraining from using the Israeli

language of “unified Jerusalem” or determining the “specific” boundaries of the recognized capital. Put differently, the United States left the door open to negotiations between Israel and the Palestinians as to these borders, thereby displaying willingness on the part of America for the “parties” to negotiate the division of Jerusalem into two capitals, Israeli and Palestinian.

Therefore, in my view, it is strange that none of the countries that objected to the declaration in question paid attention to this statement, which is very similar to the position of the United Nations, the European Union, and the Palestinian Authority. Later in his speech, the president also called on the parties to “*maintain the status quo in the holy places in Jerusalem, including the Temple Mount, also known as the Haram al-Sharif.*” On January 21, 2018, Vice President of the United States Mike Pence carried out a three-day visit to Israel. In a speech to the Knesset on January 22, 2018, he too declared that “*Jerusalem is the capital of Israel,*” and announced that President Trump had instructed the State Department to immediately begin preparations for the transfer of the American embassy from Tel Aviv to Jerusalem and that the U.S. embassy would open its doors in Jerusalem “*before the end of next year*” (2019).⁸⁶

Indeed, the Department of State announced on February 23, 2018 that the U.S. Embassy would officially move to one of the U.S. Consulate’s buildings on May 14, 2018, commemorating Israel’s 70th anniversary.⁸⁷

It is now possible to expect that the U.S. Supreme Court will also give expression to the significant change in the position of the U.S. presidents regarding Jerusalem, and instruct the State Department to register in the American passport of a child born to American citizens in Jerusalem, that he was born in Israel, unlike the ruling in the above Menachem Zivotofsky case.

Section 4: The position of the European Union regarding the status of Jerusalem⁸⁸

Initially, the EU countries, many of which are Catholic, were influenced by the Vatican’s position on these questions:⁸⁹ In 1947-1948, they supported

the territorial internationalization of Jerusalem because – in accordance with the Vatican position – they believed it necessary to protect the Holy Places. Afterwards, they differed as to the nature of the desired internationalization: territorial (most of the states), or functional (supported by Holland and Sweden). No EU country recognized the legality of Israel's rule in west Jerusalem and Jordan's rule in east Jerusalem. In the 1970s, these countries still considered that the preferred solution was the territorial internationalization of Jerusalem, and they made this explicit in a declaration by the nine European Community member states (the former name of the EU) on November 6, 1973, when they called on Israel to end its rule in east Jerusalem. Since then, they have joined all the decisions of the UN institutions that have repeatedly condemned the occupation of east Jerusalem and the measures taken by Israel to change the legal status of east Jerusalem – and have called on Israel to withdraw from that part of the city.

On November 13, 1980, the nine EU member states published the Venice Declaration, recognizing

the special importance of the role played by the question of Jerusalem for all the parties concerned [...] they will not accept any unilateral initiative designed to change the status of Jerusalem. [...] Any agreement on the city's status should guarantee freedom of access for everyone to the holy places.

They also called on Israel to “*end the territorial occupation*” in effect since 1967. The European Council, which met in Luxembourg in early December 1980, declared that “*the Venice Declaration contains the essential elements of a comprehensive, just, and lasting settlement that the parties must achieve through negotiations.*”

The EU foreign ministers prepared a comprehensive report on the main problems of the Israeli-Arab conflict, including the Jerusalem problem, and determined that the solution lay in the application of an international regime to the eastern part of the city. In other documents prepared for the Council's political committee, it was proposed to hand over the Old City of Jerusalem to the administration of a special UN representative for a limited number of years and to replace the Israeli forces in the Old City

with international forces. This would guarantee freedom of access to the holy sites, civilian administration of the city, and deferment of the decision regarding the sovereignty of east Jerusalem.

The Old City will be of a similar status to that of the Vatican [...] The religious sites outside the Old City will be regarded as having extraterritorial status, similar to a number of churches in Rome outside the Vatican walls.

The EU Council, which met in Dublin, Ireland, in June 1990, issued a statement declaring that:

Israel's settlement policy in the occupied territories presents a growing obstacle to peace in the region [...] Jewish settlements in the territories [...] including east Jerusalem, are illegal under international law, [the Council] calls earnestly on the government of Israel not to permit settlements there.

The Council of Ministers of the European Union reiterated on October 1, 1996, that "*the European Union views east Jerusalem as subject to the principles set out in Security Council Resolution 242*" (inadmissibility of the acquisition of territory by force) and therefore that this part of the city was not subject to Israeli sovereignty; this was occupied territory, to which the Fourth Geneva Convention applied.

In March 1999, it became clear that the European Union did not even recognize Israel's sovereignty in west Jerusalem, and supported the internationalization of Jerusalem as a whole. In response to Israel's announcement in February 1999 of its opposition to meetings being held between foreign diplomatic representatives and members of the Palestinian Authority outside the territory of the Palestinian Authority, and particularly in east Jerusalem, the European Union informed the Ministry of Foreign Affairs (March 1, 1999):

We reaffirm our known position on Jerusalem's special status as a separate body (*corpus separatum*). This position is compatible with international law. Accordingly, we will continue to hold meetings in Jerusalem.⁹⁰

It should be recalled that the UN General Assembly used the term “*corpus separatum*” in the Partition Resolution of November 1947 to describe Jerusalem’s special status as an international city.

A large number of additional documents indicate that the internationalization of Jerusalem was the preferred solution of the European Union, whether in respect of the entire city or just the Old City.

Nonetheless the Union will welcome any settlement agreed to by Israel and the Palestinians, and which will guarantee the European and international interests in the city. This position was also expressed in a letter sent by the German ambassador to Israel on behalf of the Union (under the presidency of Germany) to the Israeli Foreign Ministry in March 1999, in response to an Israeli demand for European leaders to stop visiting the Orient House.⁹¹

In the years that followed, however, the European Union abandoned the solution of the internationalization of Jerusalem and adopted a new position under which Jerusalem should be the capital of the State of Israel and the State of Palestine, according to the “*vision of two states for two peoples*,” and that the final status and borders of Jerusalem should be determined only in negotiations between Israel and the Palestinians. In other words: Jerusalem should be divided into two capitals: west Jerusalem would be the capital of Israel, and east Jerusalem the capital of Palestine. The borders of both capitals would be determined in negotiations between Israel and the Palestinians.

In the annual report of the EU Consuls General in east Jerusalem and Ramallah for 2012, which was published in February 2013, the Israeli government’s policy in east Jerusalem was strongly criticized, and it was determined that the continuation of this policy might thwart the possibility that the city would serve as the capital of both states, and consequently frustrate the two-state solution.⁹² Accordingly, on December 6, 2017, the EU Foreign Minister, Federica Mogherini, announced that the European Union expressed “*serious concern*” over the intention of U.S. President Donald Trump to recognize Jerusalem as the capital of Israel and continued to adhere to its position that:

the status of Jerusalem must be determined only in negotiations between Israel and the Palestinians on the basis of the two-state principle.⁹³

In another speech by Mogherini on December 7, 2017, she expressed vehement opposition to the U.S. recognition of Jerusalem as the capital of Israel and stressed that:

The EU believes that the only realistic solution to the conflict between Israel and the Palestinians is based on two states, and Jerusalem as the capital of Israel and Palestine.⁹⁴

On December 11, 2017, Israeli Prime Minister Benjamin Netanyahu met with the foreign ministers of 24 of the 28 EU countries in Brussels, the capital of Belgium. The EU foreign minister repeated her opposition to the U.S. recognition of Jerusalem as the capital of Israel, and in response to Netanyahu's remarks to the effect that he now expected other countries in Europe to transfer their embassies to Jerusalem, Mogherini stated after the visit: *"He can keep these expectations for others, because in respect of EU countries this will not happen."*⁹⁵

In contrast, in June 2007, a conference was held in the European Parliament on the occasion of the 40th anniversary of the unification of Jerusalem, organized by the Center for Jewish Communities in Europe, attended by only about 20 out of the 785 members of the European Parliament. Most notable in this event was the statement of the Finnish representative, Hanno Takola: *"Jerusalem is united and belongs to Israel."*⁹⁶

Section 5: The Palestinian Authority's position on the status of Jerusalem

On October 6, 2002, the Palestinian Legislative Council enacted a special law for Jerusalem, namely, the Capital Law, the provisions of which are as follows:⁹⁷

- A. Jerusalem is the capital of the Palestinian state and is the main and eternal seat of the three branches of government: the legislature, the executive, and the judiciary.
- B. The Palestinian state has sovereignty over Jerusalem and its holy sites, and is responsible for protecting them and guaranteeing freedom of worship and the observance of all religious ceremonies in them.
- C. Each year a special part of the general budget will be allocated for the city of Jerusalem, projects and programs will be prepared to encourage public and private investment, and it will remain a special priority development area.
- D. Any legislation or agreement derogating from the Palestinian right in Jerusalem or which are contrary to the provisions of this Law shall be deemed null and void.
- E. This Law shall not be amended or repealed except by a two-thirds majority of the Legislative Council.
- F. All parties concerned shall do everything necessary for the implementation of this Law. This law will be valid from the date of its issue and publication in the *Official Gazette*.

The law was signed by Yasser Arafat as President of the State of Palestine, as Chairman of the PLO Executive Committee, and as Chairman of the Palestinian Authority.

There is no doubt that the very enactment of this law lacks any legal validity both under the Oslo Accords between Israel and the PLO and under Israeli law. Under the Oslo Accords, Jerusalem is within the borders of the State of Israel and outside the Palestinian self-rule area, which is confined solely to the West Bank of the Jordan River, and in any event, the Palestinian Authority has no authority to legislate laws regarding Jerusalem. The very fact that this law was enacted, and certainly its content, clearly contradicts Israel's sovereignty in Jerusalem and is incompatible with the Palestinian commitments in the Oslo Accords. Under the Accords,

the status of Jerusalem is to be determined only within the framework of future negotiations on a permanent settlement; until then Jerusalem is to remain outside the realm of Palestinian government, and the Palestinian Authority is prohibited from maintaining its institutions there.⁹⁸

Accordingly, the Implementation of the Interim Agreement on the West Bank and the Gaza Strip (Restriction of Activity) Law, 5755-1994,⁹⁹ and the Implementation of the Interim Agreement on the West Bank and the Gaza Strip (Restriction of Activity) (Amendment) Law, 5758-1997,¹⁰⁰ stated that their purpose is to *“prevent political or governmental activity in the territory of the State of Israel, without the consent of the Government of Israel, which is incompatible with respect for the sovereignty of the State of Israel by the Palestinian Authority or the PLO.”* In addition, Section 97(a) of the Penal Law, 5737-1977,¹⁰¹ states that *“if a person commits an act liable to impair the sovereignty of the state with the intention to impair that sovereignty, then he is liable to the death penalty or life imprisonment.”* It appears that in Section 4 of the “Law of the Capital,” the Palestinian legislature intended to undermine the validity of Basic Law: Jerusalem, Capital of Israel. However, it is clear that the Palestinian Authority cannot annul the law of the Israeli Knesset in respect of Jerusalem, which is located in the territory of the State of Israel, and outside the Palestinian self-rule area.

Finally, it is noteworthy that the Palestinian law is not limited to east Jerusalem, but refers to the entire city, albeit without defining its territory. Nonetheless, in many declarations issued since then, the PLO and PA leaders have made it clear that their demand to establish their capital in Jerusalem is limited to east Jerusalem alone.¹⁰²

Section 6: The dispute in international law over the legality of Israel’s rule in east Jerusalem

International law experts, as well as Israeli jurists, differ as to the legality of Israel’s measures regarding the unification of Jerusalem in the view of international law.¹⁰³ The main argument against the legality of the unification of Jerusalem is that east Jerusalem is “occupied territory,” which Israel forcibly took from Jordan in the Six-Day War in contravention of the

prohibition on the use of force “*against the territorial integrity or political independence of any state*” in Article 2 (4) of the UN Charter.¹⁰⁴ Accordingly, this prohibition is also noted in most UN resolutions as one of the main reasons for denying the legality of the application of Israel’s control over east Jerusalem.

According to the prevailing view of international law, extension of sovereignty over “occupied territory” can only be achieved when the war is over, and a peace agreement has been signed with the former sovereign state in the territory under discussion or when this state ceases to exist (*Debellatio*).¹⁰⁵ Pending such agreement, the territory continues to be governed by the law of the former sovereign state, subject to essential legislative modifications, which may be enacted by the military commander in the area in question for security reasons or for the benefit of the local population, as required by the occupation of this area, in accordance with the rules of international law, and in particular: the Hague Regulations of 1907 on the Laws and Customs of War on Land and the Fourth Geneva Convention of 1949 on the Protection of Civilians in Time of War.¹⁰⁶

In this regard, I accept the views of the well-known experts on international law: Professor E. Lauterpacht,¹⁰⁷ Professor S. Schwebel,¹⁰⁸ former President of the International Court of Justice in The Hague; Prof. Y. Blum, the former Israeli Ambassador to the United Nations;¹⁰⁹ Professor J. Stone,¹¹⁰ and M. Gruhin.¹¹¹ In their opinion, upon the end of the British Mandate in Palestine, a “sovereignty vacuum” was created in Palestine, including Jerusalem, which could only be filled with legal action. This vacuum was supposed to be filled by the agreed transformation of Jerusalem into an international city in accordance with the UN “Partition Plan” of November 29, 1947. However, the illegal aggression and forcible occupation of east Jerusalem by Jordan in 1948 nullified this decision and as such, failed to give Jordan any rights there. Evidence of this lies in the fact that, apart from Pakistan, no country, including any Arab state, formally recognized the annexation of east Jerusalem to Jordan in April 1950 and the legality of Jordan’s rule there.¹¹²

In other words: according to international law, in order for an area to be considered “occupied territory” of a previous state, the latter must

be the legal sovereign in that territory.¹¹³ Therefore, in the opinion of the above jurists, since Jordan did not have legal sovereignty in east Jerusalem, Israel's takeover of this territory in June 1967 did not transform it into "occupied territory," and the laws of occupation do not apply there.

