

Why U.S. Recognition of Jerusalem Could Be Contrary to International Law



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U.S. president Donald Trump's decision to recognize Jerusalem as the capital of Israel and to move the U.S. embassy to the city has been universally condemned, as it is contrary to a well-established rule of international law stipulating that states must not recognize the fruits of conquest. While the United States chose to exercise its right of veto in the UN Security Council to block a resolution criticizing the presidential decision, the remaining members of the council, including close U.S. allies, criticized it. Similarly, the UN General Assembly, the European Union, the Arab League, and the Organisation of Islamic Cooperation have all passed strongly worded resolutions saying that they would not recognize any changes to the pre-1967 borders, including in and around Jerusalem. This paper examines the legal standing of the U.S. decision in light of previous positions which the United States has historically adopted or endorsed.

WHEN PRESIDENT DONALD TRUMP ANNOUNCED his recognition of Jerusalem as the capital of Israel and his decision to move the U.S. embassy there, the move inflamed opinion throughout the Arab and Muslim world, divided Israel's friends, and set back prospects for peace in the Middle East. In addition, it could be contrary to international law, along with other statements that Trump subsequently made about the status of the city. Notably, these include a tweet in which the U.S. president said that he had taken Jerusalem "off the table," and a comment made before the cameras at the World Economic Forum in Davos, Switzerland, when he stated that it was not necessary to talk about Jerusalem with the Palestinians "anymore." Both these statements appear to imply that since the United States considers the entire city to be part of Israel, Jerusalem is no longer a subject of negotiation with the Palestinians.

According to international law, states are prohibited from recognizing the annexation of territory acquired by force. This fundamental tenet was expressed, in another context, by the UN General Assembly (UNGA) following Russia's annexation of the Crimea in 2014. In that case, the UNGA called "upon all States, international organizations and specialized agencies not to recognize any alteration of the status of the Autonomous Republic of Crimea and the city of Sevastopol . . . and to refrain from any action or dealing that might be interpreted as recognizing any such altered status."¹ The UNGA passed a similar resolution following Trump's decision to recognize Jerusalem.²

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Numerous UN Security Council (UNSC) and UNGA resolutions adopted in the 1960s, 1970s, and 1980s, including several UNSC resolutions on which the United States voted favorably, emphasize that Israel's annexation of East Jerusalem in June 1967 is contrary to international law. In the closing days of its term, the Obama administration abstained from UNSC Resolution 2234, adopted on 23 December 2016, which stated, *inter alia*, that the council would "not recognize any changes to the 4 June 1967 lines, including with regard to Jerusalem, other than those agreed by the parties through negotiations."³ Nothing has changed since then that would make Israel's annexation of the city lawful. The Palestinian leadership has not reached agreement with Israel regarding any changes to the 4 June 1967 lines.

To appreciate the extent to which Trump's statements and actions since his Jerusalem announcement were a departure from previous U.S. positions, and from international law, we must take a closer look at both the contents of the original announcement and what the U.S. president subsequently said.

President Trump's Statement Recognizing Jerusalem as Israel's Capital

On 6 December 2017, President Trump made the following statement:

Today, we finally acknowledge the obvious: that Jerusalem is Israel's capital. This is nothing more, or less, than a recognition of reality. It is also the right thing to do. It's something that has to be done.

That is why, consistent with the Jerusalem Embassy Act, I am also directing the State Department to begin preparation to move the American embassy from Tel Aviv to Jerusalem. This will immediately begin the process of hiring architects, engineers, and planners, so that a new embassy, when completed, will be a magnificent tribute to peace.

In making these announcements, I also want to make one point very clear: This decision is not intended, in any way, to reflect a departure from our strong commitment to facilitate a lasting peace agreement. We want an agreement that is a great deal for the Israelis and a great deal for the Palestinians. We are not taking a position on any final status issues, including the specific boundaries of the Israeli sovereignty in Jerusalem, or the resolution of contested borders. Those questions are up to the parties involved.

The U.S. remains deeply committed to helping facilitate a peace agreement that is acceptable to both sides. I intend to do everything in my power to help forge such an agreement. Without question, Jerusalem is one of the most sensitive issues in those talks. The U.S. would support a two-state solution if agreed to by both sides.