On the other hand, Israel, unlike Jordan, took control of east Jerusalem in June 1967 as part of legal action in the exercise of its right to self-defense following Jordan's attack on (Israeli) western Jerusalem. Jordan launched these hostilities despite Israel's announcement that it had no intention of attacking Jordan and asking Jordan to refrain from attacking Israel. The right to self-defense is recognized in international law,¹¹⁴ as one of the two exceptions to the prohibition on the use of force set out in Article 51 of the



Gen. Uzi Narkiss (left), Defense Minister Moshe Dayan, and Chief of Staff Yitzhak Rabin in the Old City of Jerusalem during the Six-Day War. (*Ilan Bruner/GPO*)

Charter of the United Nations. Accordingly, Israel acquired sovereignty over east Jerusalem too in a lawful manner.¹¹⁵

According to international law, it is also possible to acquire sovereignty in an area occupied during wartime by means of a peace agreement signed between the occupying state and the state whose territory has been occupied, and indeed Jordan signed a peace agreement with Israel (on October 26, 1994) without east Jerusalem being restored to it.¹¹⁶ Article 9 of the agreement states that *“Israel respects the present special role of the Hashemite Kingdom of Jordan in Muslim holy shrines in Jerusalem. When negotiations on the permanent status will take place, Israel will give high priority to the Jordanian historic role in these shrines.”* However, it is clear from this provision that Jordan no longer demands the return of east Jerusalem to its sovereignty and is satisfied with Israel’s promise to give *“high priority to the Jordanian historic role,”* which is confined solely to the Muslim shrines in Jerusalem, *“when the final status negotiations”* take place in respect of Jerusalem.

Notably, Israel did not undertake to give Jordan control over, nor indeed the right to administer these sites, but only offered *“high priority”* to the historic Jordanian role in these places, without clarifying the nature of this *“role.”* Equally, the permanent status of the sites was not promised to Jordan but only negotiations on this issue, and even that not necessarily with Jordan alone.

Accordingly, the wording of the provision may be seen to imply Jordanian concession of east Jerusalem in favor of Israel, as required by the above rules of international law for the purpose of lawful acquisition of sovereignty in this territory.

At the same time, Article 9 of the Peace Treaty between Israel and Jordan states that *“Israel respects the present special role”* of the Hashemite Kingdom of Jordan in Muslim holy shrines in Jerusalem. In other words, Israel recognizes that Jordan already *“possesses”* a *“role”* in these places. The nature of that *“role”* is not clarified, and it appears that the *“role”* does not equate to *“status.”*

There is no doubt that the article in question was cleverly crafted to give expression to the historical, religious, political, and legal interests of both sides in the Muslim holy sites in Jerusalem. The late Prime Minister

Yitzhak Rabin revealed that he himself had drafted this provision, and that this formulation expressed a policy of separation between the heavenly Jerusalem and the earthly Jerusalem: earthly Jerusalem would remain in the hands of Israel, while the administration of the Islamic holy sites – heavenly Jerusalem – would be given to the Muslims.¹¹⁷ In Prime Minister Rabin's words, the "Jerusalem clause" in the agreement with Jordan was nothing new, and *"was intended to reflect the existing situation in which the Jordanians are indeed playing a role in the administration of the Islamic holy sites in Jerusalem."*¹¹⁸

Article 9 of the peace agreement was an exact copy of a clause that appeared in the agreement to end the state of armed conflict between Israel and Jordan, signed in Washington on July 25, 1994, which has since been called the "Washington Declaration." In this declaration, Israel officially recognized – for the first time since its establishment – Jordan's "special role" in the Muslim holy places in Jerusalem.

Rabin's words clearly indicate that Israel only recognized Jordan's religious role or status in the Muslim holy places in Jerusalem, while under the above two agreements, Jordan agreed to this and did not demand more. Israel's willingness to give Jordan such a "role" or status is consistent with the statements of Prime Minister Rabin and Foreign Minister Shimon Peres, following the peace treaty with Jordan that *"Jerusalem is closed from a political point of view and open from a religious point of view."*¹¹⁹ Nonetheless, the continued appointment of all the Waqf employees, including the imams and preachers in the mosques, and the payment of their salaries by the Jordanian Ministry of Religious Endowments, is not purely a matter of religious status. This is particularly true in view of Jordan's present special status relating to the administration of the Temple Mount (Haram al-Sharif), which is administered by Israel in coordination with Jordan, as seen, for example, in the Israeli government's decision of October 2015 to prohibit ministers and MKs from entering the Temple Mount,¹²⁰ and the decision to remove the magnometers from the gates of the Temple Mount at the end of July 2017.¹²¹

Official recognition was given to Jordan's status on the Temple Mount in Para. 13 of the state's response to the petition submitted in HCJ 6421/16

In accordance with Article 9 of the peace treaty between Jordan and Israel, Israel respects the present special role of the Hashemite Kingdom of Jordan in the Muslim holy places in Jerusalem. Officials on behalf of the governments of Jordan and Israel are in constant contact regarding what occurs on the Temple Mount, including the activities of the Waqf in the place. For obvious reasons, it is not possible to openly detail the nature of these contacts, which touch upon issues at the heart of the foreign relations of the State of Israel.

In this context, Deputy President of the Supreme Court Elyakim Rubinstein noted, in Para. 10 of the Supreme Court judgment given on March 23, 2017, in the above petition:

I should point out, as the one who headed the Israeli delegation to the peace treaty with Jordan, that this article (which had already appeared in the 'Washington Declaration' of July 25, 1994) was drafted uniquely (in an unusual and to some extent exceptional manner) by Prime Minister Yitzhak Rabin, personally. This article was originally intended to give expression to Jordan's connection to the mosques on the Mount, where the Hashemite dynasty is considered and regards itself as the descendant of the Prophet Muhammad, who visited the place according to Islamic tradition on a miraculous night journey. King Abdullah, grandfather of the late King Hussein, in whose time the peace treaty was signed, and the great-grandfather of the current king, who bears his name, was also murdered in the presence of his grandson Hussein in a mosque on the Temple Mount, and hence the special emotional bond, and I will not even consider the Jordanian-Palestinian aspects that were also in the background. The article is, as the state wrote in its response, the basis for the Waqf's involvement. But, of course, within the scope of Israeli law, the legal authority from beginning to end rests with Israel and the Israel Police.

In any case, and in the opinions of the jurists Schwebel and Blum, with which I agree, Israel is at minimum the holder of best "relative right" in Jerusalem,¹²³ as Jordan unlawfully occupied east Jerusalem in 1948, and

as Israel conquered this territory from Jordan in June 1967, pursuant to its right to self-defense following Jordan's attack on Jerusalem.¹²⁴

Since the present area of Jerusalem includes 64.5 square kilometers of land belonging to 28 villages and towns in the West Bank of the Jordan River, one may ask whether these arguments apply to these villages and towns as well. Were they legally incorporated into Israel or are they "occupied territories?"

A thorough and detailed discussion of this question goes beyond the scope of this article.¹²⁵ However, in brief, the answer is positive, and essentially can be summarized as follows:

- A. Jordan illegally acquired its control of the West Bank of the Jordan River, using force, in the course of a war to thwart the UN Partition Plan. Indeed, the legality of the annexation of the West Bank to Jordan, by declaring it as such on April 28, 1950,¹²⁶ was never recognized by any country in the world (including the Arab countries), apart from Britain and Pakistan.
- B. On July 31, 1988, King Hussein of Jordan announced the severing of the Jordanian administrative and judicial link to the West Bank of the Jordan River (except for its continued protection of the Muslim holy places in Jerusalem),¹²⁷ thereby waiving Jordan's right to return to rule there. Although the waiver was made in favor of the PLO as representative of the Palestinian people, since Jordan's rule in that territory was not legal, as previously explained, it could not grant the Palestinians any right to rule there.
- C. Equally, in the Jordan-Israel peace treaty, there is no Jordanian demand for the return of the West Bank of the Jordan River to its territory, and this too can be seen as a relinquishment of Jordan's rule there. Nonetheless, this important argument should be qualified, considering Article 3.2 of the agreement in question. This article states that the internationally recognized boundary between Israel and Jordan does not constitute a "*prior determination as to the status of any territories that came under Israeli military government control*

in 1967." As east Jerusalem includes not only former Jordanian Jerusalem but also 64.5 square kilometers of land and villages in the West Bank of the Jordan River (in Judea and Samaria), it may be argued that the final status of all these territories has not yet been determined!

In any event, even if there is any legal flaw in terms of international law, in the application of Israel's rule over east Jerusalem in terms of the acquisition of sovereignty there, its right to control the area is the best, even in terms of international law. No other country has such a right or has a right to sovereignty in east Jerusalem (including the territories beyond Jordanian Jerusalem – 64.5 square kilometers) that surpasses Israel's right there or is even equal to it. This is true *a fortiori*, with respect to the Palestinian Authority, which did not exist in June 1967 (it was founded only in 1994 pursuant to the Oslo Accords between Israel and the PLO signed on September 13, 1993), and even today it is not a state, according to the criteria established in international law for recognition of the existence of a state.¹²⁸

Section 7: The unification of Jerusalem in the eyes of Israeli law

The Israeli Knesset refrained from using the term "annexation" when it applied Israeli law to the territories that were added to west Jerusalem (64.5 square kilometers in addition to Jordanian Jerusalem), not because this was prohibited under international law, but because it took the legal position that the above territories had been occupied by Jordan and illegally annexed to its territory following an unlawful attack on the State of Israel, designed to thwart its establishment in violation of the UN Partition Resolution (November 29, 1947). Additionally, because Jordanian Jerusalem (six square kilometers) had been illegally occupied by Jordan, contrary to the UN resolution designating this area as part of international Jerusalem under the control of a UN Special Commissioner.

In domestic Israeli law, the Supreme Court has ruled that Israel has lawfully applied its government and laws to east Jerusalem.¹²⁹ In this

context, the Supreme Court, sitting as a High Court of Justice, rendered a ruling on January 16, 2002, in a petition regarding the jurisdiction of the Jerusalem Court for Local Affairs to hear matters relating to illegal construction by Palestinians in east Jerusalem.¹³⁰ The petitioners argued that the Israeli courts had no jurisdiction to consider construction in east Jerusalem, as the application of Israeli law to east Jerusalem was illegal by virtue of being inconsistent with customary international law.

The High Court of Justice rejected this claim and the petition, stating that it had no basis, and reiterating that as a matter of Israeli law “*State law, jurisdiction, and administration apply to east Jerusalem and were imposed lawfully.*” The court added that this internal Israeli legislation was consistent with customary international law, and declared that even if a contradiction did exist between Israeli legislation and customary international law, it was accepted case law that Israeli legislation would override. In the words of the High Court of Justice (per Justice Strasberg-Cohen) on this matter: “*Even if I assume that domestic Israeli legislation is inconsistent with customary international law – and I do not hold that this is so, as there is no basis for such an assumption – Israeli law supersedes...*”¹³¹

Finally, at the initiative of MK Hanan Porat, on March 26, 1998, the Knesset passed the Jerusalem Day Law, 5758-1998.¹³² According to this law, 28th Iyar, namely, the Hebrew date on which the IDF liberated east Jerusalem during the Six-Day War, was established as a “state holiday,” to be celebrated every year and called “Jerusalem Day.”

Section 8: The Old City as an “Antiquities Site”

The Old City (and its immediate surroundings) was declared on August 30, 1967, to be an “*antiquities site*”¹³³ by virtue of the Antiquities Ordinance,¹³⁴ which has since been replaced by the Antiquities Law, 5738-1978.¹³⁵ As an “*antiquities site*,” the Old City enjoys special protection pursuant to the above law, and any activity there (including construction and demolition, alteration or old dismantling an antiquity, and even laying of soil) requires the approval of the Director of the Israel Antiquities Authority, as provided in Section 29(a) of the Law. According to Section 29(c) of the Law, “*where an*

antiquities site is used for religious requirements or devoted to a religious purpose" (such as the Temple Mount), the consent of a special ministerial committee is also required, the members of which include the Minister of Religious Affairs, the Minister of Education and Culture, and the Minister of Justice.

Section 9: The Old City as a World Heritage Site

The Old City also enjoys special status and special protection as a cultural asset of historic and universal importance. On September 11, 1981, the UNESCO World Heritage Committee accepted a Jordanian proposal to include the Old City and its walls, by virtue of Article 11(2) of the Convention concerning the Protection of the World Cultural and Natural Heritage 1972,¹³⁶ (to which Israel is also a signatory),¹³⁷ on the World Heritage List.¹³⁸ The Jordanian proposal attached a list of 220 sites in the Old City with dozens of sites holy to Islam and Christianity, but only one Jewish seminary (the name of which was not mentioned) and one synagogue (the name of which was distorted and is unknown). Nonetheless, in accordance with a recommendation made by ICOMOS (the International Council for Monuments),¹³⁹ as of April 1981, six additional "monuments" were added to the list:¹⁴⁰ the walls of the Temple Mount from the time of King Herod, emphasizing that they include the Wailing Wall, the well-known Jewish name for the Western Wall, "Solomon's Stables," which today serves as a mosque called the al-Marwani Prayer Place, the four Jewish synagogues that were restored in the Jewish Quarter of the Old City,¹⁴¹ and the arch sacred to Christianity – *Ecce Homo* ("Behold the man!").¹⁴²

This list of sites does not necessarily mean that other sites in the Old City, the names of which are not mentioned, would not enjoy the protection of the above Convention. According to the decision of the UNESCO World Heritage Committee, the protection afforded by the Convention applies to the entire Old City, including all sites located therein.

As the Old City is included in the World Heritage list, Israel, being the governing authority, is obligated "*to do all it can, to the utmost of its own resources*" in order to protect the Old City and identify and preserve its various sites to ensure its presentation and transmission to future

generations. If necessary, Israel is entitled to “*international assistance and co-operation, in particular financial, artistic, scientific, and technical*” (Article 4 of the Convention). Each state party to the Convention must report to the General Conference of UNESCO on the measures it has taken to implement the provisions of the Convention (Art. 29).

In December 1982, the above Committee decided to accept Jordan’s proposal to register Old Jerusalem and its walls on the list of “World Heritage in Danger” (under Article 11.4 of the Convention), which relates to “*cultural and natural heritage as is threatened by serious and specific dangers.*” The registration was based on Jordan’s complaint that Israel’s “urban development” plans for the Old City and its environs, the lack of proper maintenance of the monuments, and the masses of tourists visiting there, endangered the Old City and its walls.¹⁴³ It should be noted that the decision was taken even though the UNESCO Director-General’s representative for Jerusalem, Prof. H. Lemire, rejected the facts on which the Jordanian complaint was based.¹⁴⁴

According to Article 13.3 of the Convention, the World Heritage Committee is authorized to determine the nature and extent of the international assistance required for the protection and conservation of natural and cultural assets, in accordance with the purposes of the Convention.

Chapter Four: General Summary

Jerusalem is a unique city, historically, religiously, nationally, and legally, because of its great sanctity in the eyes of Judaism, Christianity, and Islam. It is the holiest city in the world for Judaism, by virtue of the Temple Mount, which was the site of the three Jewish Temples. This is the holiest place in the world for the Jews because, according to their faith, the *Shechinah* [divine spirit] dwells there forever.

Thus, since its establishment, Jerusalem has been the capital of the Kingdom of Israel, the capital of the Kingdom of Judah, the capital of the Hasmonean Kingdom, and the capital of the State of Israel.

Jerusalem is also sacred to Christianity, mainly because of important events that took place there in the life of Jesus, especially in his last days. Jesus was crucified and buried in the Church of the Holy Sepulcher, and there he was resurrected. It is the holiest place in the world for Christianity. From Jerusalem, the Twelve Apostles set out to spread the message of Christianity around the world.

While Jerusalem was the capital of the Crusader Kingdom for part of the Crusader period (1099-1187 CE), the Christian countries have no political interest of their own in Jerusalem. Nonetheless, due to their economic and political ties with the Arab states, they deny the legality of Israeli rule in east Jerusalem and support the demand of the Palestinians and the Arab states to place east Jerusalem under the sovereignty of the future Palestinian state.

East Jerusalem is also sacred to Islam by virtue of the Temple Mount, which the Muslims call the Haram al-Sharif – the “Noble Sanctuary,” due to Islamic belief that at the end of his night journey from the Kaaba stone at Mecca the Prophet Muhammad landed at the site where the al-Aqsa Mosque was subsequently built. According to Islamic belief, he also ascended from the Foundation Rock located there (the Jewish “Holy of Holies”) to the heavens and received from Allah the five daily prayers that every Muslim is commanded to perform. Commemorating this ascent, the Muslims built the Dome of the Rock on this site, which currently serves as a mosque for women. Based on this belief, at the beginning of the eighth century, Jerusalem was recognized as the third most holy city for Islam, following Mecca and Medina.

Yet, Jerusalem was never a Muslim capital. It was always a neglected city, albeit one of religious importance – during the early Arab period (638-1099 CE), the Ayyubid period (1187-1250), the Mamluk period (1260-1517), the Ottoman period (1517-1917), and during the period of Jordanian rule (1948-1967). It is important to note that from the middle of the nineteenth century until the 1929 riots, Jews constituted an absolute majority of Jerusalem’s population: 45,000 Jews out of an overall population of 65,000.¹⁴⁵

Following the international recognition of the twentieth-century Palestinian claim to a right of self-determination, the Palestinians demanded all the territories conquered by Israel from Jordan in June 1967 for the purpose of creating an independent Palestinian state there and establishing their capital in Jerusalem. This was primarily by virtue of the existence there of the Haram al-Sharif (Temple Mount), which became, in their view, a religious and national symbol.

This is the background to the struggle for control of Jerusalem, and particularly east Jerusalem, between Israel and the Palestinians, which has been continuing for about 100 years. Unlike the Jewish population of Palestine, the Arabs did not agree to the UN Partition Plan of November 29, 1947, according to which the area would be divided into two states, Jewish and Arab, with a separate area of Jerusalem as an international area administered by the United Nations. Instead, they launched a war

to thwart this plan. During this war, Jordan conquered the eastern part of Jerusalem, and Israel defended and conquered the western part of the city. Jordan and Israel agreed on the division of Jerusalem between them in the Armistice Agreement of April 3, 1949.

The United Nations accepted the division of Jerusalem between Israel and Jordan, and over the years abandoned the solution of its internationalization. Almost the entire world became accustomed to this, albeit without formally recognizing (except Pakistan) the legality of Jordan's rule in east Jerusalem and the legality of Israel's rule in west Jerusalem

Until the early 1970s, some countries in the world only recognized *de facto* Israeli rule in west Jerusalem, and 18 of them even established their embassies there as a clear sign of their recognition of west Jerusalem as the capital of Israel.

In early June 1967, Egypt, Syria, and Jordan attacked Israel. The war ended in six days in a crushing victory for Israel. At the beginning of the war, Jordan bombed Jerusalem and even occupied a small part of its territory (the High Commissioner's Palace). Since Jordan did not heed Israel's warnings to refrain from fighting against it, Israel conquered Jordanian Jerusalem (six square kilometers) and added to Jerusalem an additional 64.5 square kilometers of the land of 28 villages and towns in the West Bank. It applied its law, administration, and jurisdiction to all these territories under the designation of "east Jerusalem." Israel hastened to build 13 new neighborhoods inhabited by 214,600 Israelis, compared with about 327,700 Arabs who live in the area of east Jerusalem.

The struggle for the political future of east Jerusalem then renewed, reaching its peak when Israel declared unified Jerusalem as the capital of Israel in a Basic Law of that name in 1980.

The United Nations has determined that Israel's rule in east Jerusalem is illegal, that all measures taken by Israel to unify the city, and in particular Basic Law: Jerusalem, Capital of Israel, are null and void and that east Jerusalem is "occupied territory," illegally annexed by Israel from Jordan, following war with Jordan, in breach of international law.

The entire world has accepted this view, and the 18 countries that maintained embassies in west Jerusalem accepted the UN call and removed their embassies from Jerusalem to other places in Israel as a sign of diplomatic protest against the imposition of Israeli rule and laws on east Jerusalem. In addition, foreign countries currently maintain nine consulates in Jerusalem. However, none of them submitted an official request (*exequatur*) to the Israeli Foreign Ministry for recognition as a consulate in view of the desire to avoid performing an act (submitting an application to the Ministry of Foreign Affairs) that would imply their countries' recognition of Jerusalem as part of the State of Israel, contrary to the policy of these countries. Nevertheless, Israel grants foreign consulates in Jerusalem consular status and documentation under the Vienna Convention on Consular Relations, 1963.

Contrary to the above, this article presents a completely different opinion, held by world-renowned experts in international law, whereby Israel has lawfully acquired sovereignty over both parts of Jerusalem as a matter of international law.

According to this view, at the end of the British Mandate in May 1948, a vacuum was created in sovereignty over Jerusalem that could only be filled by legal action, such as by turning Jerusalem into an international city through acceptance of the UN Partition Resolution of November 29, 1947.

However, in light of the rejection by the Arab states of the UN Partition resolution, and their armed aggression against Israel, aimed at thwarting the implementation of that resolution, which recommended establishment of two states, Jewish and Arab, with Jerusalem as an international city, this vacuum was ultimately filled by the conquest of west Jerusalem by Israel in exercise of its inherent right to self-defense, recognized in international law. Therefore, Israel became the legal sovereign in west Jerusalem.

On the other hand, Jordan was not considered to be the legal sovereign in east Jerusalem, since it occupied the territory during the aforementioned aggressive to thwart implementation of the Partition Resolution. Evidence of this may be found in the fact that no country in the world (including

the Arab states), apart from Pakistan, recognized the legality of Jordan's sovereignty over east Jerusalem.

The same principle is equally applicable to the 64.5 square kilometers of territory attached to Jerusalem at the end of June 1967. Jordanian rule in these territories similarly lacked legality as they had been occupied by Jordan in an aggressive war initiated by the Arab states in order to thwart the UN "Partition Plan" of November 1947. Subsequently, Jordan relinquished its authority there, both with its July 1988 announcement that it was severing its legal and administrative ties to these areas, as well as the fact that it did not demand to restore them from Israel as part of the October 1994 Treaty of Peace between Israel and Jordan.

East Jerusalem cannot be considered "occupied territory." For such status to be accorded to a particular territory, international law requires that the state whose territory was occupied must have been the legal sovereign of the territory in question. However, as explained, Jordan was not the legal sovereign of east Jerusalem, since it acquired the territory unlawfully, during the course of an aggressive war.

Accordingly, Israel acquired sovereignty in east Jerusalem, and legitimately unified the two parts of the city at the end of June 1967 and later proclaimed united Jerusalem as the capital of Israel in its 1980 Basic Law.

Prof. Schwebel and Prof. Blum have argued, as set out above, that Israel holds the best relative legal right in respect of both parts of Jerusalem, and no other country (including Jordan and the Palestinian Authority), can legally surpass Israel's right.

Contrary to the position taken by the majority of countries of the world, on April 6, 2016, Russia recognized west Jerusalem as the capital of Israel and concurrently recognized east Jerusalem as the capital of a future Palestinian state.

On December 6, 2017, in a special speech by President Donald Trump, the United States recognized Jerusalem as the capital of Israel. However, the U.S. President refrained from referring to "united Jerusalem" or

“undivided Jerusalem,” and stressed that the United States “*does not take a position on permanent issues, including the specific borders of Israeli sovereignty in Jerusalem.*” In this way, President Trump expressed his acquiescence in negotiations between Israel and the Palestinians regarding the issue of Jerusalem, including the Palestinian desire for two capitals, an Israeli capital and a Palestinian capital. The U.S. president further instructed the State Department to prepare for the transfer of the U.S. embassy from Tel Aviv to Jerusalem, scheduled for Israel’s 70th Independence Day anniversary in May 2018.



President Donald Trump shows a statement announcing intention to move the U.S. embassy in Israel to Jerusalem, December 6, 2017. (Chris Kleponis/picture-alliance/dpa/AP Images)

Immediately thereafter, the Czech Republic announced its recognition of west Jerusalem as the capital of Israel, and on December 25, 2017, the President of Guatemala announced his decision to return the Guatemalan embassy to Jerusalem, thereby implying Guatemalan recognition of Jerusalem as the capital of Israel, in view of the diplomatic practice of locating the diplomatic mission in the capital of the host country.