In the meantime, I call on all parties to maintain the status quo at Jerusalem's holy sites, including the Temple Mount, also known as Haram al-Sharif.⁴

Although Trump said the United States was not taking a position on any final status issues, including the specific boundaries of Israeli sovereignty in Jerusalem, he made no mention of the specific boundaries of Palestinian sovereignty, other than to say that he wanted an agreement that would be "a great deal for the Israelis and a great deal for the Palestinians."⁵ Further, during the press conference that followed the announcement, President Trump explained that the Jerusalem Embassy

Act, adopted by Congress in 1995, urged the federal government to relocate the U.S. embassy to Jerusalem and to recognize that city as Israel's capital.⁶ The measure, originally passed by an overwhelming bipartisan majority in Congress, was reaffirmed by a unanimous vote of the (Republican-dominated) Senate in July 2017.

Soon after recognizing Jerusalem as Israel's capital, President Trump signed the semiannual presidential waiver delaying the embassy move, as every U.S. president had done since the Jerusalem Embassy Act was passed.⁷ Trump signed the waiver, while supporting the embassy move, because otherwise the 50 percent of the funds appropriated to the Department of State for "Acquisition and Maintenance of Buildings Abroad" would be cut—as stipulated by the act.⁸ Vice President Michael Pence has since explained that the new U.S. embassy in Jerusalem would begin operating at the end of 2019.⁹ As at this writing, it was also reported that Ambassador David Friedman would start working out of an existing U.S. consular office located in the Arnona neighborhood¹⁰ in the demilitarized zone just beyond the 1967 Green Line.¹¹

The decision to recognize Jerusalem as Israel's capital has fulfilled Trump's election promise and satisfied his electoral base. Trump has also succeeded in cornering the Palestinians by reducing their options with a view to forcing them to compromise.¹² This strategy may be predicated on the belief that once the angry speeches have died down, and once a bit of time passes, negotiations can continue.¹³ This is what happened after President George W. Bush exchanged letters with Israel's then prime minister Ariel Sharon, in 2004, in which Bush stated that Israel could keep the major settlement blocs and that there would be no right of return to Israel for Palestinian refugees.¹⁴ However, the Trump move goes a step further. As the U.S. ambassador to Israel at the time of the Bush-Sharon correspondence explained in the *Washington Post*, the Bush commitment was predicated on there being an "an agreed outcome" during negotiations. Moreover, "the letter did not convey any U.S. support for or understanding of Israeli settlement activities . . . in the run-up to a peace agreement."¹⁵

Admittedly, Trump's 6 December 2017 statement was ambiguous, and was to some extent uncontroversial, since he said he was not taking a position on final status issues. Accordingly, some scholars, including the present author, had expected the U.S. president to follow up with something about Palestinian claims at a later stage,¹⁶ but Trump never availed himself of the opportunity: as at this writing, the U.S. administration has said nothing about Palestinian rights to the city. As explained below, Trump's statement that the United States was not taking a position on any final status issue or the resolution of contested borders was undermined by remarks he made subsequently.

Arab League, Organisation of Islamic Cooperation (OIC), and European Union Respond

All Arab and Muslim-majority states condemned President Trump's decision to recognize Jerusalem as the capital of Israel in the days that followed the announcement. This included the twenty-two-member Arab League and the fifty-seven-member OIC. The twenty-eight-member European Union also condemned the decision unequivocally.

The Arab League adopted a resolution in Cairo describing President Trump's statement as a serious breach of international law, in particular UNSC Resolutions 465, 476, 478, and 2334, as well as UNGA resolutions and the advisory opinion of the International Court of Justice on Israel's separation wall.¹⁷ Similarly, the OIC condemned "in the strongest terms" Trump's statement, which it described as "an attack on the historical, legal, natural and national rights of the Palestinian people," and it called on Trump to retract his recognition of Jerusalem as Israel's capital at an extraordinary summit in Istanbul.¹⁸

On 14 December 2017, the European Council reiterated its firm commitment to the two-state solution and, in this context, also reaffirmed the EU's position on Jerusalem¹⁹ as follows: "The EU considers that the peace negotiations should include the resolution of all issues surrounding the status of Jerusalem as the future capital of two states. The EU will recognize changes to the pre-1967 borders, including with regard to Jerusalem, only when agreed by the parties."²⁰

While none of these measures are binding per se, they reflect a general consensus on the part of a significant majority of the international community that the U.S. decision to recognize Jerusalem as Israel's capital is contrary to the well-established principle of international law stipulating that states must not recognize as lawful the acquisition of territory by the use of force.²¹ That fundamental principle has been confirmed by numerous international resolutions as far back as the League of Nations,²² as well as in more recent UN resolutions adopted by overwhelming majorities in both the General Assembly²³ and the Security Council.²⁴ That principle has also been confirmed as a rule of customary international law in decisions and opinions of the International Court of Justice (ICJ) that is binding upon all states.²⁵

Most states have not recognized Jerusalem as the capital of any state because the question of sovereignty remains disputed. As explained below, the UN had envisaged establishing an international trusteeship over the city at the time of the 1947 UN Partition Plan (*corpus separatum*), where sovereignty would remain in suspense. As no agreement was reached, the dispute has been allowed to fester, which has given the Israeli government an opportunity to create facts on the ground that favor its claim.

United States Vetoes Draft UNSC Resolution Condemning Trump Administration Decision

On 18 December 2017, Egypt submitted the following draft Security Council resolution (only operative paragraphs shown) on behalf of the Arab Group. In it, the Security Council

1. *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 must be rescinded in compliance with relevant resolutions of the Security Council, and in this regard, calls upon all States to refrain from the establishment of diplomatic missions in the Holy City of Jerusalem, pursuant to resolution 478 (1980) of the Security Council;
2. *Demands* that all States comply with Security Council resolutions regarding the Holy City of Jerusalem, and not to recognize any actions or measures contrary to those resolutions;

3. *Reiterates* its call for the reversal of the negative trends on the ground that are imperiling the two-State solution and for the intensification and acceleration of international and regional efforts and support aimed at achieving, without delay, a comprehensive, just and lasting peace in the Middle East on the basis of the relevant United Nations resolutions, the Madrid terms of reference, including the principle of land for peace, the Arab Peace Initiative and the Quartet Roadmap and an end to the Israeli occupation that began in 1967;
4. *Decides* to remain seized of the matter.²⁶

The draft resolution received fourteen votes in favor and one against. It was not adopted because of the negative vote of the United States, a permanent member with the right of veto. Bolivia, China, Egypt, Ethiopia, France, Italy, Japan, Kazakhstan, Russia, Senegal, Sweden, Ukraine, the United Kingdom, and Uruguay voted in favor of the draft resolution.²⁷ During the debate, all the members referred to previous UNSC resolutions on Jerusalem. In addition, Egypt,²⁸ Uruguay,²⁹ the United Kingdom,³⁰ and Senegal³¹ expressly referred to the UN Partition Plan, enshrined in UNGA Resolution 181 passed on 29 November 1947, which sought to establish a *corpus separatum* in Jerusalem.³²

The United Kingdom explained that it did not agree with the United States' decision to recognize Jerusalem. Accordingly, it voted in favor of the draft resolution as being "in line with previous Security Council resolutions, including 242 (1967), 476 (1980), 478 (1980) and 2234 (2016), and with our established position on the status of Jerusalem [. . .]." Furthermore, the British representative argued, "The status of Jerusalem should be determined through a negotiated settlement between Israelis and the Palestinians and should ultimately be the shared capital of the Israeli and Palestinian States. In line with those same resolutions, we regard East Jerusalem as part of the occupied Palestinian territories."³³ France stated that "in the absence of an agreement, and in accordance with the consensus that has prevailed for seventy years within the international community, France does not recognize any sovereignty over Jerusalem. Also, following the June 1967 conflict, we did not recognize the annexation of East Jerusalem, which is part of the occupied territories under international law."³⁴ The Russian Federation stated that Russia "remains committed to a resolution that provides for an independent State of Palestine, with East Jerusalem as its capital, living side by side in peace and security with Israel. And West Jerusalem will be the capital of Israel."³⁵ The People's Republic of China explained, "We support the establishment of a fully sovereign and independent State of Palestine, based on its 1967 borders and with East Jerusalem as its capital. That position of China will not change."³⁶