Notes

1. Chapter One is based on my book *Wars of the Holy Places*, Jerusalem Institute for Israel Studies and Hed Artzi, 2000, at pp. 370-383, and *How Awesome is this Place*, Carta Press, Jerusalem, 2006, at pp. 100-101, 110-124, 176-178, 200-210.
2. Josephus Flavius, *Antiquities of the Jews*, Book 15, Chapter 11; *History of the Jewish War against the Romans* (translated by L. Ullmann), Book One, Chapter 21, para. 401, Fifth Book, Chapter 5, paras. 184-237.
3. Data received on December 3, 2017, from the Jerusalem Institute for Israel Policy Studies, correct to the end of 2016. The data will appear in a statistical study to be published by the institute in May 2018.
4. A/Res/181. For the text of the resolution see: *The Jerusalem Question and its Resolution: Selected Documents*, edited by R. Lapidoth and M. Hirsch, Martinus Nijhoff Publishers, 1994, p.6 (hereinafter: "Lapidoth and Hirsch, Selected Documents").
5. Lapidoth, *Basic Law: Jerusalem, Capital of Israel*, The Hebrew University of Jerusalem, 1999 (hereinafter: "Lapidoth, *Jerusalem, Capital of Israel*"), at p. 20. For the text of the agreement, see: U.N. Doc. S/3015, of May 25, 1953.
6. U. Narkiss, *The Story of the "Municipal Line" in Jerusalem*, Ariel Press, Jerusalem, 1986, at pp. 5-6.
7. See, for example, Section 2(2) of the Armistice Agreement between Israel and Jordan dated April 3, 1949, Treaties No. 3, vol. 1, at p. 37. See also Y. Blum, "East Jerusalem is not 'occupied territory'," 28 *Hapraklit* (1975) 183, 184-186. In light of this, to this day Israel has refrained from establishing its boundaries, and instead of making an explicit determination of the borders, the Israeli legislature has determined that the territory to which Israeli law will apply is the area that "the Minister of Defense defined in the proclamation as being held by the Israel Defense Forces." See: Section 1 of the Jurisdiction and Powers Ordinance, 5708-1948, above. See also the remarks of the Prime Minister and Minister of Defense at the time, D. Ben-Gurion on this matter, cited by A. Rubinstein and B. Medina, *Constitutional Law of the State of Israel*, Fifth Edition, at p. 83.
8. *Official Gazette*, 5708, No. 12 at p. 66.
9. *Official Gazette*, 5708, No. 23, Schedule A, at p. 61.
10. M. Benvenisti, *Facing the Closed Wall, Divided and United Jerusalem*, Jerusalem, 1973, at pp. 46, 47.
11. *The Official Gazette of the State of Israel*, No. 48 dated 4.2.1949, at p. 376.
12. Records of the Knesset, vol. 3, at p. 221.

13. Id., at p. 226.
14. Id., at p. 281; see also at p. 313.
15. The First Knesset convened in Jerusalem at the Jewish Agency House on February 14, 1949. In the absence of proper conditions for Knesset activity in Jerusalem, it was necessary to temporarily transfer the Knesset sessions to the Kesem Cinema building in Tel Aviv. See: id., at p. 287.
16. Records of the Knesset, vol. 4, at pp. 603, 615. For further steps to establish Jerusalem's status as the capital of Israel, see A. Eldar and N. Goren, *The Jerusalem Capital Ambush: The Political Maneuvers to Relocate the American Embassy in Israel*, The Jerusalem Institute for Israel Studies, 2002, at pp. 14-16.
17. See: Section 2 of Basic Law: The Knesset, 5718-1958, SH 5718, at p. 69; Section 2 of Basic Law: The Government, 5761-2001, S.H. 5761, at p. 158; Section 2 of Basic Law: The President of the State, 5724-1964, S.H. 5723, at p. 118; Section 15(a) of Basic Law: The Judicature, 5744-1984, S.H. 5744 at p. 78; Section 4.A. of the Chamber of Advocates Law, 5721-1961, S.H. 5721, at p. 178.
18. For a brief survey and a rich bibliography on this subject, see Lapidoth, *Jerusalem, Capital of Israel*, Chapter Two, at pp. 39-42.
19. For further details, see id., note 2 at p. 40.
20. M. Hirsch and D. Hausen-Curiel, *Whither Jerusalem – Proposals and Positions Concerning the Future of Jerusalem*, Jerusalem Institute for Israel Studies, Jerusalem, 1994, at pp. 13-19; Lapidoth, *Jerusalem, Capital of Israel*, note 2.
21. Lapidoth, *Jerusalem, Capital of Israel*, note 3, at p. 40.
22. Id., note 4.
23. Id., note 5 at p. 41.
24. A/Res/273 (11.5.49).
25. For details see: Alan Baker, "Is Jerusalem Really Negotiable? An Analysis of Jerusalem's Place in the Peace Process," *Jewish Political Studies Review*, Vol. 24, No. 3-4, at pp. 78-80. (http://jcpa.org/wp-content/uploads/2013/05/V24_3_5.pdf); Berkovitz, *Wars of the Holy Places*, at pp. 54-58, 400-402. See also: Address by Prime Minister D. Ben-Gurion in the Knesset on the Internationalization of Jerusalem, December 5, 1949, Records of the Knesset, vol. 3, p. 221.
26. See: Lapidoth, *Jerusalem, Capital of Israel*, at p. 74, note 50.
27. According to information I received from Adv. Alan Baker, former Israeli Ambassador to Canada and former Legal Adviser to the Israel Foreign Ministry.
28. See: Lapidoth, *Jerusalem, Capital of Israel*, at p. 72, notes 44 and 45.
29. See: Lapidoth, *Jerusalem – Legal Aspects*, Jerusalem Institute for Israel Studies, Jerusalem, 1999, Second Edition, at p. 15 alongside the reference to notes 61-62. Lapidoth, *Jerusalem, Capital of Israel*, at p. 40. For a detailed discussion of the positions of the parties involved in the peace negotiations regarding the status of west and east Jerusalem, see Berkowitz, *Wars of the Holy Places*, at pp. 384-395.

For the text of the Hague Convention of 1907, the Geneva Convention of 1949 and the Laws of War Regulations, see: *Land Law and International Law in Judea and Samaria*, ed. H. Arnon and C. Vinitzky, Tel Aviv, 2013, at p. 33, note 52 (place of publication on the Internet); M. Drori, *The Legislation in the Judea and Samaria Area*, Faculty of Law, The Hebrew University of Jerusalem, 5735-1978, at p. 49, note 3. Israel is a signatory to the Fourth Geneva Convention, 1949. See: Treaties No. 1 (30), at p. 559.

30. For further details, see Lapidoth, *Jerusalem, Capital of Israel*, at pp. 51-54, Berkovitz, *Wars of the Holy Places*, at pp. 58-59.
31. S.H. 5727, at p. 74.
32. Regulation Files 2064 dated June 28, 1967, at p. 2690.
33. For further details, see Lapidoth, *Jerusalem, Capital of Israel*, at pp. 51-54, and in particular the map on p. 24, id.
34. S.H. 5727, at p. 74.
35. Jerusalem Declaration (Expansion of the Municipal Boundaries), 5727 – 1967, Regulation Files 2065, at p. 2694.
36. The municipal area of Tel Aviv is 51,830 dunams and the area of Haifa is 64,680 dunams.
37. Berkovitz, *Wars of the Holy Places*, at p. 261.
38. A/pv 1550 (12.7.67). See also Lapidoth, *Jerusalem, Capital of Israel*, at p. 23, note 28.
39. For General Assembly Resolutions, see for example: A/Res/2253 (4.7.1967); A/Res/2254 (4.7.1967). For Security Council Resolutions, see for example: S/Res/252 (21.5.1968); S/Res/267 (3.7.1969); S/Res/271 (15.9.1969); S/Res/298 (25.9.1971).
40. A/6793; S/8146 at pp. 1-2.
41. Id., at p. 7.
42. S.H. 5759, at p. 86.
43. S.H. 5774, at p. 400.
44. For the text of this law see: S.H. 5740, at p. 186, and the description of the purpose of the law in the explanatory notes to the bill in the H.H., 5740, p. 285; for a detailed analysis of the provisions of this law, see Lapidoth, *Jerusalem, Capital of Israel*, at pp. 63-110.
45. For the meaning of the term “capital,” see H. Cohen, *The Status of Jerusalem in the Law of the State of Israel, 40 Years in Jerusalem*, edited by A. Ahimeir and I. Bar Siman Tov, Jerusalem Institute for Israel Studies, 2008, at pp. 375, 378-379.
46. S.H. 5761, at p. 28.
47. See the description of the purpose of the law in Clause 1 of the bill and the explanatory notes to the bill in H.H. 2908 of 18 July 2000, at p. 516; see also: Berkowitz, *Wars of the Holy Places*, at pp. 177, 260-261.
48. The words “among other things” are intended to clarify that the law also applies to additional extensions of the municipal area of Jerusalem that were made in later years. See: Berkowitz, *Wars of the Holy Places*, id.
49. The text of the agreement in Hebrew and English is available on the Knesset Internet site.
50. According to information I received from a source who asked not to reveal his name.
51. The text of the statutory amendment is available on the Knesset Internet site.
52. For details, see Lapidoth, *Jerusalem, Capital of Israel*, at p. 57.
53. S/Res/478. See also: S/Res/465 (1.3.1980); S/Res/476 (30.6.1980).
54. A/Res/35/169. See also: A/Res/35/122 (17.12.1980).
55. For a list of dozens of such decisions, see: note 194 on page 56 of my book: *How Awesome is this Place*, Carta, Jerusalem, 2006.
56. International Court of Justice, *The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion, 9.7.04), Sec. 75.

57. For a critique of this statement, see M. Hirsch, "The Legal Status of Jerusalem Following the ICJ Advisory Opinion on the Separation Barrier", 38 *Israel Law Review*, (2005) at pp. 298, 303. See also A. Rubinstein and B. Medina, *The Constitutional Law of the State of Israel*, Schocken Press, Tel Aviv, 2000, vol. II, at p. 925.
58. For the full text of the draft and the resolution (EJ-10/L.22), see the site: <http://www.timesofisrael.com>. The Security Council has five permanent members (the United States, Russia, the United Kingdom, France, and China) and 10 rotating members. Only the permanent members have veto power under Article 27.3 of the UN Charter.
59. *Haaretz* and *Yedioth Aharonot* of December 19, 2017.
60. For the text of the resolution and the results of the vote, see the above site.
61. According to information I received from the Israeli Ministry of Foreign Affairs on January 11, 2018.
62. According to information I received from the French consulate in Haifa on January 15, 2018.
63. According to information I received from the Spanish consulate in Jerusalem on January 15, 2018.
64. See: Berkowitz, *Wars of the Holy Places*, at pp. 347, 406, and according to information I received from the Ministry of Foreign Affairs on January 15, 2018.
65. According to information I received from the Ministry of Foreign Affairs on January 14, 2018. For the text of The Vienna Convention on Consular Relations, 1963 see the website of the Office of Legal Affairs of the United Nations; and also 596. U.N.T.S. 261.
66. See: HCJ 256/01 Rabach et al v. Jerusalem Court for Local Matters, 56(2) PD 930, 934 opposite the letter F, and at p. 935 opposite the letters A-C; ALA 7092/94 Her Majesty the Queen in Right of Canada v. Addleson, 51(1) PD 695, para. 12 at pp. 639-641; and the list of references in CA (District Court of Tel Aviv) 4289/98 PDM 5758 (3) 1, at pp. 12-13, 14-16 (para. 5).
67. According to information I received from the Foreign Ministry on January 15, 2018. For a detailed discussion of consular relations, the status of the consulate and consular officials, their rights and immunities, see R. Sabel and Y. Ronen, *International Law*, Third Edition, 2017, chapter 11, at pp. 257-270.
68. *Kol Israel Reshet Bet* News of June 5, 2014.
69. News from *Ynet* of April 6, 2017; Dr. R. Bergman, "Putin recognizes Jerusalem," *id.* – on May 23, 2017.
70. *Israel Today* of December 7, 2017, at p. 17.
71. *Haaretz* of December 8, 2017, at p. 6, and of December 10, 2017 at p. 6.
72. Guatemala maintained an embassy in west Jerusalem until 1980. It removed the embassy from Jerusalem in accordance with Security Council Resolution No. 478, and transferred it to Tel Aviv.
73. News from *Ynet* of December 25, 2017; *Haaretz* of December 26, 2017.
74. For details of the U.S. position, see Berkowitz, *Wars of the Holy Places*, at pp. 390-392.
75. *Ibid.*, at p. 391, and see SCOR, 24th Year, 1969, 1483rd Meeting July 1, 1969, at pp. 11-12. The statements of the two ambassadors were also published in Lapidoth and Hirsch, *A Collection of Documents*, at pp. 174-177; 236-238.
76. For the Camp David documents, see: *Treaties 857*, vol. 25, at pp. 509, 526.