The United States, for its part, expressed the view that previous UNSC resolutions on Jerusalem, including Resolution 478 (1980), were not binding.³⁷ The U.S. ambassador to the UN, Nikki Haley, recalled that when that it was adopted, then-U.S. secretary of state Edmund Muskie had insisted that the resolution was "not binding" and "without force."³⁸ Haley explained that U.S. policy had therefore not changed. "The President took great care," she said, "not to prejudge final-status negotiations in any way, including the specific boundaries of Israeli sovereignty in Jerusalem, which remains a subject to be negotiated only by the parties. The position is fully in line with previous Security Council resolutions on this item. The President was also careful to state that we

support the status quo regarding Jerusalem's holy sites and that we support a two-State solution if that is what the parties agree to. Again, those positions are fully consistent with previous Security Council resolutions."³⁹ As I argue below, President Trump's subsequent statements undermine the argument advanced by Ambassador Haley that the U.S. position is fully in line with previous Security Council resolutions.

The UN General Assembly Adopts Virtually Identical Resolution, ES-10/19

On 19 December 2017, the tenth emergency special session of the UNGA was resumed at the request of Turkey (chair of the OIC), Yemen (chair of the Arab Group at the UN), and Venezuela (chair of the Movement of Non-Aligned Countries). The session adopted resolution ES-10/19, which was virtually identical to the draft UNSC resolution that had been vetoed by the United States.⁴⁰

During the debate on UNGA Resolution ES-10/19, Turkey,⁴¹ Venezuela,⁴² Indonesia,⁴³ Malaysia,⁴⁴ North Korea,⁴⁵ South Africa,⁴⁶ Estonia (on behalf of the EU),⁴⁷ Nicaragua,⁴⁸ and Mexico⁴⁹ all referred to UNSC Resolution 478 of 1980.⁵⁰ Additionally, reference was made by Turkey,⁵¹ Venezuela,⁵² and South Africa⁵³ to UNSC Resolution 476 (1980).⁵⁴ Many states also referenced UNSC Resolution 2334 (2016).⁵⁵ Syria made reference to UNGA Resolution 194 (III).⁵⁶ The Holy See also participated in the debate and made a statement.⁵⁷

Ambassador Haley attacked the UNGA as hostile to Israel and insisted that President Trump's decision to acknowledge Jerusalem as the capital of Israel was

made in accordance with U.S. law dating back to 1995, and its position has been repeatedly endorsed by the American people ever since. The decision does not prejudice any final-status issues, including Jerusalem's boundaries. The decision does not preclude a two-State solution, if the parties agree to that. The decision does nothing to harm peace efforts. Rather, the President's decision reflects the will of the American people and our right as a nation to choose the location of our embassy . . . America will put its embassy in Jerusalem. That is what the American people want us to do, and it is the right thing to do.⁵⁸

Haley's argument that the president's decision reflects the will of the American people and that the United States' right to choose the location of its embassy is in accordance with a U.S. law dating back to 1995 is addressed below.

Israel Amends Its Basic Law

On 2 January 2018, Israel's parliament, the Knesset, amended its Basic Law on Jerusalem, originally passed on 30 July 1980, which states that "Jerusalem, complete and united, is the capital of Israel."⁵⁹ It is important to note that the Basic Law describing Jerusalem as the capital of Israel was termed "null and void" by the Security Council in Resolution 478 of 1980.⁶⁰

According to Israeli law hitherto, a supermajority (eighty votes) was necessary for the Knesset to approve the transfer of areas within Jerusalem's municipality to a future country—such as Jordan or Palestine—but now this supermajority requirement can be amended by another “amending” Basic Law adopted with a simple majority of sixty-one votes.⁶¹ In other words, the new law makes it easier to transfer parts of Jerusalem to a future “state.”