77. For the text of the law, see: Pub. L.104-45 (8.11.95) 109 Stat. 398. For a comprehensive study of the proceedings taken to transfer the U.S. Embassy to Jerusalem and relevant legislation see: A. Eldar and N. Goren, *The Jerusalem Capital Ambush*, above.
78. The decision was made unanimously by the Senate on May 20, 1997 and by an absolute majority (406:17) in the House of Representatives on June 10, 1997. According to information I received from the American Culture Center from the research authors, Raphael Amelan and Jackie Stein, and I thank them.
79. According to the Constitution of the United States, the President has veto power over laws passed by Congress. However, if the law, which the President vetoes, is approved again by Congress by a majority of more than 2/3 in both houses of Congress, the law enters into force. In the case at hand, as the "Jerusalem Embassy Act" was passed in the first place by a majority of about 90% in both Houses of Congress, despite the President's public opposition to the law, the President saw no point in vetoing the Act. The President did not sign the law. However it came into force on November 8, 1995. See also Almanac, Congressional Quarterly, 1995, at pp. 10-23, H-210.
80. *Haaretz*, October 26, 1995.
81. G. R. Watson, "The Jerusalem Act of 1995," *Catholic University Review*, vol. 45 (1996), at pp. 837, 846 etc. For the opinion that the Congress Act amounts to U.S. recognition of the unification of Jerusalem, see: M. Halberstam, "The Jerusalem Embassy Act: U.S. Recognition of Undivided Jerusalem as the Capital of Israel," *Bar-Ilan Law Studies*, Vol. 14, 1998, at pp. 391, 395-396.
82. Misc. App. (District Court Jerusalem) 186/87 Attorney-General vs. Yoel Davis, PDM 5749 (3) 336, 339 (para. 13).
83. *Zivotofsky v. Kerry*, vol. 576 U.S (8.6.15) Docket No. 13-628.
84. See: *Haaretz* of December 6, 2017 at p. 4.
85. The full speech may be found on the Internet.
86. The full speech may be found on the Internet.
87. State Department announces opening of U.S. Embassy Jerusalem, February 23, 2018, <https://www.state.gov/r/pa/prs/ps/2018/02/278825.htm>.
88. See: Berkowitz, *Wars of the Holy Places*, at p. 393.
89. *Id.* at pp. 334-353.
90. *Id.* at p. 394.
91. *An Entangled City*, ed. by A. Ramon, The Jerusalem Institute for Israel Studies, 2003, at p. 400.
92. The main points of this report were published in *Haaretz* on February 27, 2013.
93. *Haaretz* on December 8, 2017.
94. *Id.*
95. *Haaretz* on December 12, 2017.
96. *Wikipedia*, "The Legal Status of Jerusalem".
97. The law was published in the Palestinian Authority daily *Al-Hayat Al-Jadida* on October 7, 2002. I thank the Middle East Media Research Institute (MEMRI), which translated the law into Hebrew, and provided me with the text.
98. For further details see: Berkowitz, *Wars of the Holy Places*, at pp. 132-133, 137.
99. S.H. 5755, at p. 85.
100. S.H. 5758, at p. 22.

101. S.H. 5737, at p. 226.
102. For further details see: Berkowitz, *Wars of the Holy Places*, at pp. 387-389; Statements made by PA Chairman Mahmoud Abbas at a meeting of Arab League foreign ministers in Cairo on May 28, 2016 – *Arutz Sheva Israel National News* on the Internet of May 29, 2016; and at the Conference of Islamic Countries in Istanbul on December 13, 2017 – *Haaretz* of December 14, 2017.
103. For a brief review of this issue, see Lapidoth, *Jerusalem, Capital of Israel*, at pp. 39-48; Berkowitz, *Wars of the Holy Places*, p. 443, note 5 (Chapter 6); M. Landau, Y. Blum and M. Rosen, "Arafat's Lies," *Haaretz*, January 3, 2001; and in particular the debate between Prof. Y. Blum and Prof. Y. Dinstein in a series of articles on the subject: Y. Dinstein, "Zion in International Law Will Be Redeemed," *Hapraklit*, 27 (1971), 5; Y. Blum, "Zion in International Law was Redeemed," *Hapraklit*, 27 (1971), 315; Y. Dinstein, "And the Redemption was not Redeemed," *Hapraklit*, 27 (1971), 519; Y. Blum, "East Jerusalem is not Occupied Territory," *Hapraklit*, 28 (1975), 183.
104. Treaties 1, p. 203.
105. See: Y. Dinstein, *The International Law and the State*, Schocken and Tel Aviv University Press, Tel Aviv, 1971, at pp. 122-128; Y. Dinstein, *Laws of War*, Schocken and Tel Aviv University Press, 1983, at pp. 65, 210-213; Dinstein, "Zion in International Law Will Be Redeemed," *Hapraklit*, 27 (1971), 5, 7-8; Y. Blum, "Zion in International Law was Redeemed," *Hapraklit*, id., at 315-319. In the opinion of Prof. H. Grief, sovereignty over a given territory is transferred not only upon the signing of a peace agreement between the occupying state and the occupied state, but also upon subjugation or real and prolonged cessation of hostilities between the belligerent parties. See: H. Grief, *The Legal Foundation and Borders of Israel under International Law*, Mazo Publishers, Jerusalem, Israel, 2008, at pp. 279-302, including historical examples there. See also: L. Oppenheim, *International Law*, Sixth Edition, edited by H. Lauterpacht, Longmans, Green And Co. London, New York, Toronto, 1947, vol. 1, at pp. 518-525.
106. For the text of these Regulations and the Convention, see note 30 above.
107. E. Lauterpacht, *Jerusalem and the Holy Places*, The Anglo-Israel Association, London, 1968, at pp. 46-48.
108. S.M. Schwebel, "What Weight to Conquest?" *64 American Journal of International Law* (1970), at pp. 344, 345-346.
109. Blum, "Zion in International Law was Redeemed," *Hapraklit* 27, at pp. 318-321; Y. Blum, "The Missing Reversioner: Reflections on the Status of Judea and Samaria", *Israel Law Review*, vol. 3 (1968), at p. 279.
110. J. Stone, *Israel And Palestine – Assault on the Law of Nations*, Baltimore, The Johns Hopkins University Press, 1981, at pp. 116-118.
111. M.I. Gruhin, "Jerusalem: Legal and Political Dimensions in a Search for Peace," *12 Case Western Journal of International Law*, (1980), at pp. 169, 205-207.
112. See in this regard: Y. Blum, "The Missing Reversioner: Reflection on the Status of Judea and Samaria" op. cit. at pp. 289-291; J. Stone, *No Peace – No War in The Middle East, Legal Problems of the First Year*, Sydney, 1969, Maitland Publication Pty. Ltd. For the International Law Association (Australian Branch), p. 39; M. Shamgar, "The Observance of International Law in the Administered Territories", 1 (1971), *IYBHR* p. 264 ff.

113. V. Glahn, *The Occupation of Enemy Territory*, 1957, p.139 (quoted in Blum's aforementioned article, *Hapraklit* 27 [1971] in Note 16, at pp. 318-319); Arnon and Vinitzky, *Land Law and International Law in Judea and Samaria*, supra (note 30 above), at p. 84, and the references in note 32, *ibid.*, Lauterpacht, *Jerusalem and the Holy Places*, op. cit. at pp. 49-50; Cf: HCJ 61/80 Haetzni v. The State of Israel, 34(3) PD 595,597 opposite letters E and F; Drori, *Legislation in Judea and Samaria*, p. 26. E. Benvenisti, *The International Law of Occupation*, 2nd ed. Oxford University Press, Oxford, 2012, at p. 207.
114. For a detailed discussion of this right, see Dinstein, *Laws of War*, at pp. 65-94; Ben Naftali and Shany, *International Law between War and Peace*, supra note 101, at pp. 76-103.
115. See all references in notes 75-84 above.
116. For the text of the agreement in Hebrew and English, see: The Knesset Website on the Internet, <http://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/israel-jordan%20peace%20treaty.aspx>
117. *Yedioth Ha'aharonot* of July 26, 1994; and *Haaretz* of July 27, 1994.
118. Records of the Knesset, vol. 139, session of August 3, 1994, at p. 10261.
119. For further details, see Berkovitz, *Wars of the Holy Places*, at p. 314.
120. See note 51 above.
121. See the Israeli newspapers of July 25, 2017.
122. The judgment has been published on websites. This judgment considered a petition against the alleged failure of the police to deal with the violent behavior of Waqf officials towards Jewish visitors on the Temple Mount. The petition was dismissed after it was proved that the police were in fact operating properly against Waqf members and properly safeguarding the Jewish visitors to the Temple Mount and public order there.
123. See: S. Schwebel, "What Weight to Conquest?" op.cit. p.346; Y. Blum, "The Missing Reversioner: Reflections on the Status of Judea and Samaria," op. cit. at pp. 279-301, and his article "Zion in International Law," p. 320. Arnon and Vinitzky, *Land Law and International Law in Judea and Samaria*, at p. 85.
124. This right is regulated in Article 51 of the United Nations Charter. For a detailed discussion, see R. Sable and Y. Ronen, *International Law*, Third Edition, Jerusalem, 2016, at p. 336.
125. For a thorough discussion of the issue in question, see, for example, the three articles on this subject in Arnon and Vinitzky's book, *Land Law and International Law in Judea and Samaria*, above, and the committee report on the status of construction in Judea and Samaria (headed by Supreme Court Justice (ret.) E. Levy) of June 21, 2012, at pp. 375-379 of this book.
126. Collection of Laws and Regulations (Majmu'at al-Qawanin wa al-Anzimah), vol. I, at p. 4.
127. International Legal Materials (1982), p. 1637; Lapidoth and Hirsch, *A Collection of Documents*, at pp. 339-343.
128. For a detailed discussion of these conditions, see Y. Dinstein, *International Law and the State*, Schocken and Tel Aviv University Press, 1971, at pp. 94-100. Pursuant to UN General Assembly Resolution 67/19 of November 29, 2012, to allow the Palestinian Authority to join the UN as "an Observer State which is not a full member," the

PA decided to call itself “the State of Palestine.” However, it does not meet the requirements of international law for recognition as a state, as stipulated in the Montevideo Convention on the Rights and Duties of States, 1933, as detailed in Prof. Dinstein’s aforementioned book. For this purpose see also: G. R. Watson, *The Oslo Accords – International Law and the Israeli-Palestinian Peace Agreements*, Oxford University Press, Oxford, 2000, at pp. 68, 250.

This question was discussed in Israeli law, for the first time, within the framework of the procedural decision of March 30, 2003 of the Jerusalem District Court. In Civil File 2538/00 Litvak v. The Palestinian Authority and Yasser Arafat, in a number of common procedural questions relating to a number of tort claims pending against the Palestinian Authority; see Piskei Din Mechoziim 2002(b) 776. The opinion of the two majority judges was that the question of the status of the Palestinian Authority as a state is a political-legal question that should be decided in each claim separately, based on a certificate of the Minister of Foreign Affairs on this matter. The minority judge, Justice M. Drori, held that the question under discussion was a legal matter only, which only the court was authorized to hear, and there was no need for a certificate from the Foreign Minister on the subject. Accordingly, he considered in detail the status of the Palestinian Authority and held that it was not a state. Although the Palestinian Authority filed an application to appeal to the Supreme Court against the decision of the District Court (ALA 4060/03 PA v. A. Dayan), it did not contest the District Court’s ruling on the above question, and therefore, the Supreme Court did not reexamine it, and it became final and binding (see *ibid.*, Para. 7 of the judgment). The rest of the application was also rejected. The judgment was published on the Supreme Court’s Judgments website and in 62(3) PD 1. See also: CA 5093/06 Agudat Mideshet Eretz Israel Association v. The State of Israel, (the judgment was published in the Supreme Court website). Accordingly, the District Court of Jerusalem (per Deputy President, Justice M. Drori) ruled in another case, based on an appropriate certificate from the Minister of Foreign Affairs, that the PA is not a state.

See: Civil File (Jerusalem District Court) 4071/02 Anon. v. The PA, paras. 18, 38, 539-540 of the decision of 15.10.12 (published in the databases); see also: Civil File (Jerusalem District Court) 3361/09 Heirs of Sharon Ben Shalom v. PA (published in the databases).

Therefore, the case law states that the immunity of a foreign sovereign will be granted only to entities recognized as states by the Ministry of Foreign Affairs. See also: HCJ 4354/92 Temple Mount Faithful v. Prime Minister, 47(1) PD 34, 37; HCJ 910/86 Ressler v. Minister of Defense 42(2) PD 441, at 523-524; HCJ 186/65 Rainer v. Prime Minister 19(2) PD 485,487.

129. See mainly: HCJ 223/67 Ben-Dov v. Minister of Religious Affairs, 22(1) PD 440, 441-442 opposite the letters A-B; HCJ 171/68 Hanzalis v. Tribunal of the Greek Orthodox Church, 23(1) PD 260, 269; HCJ 283/69 Ravid v. The Military Court, 24(2) PD 419; 422-423; HCJ 282/88 Awad v. Yitzhak Shamir, Prime Minister, 42(2) PD 424, 429; HCJ 4185/90 Temple Mount Faithful v. Attorney General 47(5) PD 221, 280-282; Statement by the Minister of Justice Shapira during the Knesset debate on the bill pursuant to which Israeli law was applied to east Jerusalem, Records of the Knesset, vol. 49, at p. 2420.

130. HCJ 256/01 Rabach et al. v. The Jerusalem Court for Local Matters, 56(2) PD 930, 934 opposite the letter F, and at p. 935 opposite the letters A-C.
131. Id., at p. 934 opposite the letter F; and at p. 935 opposite the letters A-C.
132. S.H. 5758, at p. 180.
133. *Official Gazette*, No. 1390, at p. 2159.
134. LSI, vol. A, at p. 24.
135. S.H. 5738 – 1978 at p. 76. See also Sections 49(b) and 28(a) of this Law.
136. Israel joined the Convention and its signature took effect on January 6, 2000.
137. For the text of the Convention, see Treaties No. 1303, vol. 44 at p. 1.
138. For the discussion and decision see: WH Committee 1st Extraordinary Session, Paris 1981, cc-81 / conf. 008/2 Rev. Paris, (September 30, 1981) at pp. 1- 4; 113Ex / Dec.5.5.1 (19.10.1981).
139. This is an international, non-governmental body that advises the World Heritage Committee, in accordance with Article 8.3 of the above-mentioned Convention. For recommendations, see Records of the General Conference, 17th Session, Paris 17.10-21.10 (1972), vol.1: Resolutions, Recommendations, at p. 135.
140. I again thank Prof. M. Turner, Chairman of the Israeli Committee for World Heritage and the Archive Director of the Ministry of Foreign Affairs, Ms. Ortal Elbaz-Bracha, for having provided me with the list of these sites.
141. The Ramban Synagogue, the Yohanan Ben-Zakkai Synagogue, the Prophet Elijah Synagogue, and the Istanbul Synagogue; see also: WH Committee: 1st Extraordinary Session, Paris 1981, 148 Rev., Addendum to Annex III (16.12.1980).
142. According to Christian tradition, this was the place where the Roman prefect Pontius Pilate presented Jesus to the Jews. See: *The New Testament*, Book of John 19: 5. For more details see: Schiller, *Guide to Christian Sites in Israel*, at pp. 197-198.
143. For the discussion and decision see: WH Committee: Report of the 6th Session, Paris, 1982 sec.x. at pp.7-8; 82/ch/conf.015/8 Paris (17.1.83).
144. For further details, see Berkowitz, *Wars of the Holy Places*, at pp. 68-70, 124-125.
145. Dore Gold, *The Campaign for Jerusalem*, Yediot Ahronoth Press, Tel Aviv, 2008, at p. 122.

About the Author

Dr. Shmuel Berkowitz, Adv. is a renowned expert on Jerusalem and the holy places in Israel from a historical, religious, legal, and political perspective. He is a researcher, a lecturer in universities and research institutes, and an adviser to the Government of Israel, the President of Israel, the Western Wall Heritage Foundation, Ateret Cohanim, the Simon Wiesenthal Center, and various Christian committees. He is the author of *Wars of the Holy Places* (Jerusalem, 2000), and *How Awesome Is This Place* (Jerusalem, 2006), as well as numerous articles. The book *Wars of the Holy Places* won first prize at the Jaffee Center for Strategic Studies for top research in the field of Israeli security in 2001.



The Jerusalem Center for Public Affairs is a leading independent research institute specializing in public diplomacy and foreign policy. Founded in 1976, the Center has produced hundreds of studies and initiatives by leading experts on a wide range of strategic topics. The Center is headed by Amb. Dore Gold, former Israeli ambassador to the UN and director-general of the Israel Ministry of Foreign Affairs.

Jerusalem Center Programs:

Defensible Borders for Israel – A major security and public diplomacy initiative that analyzes current terror threats and Israel's corresponding territorial requirements, particularly in the strategically vital West Bank.

Jerusalem in International Diplomacy – Dore Gold analyzes the legal and historic rights of Israel in Jerusalem in *The Fight for Jerusalem: Radical Islam, the West, and the Future of the Holy City*. Veteran Israeli journalist Nadav Shragai documents nearly a century of Arab violence in "*The Al-Aksa is in Danger*" *Libel: The History of a Lie*.

Combating Delegitimization and BDS – A public diplomacy program exposing those forces that are questioning Israel's very legitimacy. Publications include *Israel's Rights as a Nation-State in International Diplomacy* (2011) and *Unmasking BDS: Radical Roots, Extremist Ends* (2016).

Global Law Forum – A program that undertakes studies and advances policy initiatives to protect Israel's legal rights in its conflict with the Palestinians and radical Islam.

Institute for Contemporary Affairs (ICA) – A program founded in 2002 jointly with the

Wechsler Family Foundation that presents Israel's case on current issues through high-level briefings by government and military leaders to the foreign diplomatic corps and foreign press.

Jerusalem Center Serial Publications:

Jerusalem Issue Brief – Insider briefings by top-level Israeli government officials, military experts, and academics, as part of the Center's Institute for Contemporary Affairs.

Daily Alert – A daily digest of hyperlinked news and commentary on Israel and the Middle East from the world and Israeli press since 2002.

Jewish Political Studies Review – A scholarly journal founded in 1989.

Jerusalem Center Websites:

jcpa.org (English)

jcpa.org.il (Hebrew)

jcpa-lecape.org (French)

jer-zentrum.org (German)

facebook.com/jerusalemcenter

twitter.com/JerusalemCenter

youtube.com/TheJerusalemCenter

twitter.com/JCPA_Hebrew

President: Amb. Dore Gold

Director General: Chaya Herskovic

Chairman of the Steering Committee: Prof. Arthur Eidelman

Steering Committee:

Maj. Gen. (ret.) Uzi Dayan

Prof. Rela Geffen

Zvi R. Marom

Prof. Shmuel Sandler

Howard M. Weisband



Most member states of the United Nations still refuse to recognize Jerusalem as the united capital of Israel, even though more than 50 years have passed since the city's unification in 1967.

The United Nations and its member states do not recognize the legality of Israeli sovereignty over Jerusalem for political and religious reasons. They drape their opposition in claims of Israel's disregard for international law. They claim that Israel's capture of Jerusalem during a war, when it was taken from Jordan by force, is a violation of the international law forbidding annexation of foreign territory. For that reason they insist that Israel's rule over Jerusalem is illegal.

This monograph, however, shows that Israel has valid legal status in Jerusalem. Israel gained control of both parts of the city after Jordan and other Arab states declared war upon it in May 1948 and in June 1967 respectively. In doing so, Israel exercised its right to self-defense, which international law recognizes as a legitimate reason for using military force. Moreover, apart from Pakistan, not a single country in the world (including any of the Arab states) recognized the legality of Jordan's sovereignty over east Jerusalem.

In fact, this rationale led to the recent dramatic developments in the attitude of other countries regarding Jerusalem's status. In April 2017, Russia recognized west Jerusalem as the capital of Israel and east Jerusalem as the capital of a future Palestinian state. In December 2017, the United States recognized Jerusalem as Israel's capital. In February 2018, the United States announced that its embassy would be transferred from Tel Aviv to Jerusalem in May 2018. Subsequently, other countries are either taking similar steps, or considering doing so.



ISBN 978-965-218-140-4



9 789652 181404 >

U.S. Policy on Israel Held Hostage by Threats and Outdated Arguments

Prepared written testimony of:

Prof. Eugene Kontorovich
Northwestern University School of Law;
Kohelet Policy Forum



U.S. House of Representatives Committee on Oversight &
Government Reform, National Security Subcommittee hearing:

“Moving the American Embassy to Jerusalem: Challenges and Opportunities”

November 8, 2017

Chairman DeSantis, Ranking Member Lynch, and honorable members of the Subcommittee, I am honored to be invited to testify before you today about implementing the Jerusalem Embassy Act, which will take full effect on Dec. 2, absent a presidential waiver issued prior to that date. I am a professor at Northwestern University Pritzker School of Law, where I teach constitutional and international law. I am also the head of the international law department at the Kohelet Policy Forum, a Jerusalem think-tank. I have written dozens of scholarly articles on various aspects of U.S. foreign relations law and the Arab-Israeli conflict, which have been published in leading law reviews and peer-reviewed journals. My scholarship has been frequently cited in leading foreign relations cases in federal courts, and I have testified repeatedly before Congress, as well as the European Parliament. I also co-wrote an amicus brief to the Supreme Court in *Zivotofsky v. Kerry*, the Jerusalem passport case.

My testimony today will explain the reasons behind the U.S. embassy's current location, and explain the structure of the Embassy Act. It will show that the Embassy's location outside of Jerusalem undermines U.S. foreign policy and helps isolate Israel. It will then consider the oft-repeated national security arguments in favor of delaying the Act's implementation. These arguments have not aged well since they were first rehearsed upon the law's passage 22 years ago. Moreover, they reward threats of violence, and allow U.S. policy to be held hostage by terrorists and aspiring terrorists.

1. What a waiver really means

I will begin by discussing the structure of the Jerusalem Embassy Act, and how it operates. Jerusalem is the only world capital whose status is denied recognition by the United States. To remedy that, in 1995 Congress passed the Jerusalem Embassy Act, which mandates moving the U.S. Embassy to a "unified" Jerusalem. The implementation of the law has been held in abeyance due to semiannual presidential waivers for "national security" reasons.

Crucially, the law already requires the embassy to Israel to be moved to that country's capital, Jerusalem. It is important to stress that the waiver available to the president under the Jerusalem Embassy Act of 1995¹ does *not* waive the obligation to move the embassy. That policy has been fully adopted by Congress in the Act (sec. 3(a)(3)) and is not waivable.

Congress, having total power over the spending of taxpayer dollars, does not have to pay for an embassy in Tel Aviv, regardless of the Executive branch's foreign policy preferences. Thus, the Act's enforcement mechanism is to suspend half of the appropriated funds for the State Department's "Acquisition and Maintenance of

¹ Jerusalem Embassy Act of 1995, Pub.L. 104-45, Nov 8, 1995, 109 Stat. 398.

Buildings Abroad” until the law’s terms are complied with. The waiver provision simply allows the president to waive the financial penalty for renewable six-month periods. The waiver does not change the underlying substantive obligation of having the embassy in Jerusalem as a condition for ongoing State Department funding.

Moreover, the law says nothing about “moving” the embassy. Rather, the requirement is to “officially open” an embassy, which can be done with a mere declaration upgrading the status of one of the existing consular facilities in the city. It does not require the physical relocation of the facility in Tel Aviv or any of its functions.

Under the structure of the Act, once a six-month waiver expires, the full force of the Act’s funding provisions take effect beginning the subsequent fiscal year (sec. 3(b)). Once a waiver period expires without a waiver being issued, no further waivers are possible. It is important to stress that literally nothing need be done to implement the Act – the president must simply refrain from signing a waiver. Such an action need not be interpreted as any kind of statement about or change in U.S. policy, a fact that gives the Executive significant diplomatic cover. That is because U.S. policy is already established by the Act. And that law does not allow for any waiver based on foreign policy concerns. Any arguments for further waivers based on concerns about the (apparently moribund) Israeli-Palestinian peace process, the reactions of Arab states, and similar concerns are entirely illegitimate and cannot be considered. The Act only allows the president to issue a waiver when it is “necessary” to protect national security.

2. What the Embassy’s Status Means

It is important to understand the reasons for the Embassy’s current location outside Jerusalem, and its implications for U.S foreign policy. The current situation results in an American foreign policy stance that is both dangerous to Israel, discrediting to the U.S., and fundamentally incoherent. The U.S. embassy was never established in Jerusalem, because the U.S., upon Israel’s creation, refused to recognize any part of the city as under Israeli sovereignty. This policy was originally due to the United Nations General Assembly’s 1947 proposal, in Resolution 181, to partition Mandatory Palestine into three non-continuous Jewish sectors and four non-contiguous Arab sectors, each of which would become a separate country. In this arrangement, the greater Jerusalem area would be a “corpus separatum,” an internationalized city under no sovereignty. The General Assembly’s proposal had no legal force and was unworkable, and in any case completely rejected by the Arab states, who opposed a Jewish state within any borders. Thus, the proposed treatment of Jerusalem by Res. 181 should have been absolutely irrelevant in 1948, and it is nothing but a historical footnote today.²

² Abraham Bell & Eugene Kontorovich, *Palestine, Uti Possidetis Juris, and the Borders of Israel*, 58 Ariz. L. Rev. 633, 677-78 (2016).

In no other respect does the U.S. give any deference to Res. 181's proposed borders – it does not doubt Israeli sovereignty over the Tel Aviv neighborhood of Jaffa although it would have fallen under Arab sovereignty under the proposed partition plan. Even more absurdly, the deference to Jerusalem's *corpus separatum* status only operates against Israel. The borders of the proposed international city exceeded those of the city today, and in particular included significant parts of Bethlehem, so as to incorporate Christian holy sites. Yet the U.S. treats Bethlehem as part of the territory administered by the Palestinian Authority, instead of treating it as a sui generis entity as it does the Israeli-controlled parts of the *corpus separatum*. The insistence on maintaining the policy legacy of a hypothetical *corpus separatum* when it comes to Israel but not the Palestinians locks in a deeply anti-Israel bias in America's regional diplomacy. The refusal to locate the embassy in Jerusalem is both anachronistic and incoherent.

What is worse, by giving deference to pre-1948 border proposals, the Embassy's current location casts a permanent question mark on the U.S.'s acceptance of the State of Israel. It suggests – contrary to U.S. policy - that Israel's legitimate borders are somehow related to those proposed by U.N. G.A. Res. 181.