It has been reported that Abu Dis, which lies outside the perimeter of the separation wall that Israel has constructed, and which itself is contrary to international law,⁶² might become the future capital of a Palestinian state (as opposed to East Jerusalem) were Israel to recognize such a state (by no means a foregone conclusion).⁶³ In exchange for “ceding” this territory, Israel would “absorb” the settlement blocs located around Jerusalem.⁶⁴

President Trump's Tweets and Davos Conversation with Netanyahu

The move to redraw Jerusalem's boundaries appears to have been coordinated with the Trump administration. On the same day the amendment was passed by the Knesset, President Trump published a series of tweets saying, “We have taken Jerusalem, the toughest part of the negotiation, off the table.”

It's not only Pakistan that we pay billions of dollars to for nothing, but also many other countries, and others. As an example, we pay the Palestinians HUNDRED OF MILLIONS OF DOLLARS a year and get no appreciation or respect. They don't even want to negotiate a long overdue . . .

. . . peace treaty with Israel. We have taken Jerusalem, the toughest part of the negotiation, off the table, but Israel, for that, would have had to pay more. But with the Palestinians no longer willing to talk peace, why should we make any of these massive future payments to them?⁶⁵

Three weeks later, during their televised meeting at the World Economic Forum in Davos on 25 January, Trump told Israeli prime minister Benjamin Netanyahu that he had “a great proposal for the Palestinians, it covers a lot of the things we discussed over the years.”⁶⁶ He added, “They never got past Jerusalem. We took it off the table. We don't have to talk about it anymore.” Trump then turned to Netanyahu and said, “You win one point, and you'll give up some points later in the negotiation, if it ever takes place. I don't know that it ever will take place.”⁶⁷

According to Husam Zomlot, Palestine's representative to the United States, President Trump never discussed Jerusalem with Palestinian Authority president Mahmoud Abbas.⁶⁸ Consequently, by recognizing Jerusalem as the capital of Israel and by taking Jerusalem “off the table” in negotiations with the Palestinians, Trump appears to be prejudging final status negotiations between Israel and the Palestinians. By doing so, the Trump administration's policy is contrary to the 1991 Letter of Assurances that the United States sent to the Palestinian delegation on the Terms of Reference for the Madrid Peace Conference.⁶⁹ It is also contrary to the 1993 Israeli-Palestinian Declaration of Principles and the 1995 Israeli-Palestinian Interim Agreement (also known as the Oslo Accords), which both state that the final settlement of Jerusalem is to be negotiated between the two sides.⁷⁰ Trump's recognition of Jerusalem is also contrary to the Arab Peace Initiative,⁷¹ the 2003 Roadmap to a Permanent

Two State Solution,⁷² UNSC Resolution 2234,⁷³ and the 15 January 2017 Conference for Peace in the Middle East that was organized by France and attended by the Obama administration in its closing days.⁷⁴

Why the Status of Jerusalem Remains Disputed

The status of Jerusalem has remained unresolved for over a century. Up until the British conquest of the city in November 1917, Ottoman sovereignty over Jerusalem was uncontested. The problem began when the League of Nations entrusted a mandate to the United Kingdom to administer Palestine, a new geopolitical entity that was carved out of the remnants of the Ottoman Empire, which included Jerusalem, and over which no agreement was reached.

Due to the presence of holy places in Jerusalem, Bethlehem, and Nazareth, Palestine was treated differently to all of the other mandates. In many respects, its status was unique because of the importance attached to it by the Allied powers that had defeated the Ottomans and claimed to have a special interest in the holy places. As a result of conflicting claims, the British government was unable to reach agreement with the League of Nations about how to handle these. A. J. Balfour, the UK foreign secretary at the time, envisaged establishing a League of Nations commission to look into the differing claims, but his proposal to confer chairmanship of the council on U.S. president Woodrow Wilson, a Protestant, met with virulent opposition from the Vatican, and from Brazil, France, Italy, Portugal, Spain, and Poland, some of which were members of the Council of the League of Nations in 1922.⁷⁵ In fact, the dispute led to a delay in the approval of the mandate until 1923, and only after the United Kingdom had agreed to certain conditions that were demanded of it by the Holy See in respect of the Arab community.⁷⁶