All this does concrete harm. By refusing to even give force to Israel's sovereignty within the 1949 Armistice lines, any U.S. brokering of a peace process loses all credibility. Moreover, this encourages Arab maximalism by implying that Israel is a uniquely probationary state, and suggesting they have some say in territory that was never under Arab control. The current arrangement requires the maintenance of a silly charade where U.S. officials must commute through the country's most difficult traffic to interact with the Israeli government, while being meticulously careful to not mention what country that government sits in. All this is deeply discrediting to U.S. diplomacy. America can hardly reassure Israel about its security concerns in any peace deal when it allows itself to be held hostage by threats of violence. Finally, it must be noted that the U.S. failure to implement the Embassy Act has done absolutely nothing to moderate the Palestinians' resistance to a negotiated diplomatic solution.

3. National security waiver and discredited predictions

The central argument against moving the embassy is that it would lead to violence, and in particular to attacks against American targets. As explained above, these are the only permissible arguments for waiver under the Act. But the basis of those warnings has been undermined by the massive changes in the region since 1995. In 1995, the Middle East was controlled by stable Arab autocracies that sought to suppress anti-U.S. actions, while at the same time being highly critical of U.S. support for Israel. Today, the Sunni Arab

states have found common cause with Israel and the U.S., and the specter of jihadist violence is no longer a threat, but a reality.

While the Palestinian issue was once at the forefront of Arab politics, today Israel's neighbors are preoccupied with a nuclear Iran and radical Islamic groups. For the Sunni Arab states, the Trump administration's harder line against Iran is far more important than Jerusalem. Indeed, with Saudi Arabia now under direct attack by Iranian-backed Shiite forces, the Sunni states have every reason to suppress any anti-American efforts. To be sure, implementation of the law could in principle serve as a pretext for attacks by groups like ISIS and al Qaeda. But these groups have already declared war against the U.S., and are fully motivated to carry out attacks to the extent of their capacity. The despicable attack on the U.S. consulate in Benghazi and the silly pretexts offered for it, serve as a powerful reminder of this point. While any attacks carried out after a waiver is not issued may be "dedicated" to the issue, this does not mean the expiration of a waiver will increase the capacity or determination of America's enemies. The U.S. cannot be threatened by what is already happening.

Invoking hypothetical threats as a reason for distorting U.S. foreign policy towards a key ally is itself deeply inconsistent with U.S. foreign policy and basic prudence. U.S. embassies in the Middle East routinely face concrete and specific threats.³ Indeed, in 1998, Islamic terrorists blew up the U.S. embassies in Dar El Salaam, Tanzania, and Nairobi, Kenya. These attacks were said to be a response to various aspects of U.S. foreign policy.⁴ But America did not respond by rethinking those policies, or by withdrawing its embassies from those cities. Instead, the Executive undertook to hunt down and punish the perpetrators, while Congress appropriated extraordinary amounts for improved security at diplomatic facilities around the world.⁵

Arguing that the U.S. not carry out its policy with regards to its closest ally in the Middle East amounts to an argument for treating Israel differently, and thus implicitly validates those who deny Israel's full status among the nations of the world.

Indeed, recent events have shown how hollow threats of retaliation in the wake of changing policies on Jerusalem are. In April of this year, Russia suddenly announced that it recognized Jerusalem as the capital of Israel.⁶ This made Russia the first and only country in the world to recognize Jerusalem as Israeli in any way – a major development.

³ For one of many examples, see Michael Edison Hayden, *US Embassy in Egypt warns of 'potential threat' from terrorist organization*, ABC News, (May 24, 2017), available at.

⁴ Lawrence Wright, *The Looming Tower: Al Qaeda and the Road to 9/11*. (New York: Knopf 2016).

⁵ Susan Epstein, *Diplomatic and Embassy Security Funding Before and After the Benghazi Attacks*, Congressional Research Service Report (Sept. 10, 2014) State Department Fact Sheet, *Funding for Embassy Security* (Aug. 4, 1999), available at https://1997-2001.state.gov/regions/africa/fs_anniv_funding.html.

⁶ Russian Foreign Ministry, *Statement regarding Palestinian-Israeli settlement* (April 6, 2017), available at http://www.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/2717182.

It was an extraordinary change in policy for the Kremlin, which had always been a steadfast backer of the Palestinians.

Prior to Moscow's recognition announcement, experts would have predicted that such a unilateral recognition would provoke anger and violence from at least the Palestinians. Note what happened next: No explosions of anger at the Arab world. No end to Russia's diplomatic role in the Middle East. No terror attacks against Russian targets. Indeed, Moscow's dramatic Jerusalem reversal has largely been ignored by the foreign-policy establishment because it disproves their predictions of mayhem.⁷

Once the President fails to issue a waiver, the Palestinian Authority would have every incentive to downplay the significance of the move – as they did with Moscow's recognition – because to do otherwise would be to concede a fundamental diplomatic defeat. The Abbas government is unlikely to want to do that.

4. Conclusion

It is not surprising that the Palestinian Authority threatens dire consequences if the U.S. moves its Israeli embassy. It has found that such threats work. This means that waiving the Act based on such threats in fact invites further threats: the waiver creates its own predicate. The national security arguments for waiver in effect allow U.S. foreign policy to be taken hostage by terrorists, or anyone willing to make threats. America's stance on such an important issue cannot be dictated by terror. Instead, the U.S. should make clear that if the PA allows any action against Israel or the U.S. in response to a non-waiver, the U.S. will close PA offices in Washington.

Finally, I would recommend that the U.S. Embassy ultimately be moved to the site of the current U.S. Consulate in the Arnon Hanetziv neighborhood. Only this can give full effect to Congress's policy of moving the Embassy in a "unified" Jerusalem. This location is in what was a demilitarized zone under the 1949 Armistice Lines. The Palestinian claim to those areas of Mandatory Palestine conquered in an aggressive war by Jordan and Egypt do not apply to this area. However, it would signal that the U.S. does not regard these Armistice lines as creating no-go zones for Jews or Israelis.

Moving the Embassy to this location could catalyze the peace process by showing the Palestinians that there is a cost to their repeated refusal of Israel's offers of statehood, which the U.S. has supported. The Palestinians have been offered an independent state in the peace negotiations in 2000 and 2001, and Netanyahu was reportedly prepared to make far-reaching concessions in 2014. Each time, the Palestinians said no. Never has there

⁷ Eugene Kontorovich, *Russia Recognizes Jerusalem as Israel's Capital. Why Can't the U.S.?* (May 14, 2017).

been a national independence movement that has refused an independence offer on the grounds that it does not include all the territory the movement seeks. Imagine if the United States refused to accept peace with Britain because it did not give the newly independent colonies the northern border they sought. Yet the Palestinian rejection of successive proposals carries no negative consequences for them — it just raises the expectations from Israel in the next round.

One of the main reasons for the failure to reach a peace deal is the unspoken assumption that protracted and repeated Palestinian rejectionism costs them nothing diplomatically, while creating constraints for Israel. Moving the Embassy to Jerusalem, and in particular to the current major consular facility, would break this deadlock and open the doors to progress.

Thank you for giving me the opportunity to address these issues, and I welcome your questions.

Professor Eugene Kontorovich – career highlights

Prof. Eugene Kontorovich is a professor of international and constitutional law and Northwestern University's Pritzker School of Law. His prolific scholarship has been published in leading academic journals, and cited by federal and foreign courts in important international and foreign relations law cases.

He is widely recognized as a primary authority of legal and diplomatic issues related to the Israel-Arab conflict. His analysis about the legality of Israel's presence in Judea and Samaria have revolutionized discussions of this issue. He has been described by Haaretz as "a one-man legal lawfare brain trust" as well as "one of the cagiest commentators" on Israel.

Prof. Kontorovich is also a prominent constitutional law scholar, particularly in the field of U.S. foreign relations law. His writings have played an important role in developing the constitutional and intellectual case against excessive U.S. involvement in international legal institutions. His frequent commentary has provided some of the basic intellectual support for a range of current issues ranging from the case against early voting to the illegality of the Iran deal.

He has been deeply engaged in numerous public policy initiatives. Most recently, Prof. Kontorovich is the policy mastermind of the wave of state laws opposing boycotts of Israel, which have been adopted in 14 states in the past 18 months. He wrote a Supreme Court amicus brief in the Jerusalem passport case. He is regularly called on to advise legislators and cabinet members in the U.S., Israel, and Europe on questions pertaining international law.

Prof. Kontorovich's is a regular contributor to the *Washington Post's* Volokh Conspiracy blog, and his essays and op-eds have appeared in the *New York Times*, *Wall Street Journal*, *Los Angeles Times*, *USA Today*, *POLITICO*, and many other leading publications. He is regularly sought out for legal commentary by the nation's major news organizations.

He attended college and law school at the University of Chicago, and later taught there. He clerked for Judge Richard Posner on the United States Court of Appeals for the Seventh Circuit. In a previous career, he was a newspaperman at *Wall Street Journal*, and *New York Post*. He has been honored with a fellowship at the Institute for Advanced Study in Princeton, in 2011-12, and with the Federalist Society's prestigious Bator Award, given annually to a young scholar (under 40), for outstanding scholarship and teaching.

Committee on Oversight and Government Reform
Witness Disclosure Requirement — “Truth in Testimony”

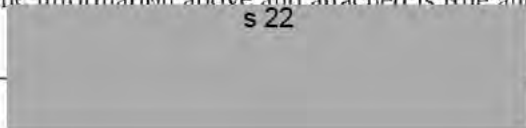
Pursuant to House Rule XI, clause 2(g)(5) and Committee Rule 16(a), non-governmental witnesses are required to provide the Committee with the information requested below in advance of testifying before the Committee. You may attach additional sheets if you need more space.

Name: **Eugene Kontorovich**

1. Please list any entity you are representing in your testimony before the Committee and briefly describe your relationship with each entity.					
Name of Entity	Your relationship with the entity				
Kohelet Policy Forum	head of the international law department				
2. Please list any federal grants or contracts (including subgrants or subcontracts) you or the entity or entities listed above have received since January 1, 2015, that are related to the subject of the hearing.					
Recipient of the grant or contact (you or entity above)	Grant or Contract Name	Agency	Program	Source	Amount
3. Please list any payments or contracts (including subcontracts) you or the entity or entities listed above have received since January 1, 2015 from a foreign government, that are related to the subject of the hearing.					
Recipient of the grant or contact (you or entity above)	Grant or Contract Name	Agency	Program	Source	Amount

I certify that the information above and attached is true and correct to the best of my knowledge.

Signature _____



Date: **Nov. 6, 2017**

Page **1** of **1**

From: [Peter Wertheim](#)
To: [Peter Wertheim](#)
Subject: Australian PM's announcement re Jerusalem
Date: Saturday, 15 December 2018 9:23:18 PM
Attachments: [ECAJ - Media Statement - Australian recognition of Jerusalem as Israel's capital 15.12.2018.pdf](#)
Importance: High

Please find Media statement attached.

Kind regards

Peter

Peter Wertheim AM | co-Chief Executive Officer

phone: 02 8353 8500 | m: 0408 160 904 | fax 02 9361 5888

e: pwertheim@ecaj.org.au | www.ecaj.org.au



**Executive Council of
Australian Jewry**



Executive Council
of Australian Jewry Inc.

STATEMENT

15 December 2018

Australia recognises that Jerusalem is the capital of Israel

The Executive Council of Australian Jewry (ECAJ), the peak representative body of the Australian Jewish community, has welcomed the Australian government's ground-breaking announcement that "Australia now recognises West Jerusalem, as the seat of the Knesset and many of the institutions of government, is the capital of Israel." Prime Minister Scott Morrison made the announcement at a speech at the Sydney Institute today.

In a joint statement made by ECAJ President Anton Block and CEOs, Peter Wertheim and Alex Ryvchin, the ECAJ praised the announcement as "a simple acknowledgement of a reality that has existed since 1950. The Prime Minister deserves credit for resisting pressure from many quarters against taking even this modest step".

"Recognising that Israel's seat of government is located in the western part of the city, which is incontestably sovereign Israeli territory, does not in any way impact upon or pre-judge the future status of the contested eastern and other parts of the city captured by Israel in 1967", they said.

"The Prime Minister noted that Jerusalem's ultimate status, including its borders and boundaries, is a final status issue to be resolved between the parties", they added. "This is a pointed rejection of the Palestinians' demand that their claim to the whole of eastern Jerusalem must be accepted up front, as was the Prime Minister's statement that Australia expects the capital of a future Palestinian state to be located 'in' east Jerusalem. This leaves open the possibility that the predominantly Jewish neighbourhoods located in east Jerusalem can become a part of Israel in any negotiated settlement".

"Australia is a respected regional power which has good relations with both Israel and the Palestinians", the ECAJ spokespeople said. "The Australian government's announcement sends a message to Palestinian leaders that their unilateralist approach, seeking to prise concessions out of Israel without any quid pro quo, through the UN and its agencies and via the BDS campaign, is rejected by reasonable people, and has had the opposite results to those the Palestinians had intended. It's a failed strategy, and the Palestinians need to return to the negotiating table. There is no other way to achieve a

Palestinian State that will be viable, and a just and lasting peace based on the principle of two States for two peoples”.

The ECAJ noted that the Australian government will delay moving its embassy from Tel Aviv to Jerusalem until the final status of the city is determined under a peace agreement, and that in the interim Australia will establish a defence and trade office in Jerusalem.

“We hope that this will be a first step only”, the ECAJ spokespeople said. ““We look forward to Australia moving its embassy in Israel to the government precinct in the western part of Jerusalem in due course. Moving Australia’s embassy there would be no more pre-emptive of the outcome of peace negotiations than recognising it as Israel’s capital”.

The ECAJ also welcomed the Prime Minister’s criticism of the “biased and unfair targeting of Israel” in the UN General Assembly, which he described as “deeply unhelpful to efforts to build peace and stability”, and his observation that “the UN General Assembly is now the place where Israel is bullied and where antisemitism is cloaked in language about human rights.”

The ECAJ spokespeople stated: “Nothing is more corrosive of the international rules-based order than this kind of bias and implicit racism within the UN’s culture. The Prime Minister’s criticisms of the UN are well-founded, and Australia’s recent rejection of biased resolutions against Israel is to be applauded”.

The ECAJ agreed with the Prime Minister’s observation that the Iran nuclear deal was not designed to address Iran’s destabilising activities in the Middle East region and beyond, its sponsorship of terrorism or its proliferation of ballistic missiles. “These are precisely the reasons why the deal should be reviewed, not affirmed”, the ECAJ spokespeople said. “We hope that the Australian government will come to the same conclusion in time, but in the meantime we appreciate the measures taken by the government to constrain the Iranian regime’s aggressive and destabilising actions”.

Contact:

Peter Wertheim AM | co-CEO

phone: 02 8353 8500 | m: 0408 160 904 | fax 02 9361 5888

e: pwertheim@ecaj.org.au | www.ecaj.org.au



הפדרציה הציונית באוסטרליה
ZIONISTFEDERATION
 of Australia

306 Hawthorn Road
 Caulfield South, VIC 3162
 +613 9272 5644
 zfa@zfa.com.au
 www.zfa.com.au

3/146 Darlinghurst Road
 Darlinghurst, NSW 2010
 +612 9360 9938
 zfa@zfa.com.au
 www.zfa.com.au

19 November 2018

The Hon Scott Morrison MP
 Prime Minister
 Parliament House
 CANBERRA ACT 2600

Dear Prime Minister,

I have recently been elected President of the Zionist Federation of Australia, which is the roof body of all Zionist organisations throughout Australia.

I am delighted that my first act as President is to write to you in reference to two issues on which you have demonstrated principled conviction:- the location of Australia's Embassy in Israel^{s 22}

The Zionist Federation of Australia welcomes your recent announcement to review both of these foreign policy decisions and on behalf of the Jewish community in Australia, I thank you for your moral clarity in relation to both of these issues.

As you will appreciate, Jerusalem is and always has been the beating heart of the Jewish people; it has been the capital of the Jewish nation for over 3,000 years. West Jerusalem already functions as Israel's capital as it is home to Israel's Knesset, Supreme Court, government agencies and the President's and Prime Minister's Residences.

As a sovereign nation, Israel has the right to determine its own capital. Israel has determined Jerusalem to be that capital and a decision to relocate the Australian Embassy there will reflect what already exists in reality.

Next year, Australia and Israel will be celebrating 70 years of close diplomatic relations. However, as you have said on previous occasions, this relationship is underpinned by a shared commitment to the values of democracy, religious freedom and the rule of law. Officially recognising Jerusalem as Israel's capital would reaffirm your Government's already strong commitment to the State of Israel and its sovereignty.

s 22

Representing the Zionist Aims of Australian Jewry

President Jeremy Leibler • Chief Executive Officer GINETTE SEARLE • Israel Office Director YIGAL SELA •

Constituent Organisations State Zionist Councils of: ACT • New South Wales • Queensland • South Australia • Victoria • Western Australia

Affiliated Organisations: Amelnu • ARZA • Australian Forum of Russian Jewry • Australasian Union of Jewish Students • Australian Zionist Youth Council • Friends of Likud • Jewish National Fund Australia • Maccabi Australia • Mercaz Masorti Australasia • Mizrahi Organisation • National Council of Jewish Women Australia • Union for Progressive Judaism • United Israel Appeal Australia • Women's International Zionist Organisation • Youth Aliyah Australia •

Today, I have circulated to your parliamentary colleagues materials on behalf of the Zionist Federation to make the case for relocating Australia's Embassy. This infographic fact sheet is attached here for your information.

I would welcome the opportunity to meet with you and your colleagues to discuss this matter further.

Kind Regards,

s 22

A large rectangular area of the document has been redacted with a solid grey block, obscuring the signature and any handwritten notes.

Jeremy Leibler
PRESIDENT



PRIME MINISTER

Reference: MC18-145630

11 JAN 2019

Mr Jeremy Leibler
 President
 Zionist Federation of Australia
 306 Hawthorn Road
 CAULFIELD SOUTH VIC 3162

Dear Mr Leibler

Thank you for your letter dated 19 November 2018 regarding the Government's review of
 Australia's policies with respect to Israel s 22
 s 22

Australia has always been one of Israel's greatest friends and I intend for that to remain the case. Our national interests are well served by our productive and increasingly diverse bilateral relationship. This is underpinned by shared values, including a commitment to democracy and the rule of law.

Australia also has a deep interest in seeing the emergence of a successful two-state solution. Australia wants to see Israel succeed as a liberal participatory democracy in the Middle East, and the Government regards it as imperative that Australia continues to strongly support its right to exist within secure and internationally recognised borders.

In this context, I was proud to announce on 15 December 2018 that Australia now recognises West Jerusalem, being the seat of the Knesset and many of the institutions of government, is the capital of Israel. We look forward to moving our Embassy to West Jerusalem when practical, in support of, and after final status determination. The Australian Government will also establish a Trade and Defence Office in West Jerusalem. With deepening defence industry ties and Australia-Israel trade now running at over \$1.3 billion per year, this will help continue to build our strong bilateral relationship.

s 22

I thank you for the strong contribution you made to the Government's review of Australia's position with respect to Jerusalem, and I congratulate you on your recent appointment as President of the Zionist Federation of Australia.

Yours sincerely

s 22



SCOTT MORRISON



**SUBMISSION REGARDING THE PROPOSED RECOGNITION OF WEST JERUSALEM
AS ISRAEL'S CAPITAL AND MOVING THE AUSTRALIAN EMBASSY FROM TEL
AVIV TO WEST JERUSALEM**

Jeremy Leibler

President, Zionist Federation of Australia

- 1 On 5 December 2018, President of the Zionist Federation of Australia (ZFA) – Jeremy Leibler – met with Secretary Adamson, s 22 and s 22 from the Department of Foreign Affairs and Trade (DFAT). The ZFA is the elected roof body of the Jewish Community representing a diverse group of Jewish organisations throughout Australia on issues relating to Israel and Australia's relationship with Israel.
- 2 The consultation was in relation to the Prime Minister's announcement that the Government was willing to explore formally recognising West Jerusalem as the capital of Israel and moving the Australian embassy in Israel to West Jerusalem.
- 3 The ZFA welcomes the opportunity to make a formal written submission to the Australian Government on this important matter.
- 4 Although the Jewish community is not monolithic, the overwhelming majority of the Jewish community support both the Australian Government's recognition of Jerusalem as the capital of Israel and moving the Australian embassy from Tel Aviv. This is due to the following:
 - (a) Moving the embassy from Tel Aviv to West Jerusalem does not preclude or in any way prejudice a two state solution or resumption of the peace process. Nor does it preclude the Australian Government recognising East Jerusalem as the capital of a future Palestinian state in the context of a future peace agreement, should the Palestinians return to the negotiating table in good faith. Moving the embassy does not jeopardise this possibility.
 - (b) West Jerusalem is the sovereign territory of the State of Israel. This has never been disputed since the Establishment of the State of Israel in 1948.
 - (i) The Australian Government already recognises West Jerusalem as sovereign Israeli territory. It is home to the Israeli Supreme Court, Knesset, government agencies, residences of the Prime Minister and President, and is where Australian diplomats present their credentials.
 - (ii) Anyone who suggests that West Jerusalem is disputed territory does not recognise Israel's 1948 borders and therefore Israel's right to exist.
 - (c) Presently, more than 100 countries worldwide are involved in territorial disputes, some involving occupations and capitals. Of these countries, Israel is the *only* country whose chosen capital is not accepted by the overwhelming majority of the international community. Australia should treat Israel as it would any of the more than

Representing the Zionist Aims of Australian Jewry

President Mr Jeremy Leibler • Executive Director Mrs Ginette Searle • Israel Office Director Mr Yigal Sela •

Constituent Organisations State Zionist Councils of: ACT • New South Wales • Queensland • South Australia • Victoria • Western Australia

Affiliated Organisations: Ameinu • ARZA • Australian Forum of Russian Jewry • Australasian Union of Jewish Students • Australian Zionist Youth Council • Friends of Ukud • Jewish National Fund Australia • Maocabi Australia • Mercat Masorti Australasia • Mizrahi Organisation • National Council of Jewish Women Australia • Union for Progressive Judaism • United Israel Appeal Australia • Women's International Zionist Organisation • Youth Aliyah Australia •

100 other countries. This includes officially recognising the capital city Israel has chosen for itself –Jerusalem – and moving its embassy there. Should the Australian Government fail to do either of these actions, it would be applying different standards to Israel alone.

5 Moving the embassy to West Jerusalem will not compromise Australia's position as an honest broker in resolving the Israel-Palestinian conflict. Australia will not appear as though it is taking sides.

- (a) While President Trump's peace plan is yet to be released, it is likely that it will require both Israel and the Palestinians to make difficult compromises. Since the US has formally recognised Jerusalem as Israel's capital, the Israeli government appreciates that it would be difficult to resist any proposed compromises, even if they present internal political challenges. Should Australia also recognise Jerusalem as Israel's capital and move its embassy there, it could also play a credible role in encouraging both sides to make compromises.
- (b) One of the major obstacles to peace is the persistent Palestinian refusal to recognise Israel's right to exist as Jewish State and its continued denial of a Jewish connection to Jerusalem and the Land of Israel.
 - (i) The Jewish people have a 3,000-year-old historic connection to Israel; Jerusalem has only ever been the capital of the Jewish state.
 - (ii) By recognising Jerusalem as Israel's capital, the Australian Government can inject a sense of reality to the conflict by forcing the Palestinians to come to terms with this reality. Peace will not be achieved while Palestinians are rewarded for denying historical facts and their false narratives are encouraged.
- (c) By moving the Australian embassy to West Jerusalem and leaving open the possibility to do the same for a Palestinian capital in East Jerusalem within the framework of a negotiated peace agreement, Australia is treating both parties equally.

6 Moving the embassy to West Jerusalem is consistent with Australia's national interest.

- (a) The Australian government recently demonstrated moral clarity and courage by voting against 6 biased and anti-Israel resolutions in the United Nations. These motions were one-sided as they only recognised the Palestinian connection to Jerusalem without acknowledging the 3000 year connection of the Jewish people to Jerusalem. Recognising Jerusalem as Israel's sovereign capital and moving the embassy there is consistent with the foreign policy decision to treat both parties equally.
- (b) The US, Australia's largest and most important ally, has moved its embassy to Jerusalem as have some other countries. A decision to relocate the Embassy is consistent with the foreign policy position of our strongest ally.
- (c) There have been no material adverse ramifications to the US or the Trump administration due to the embassy move. Although some Arab countries, like Saudi Arabia, threatened adverse actions to the US, these threats proved to be hollow. These countries have a record of fuelling rhetoric about the Israel-Palestinian conflict

to mainly control their own internal political unrest and will ultimately act in their own best interests. It is likely that a similar approach can be expected from Malaysia and Indonesia. In fact, it has recently been reported that people were paid \$3.50 an hour to attend a rally outside the Australian embassy in Indonesia. This suggests that Indonesia is unlikely to act on its threats, should Australia move its embassy.

- (d) Australia's foreign policy on Israel should not be dictated by Malaysia or Indonesia, neither of which recognise Israel nor have any diplomatic relations with Israel.
 - (e) Israel is an important ally in the Middle East. Israel is the only liberal democracy in the region and Australia and Israel enjoy strong and mutually beneficial economic and defence cooperation.
- 7 Australia played a leading role in recognising the State of Israel in 1948. By formally recognising West Jerusalem as Israel's capital and moving its embassy there, Australia can continue this important role and continue to act as an effective middle power in the international, diplomatic arena.
- 8 The Australian Jewish Community overwhelmingly supports both the Australian Government's recognition of Jerusalem as the capital of Israel and moving the Australian embassy from Tel Aviv. To the extent that there are practical or logistical considerations that could delay full implementation of this proposal, we are of the strong view that any announcement should at a minimum be more than a mere symbolic recognition of West Jerusalem as the capital of Israel.

For further information, please contact:

Jeremy Leibler, President, Zionist Federation of Australia

(w) +61 3 9229 9744

(m) +61 417 382 387

(e) jleibler@abl.com.au