In other words, no agreement was reached during the British Mandate (1922–48) with regard to the holy places. It was for this reason that when the United Kingdom sought the advice of the UN with a view to transferring power at the end of the British Mandate, the UNGA proposed a “Plan of Partition with Economic Union” that envisaged establishing a *corpus separatum* over Jerusalem (including West Jerusalem) and Bethlehem where the majority of the most important holy places are located.⁷⁷ In furtherance of the partition plan, the UN Trusteeship Council drafted a special statute for the city.⁷⁸ A similar proposal to establish a separate mandate over the holy places had been suggested a decade earlier by the UK Peel Commission, when the British government was seriously considering terminating the Mandate before the outbreak of the World War II.⁷⁹

Significantly, the United Kingdom relinquished the Mandate on 15 May 1948 without agreement from the UN and it prevented the UN from implementing the partition plan.⁸⁰ Accordingly, Jordanian forces occupied East Jerusalem, Israeli forces occupied West Jerusalem, and the Trusteeship Council’s special statute for the city became a dead letter. While the United Kingdom recognized Jordan’s annexation of the West Bank following a referendum and the election of a new Jordanian parliament that included representatives from the West Bank, the United Kingdom did not recognize Jordan’s annexation of East Jerusalem.⁸¹ Nor did the United Kingdom (or any other state) recognize Israel’s annexation of West Jerusalem.⁸² Accordingly,

sovereignty over the city continues to be disputed, and most states have held back from recognizing the sovereignty of any claimant until the dispute has been satisfactorily resolved.

The United States' Legal Arguments

The United States has advanced three legal arguments justifying its recognition of Jerusalem: first, its sovereign right as a nation to determine where to locate its embassy; second, its refusal to support UNSC Resolution 478 (1980), which it claims was not binding; third, the Jerusalem Embassy Act dating back to 1995. However, none of these arguments are irreproachable.

THE UNITED STATES DOES NOT HAVE AN UNFETTERED RIGHT TO CHOOSE THE LOCATION OF ITS EMBASSIES

While every state has the right to determine whether to establish an embassy in a state with whom it has diplomatic relations (with that state's agreement), this right is not unfettered. *A state can only establish a diplomatic mission in territory over which the receiving state has sovereignty.* Israel does not have sovereignty over any part of Jerusalem nor does any other state. Trump could have sought the agreement of Israel and the Palestinians before making the move, perhaps as part of a bold effort to encourage peace, but he did not do this. Accordingly, most diplomatic missions remain located in Tel Aviv, precisely because "a move to Jerusalem would imply acceptance of Israel's establishment there of its seat of government."⁸³

West Jerusalem

When the Knesset was transferred from Tel Aviv to West Jerusalem in December 1949, states kept their embassies located in Tel Aviv because they did not accept that West Jerusalem was part of Israel. This is why, when Israel announced that it was moving its seat of government from Tel Aviv to Jerusalem, the State Department imposed a boycott on U.S. officials doing business there.⁸⁴ On 13 January 1950, Leonard Meeker, of the Office of the Legal Advisor, informed the State Department that "the U.S. . . . should not take any steps with respect to the functioning of American consular officers in Jerusalem which would recognize the sovereignty of any national state in that area."⁸⁵ The United States has also declined to subordinate its consular mission in Jerusalem to its embassy in Tel Aviv to avoid giving the appearance that Jerusalem is lawfully part of Israel.⁸⁶

The reason why states did not move their embassies to West Jerusalem in 1949 is because they were still holding out for a resolution of the city's status that would result in a UN trusteeship as envisaged in the *corpus separatum* solution under the 1947 UN partition plan. In recent years, it appears that some states may have modified their position and accorded *de facto* recognition to Israel's claim to West Jerusalem by sending their diplomats to West Jerusalem to receive their credentials.⁸⁷ Of course, this may simply be the recognition of a reality, in the sense that these diplomats have no choice but to receive their credentials in West Jerusalem, if they want to carry out their functions as diplomats in Israel. A more detailed study of the individual policies of these states would be needed in order to ascertain the correct legal position. The position is clearer with regard to East Jerusalem, however, which no state recognizes as Israel's capital.

East Jerusalem

When Israel annexed East Jerusalem in 1967 by amending its Law and Administration Ordinance on 28 June 1967,⁸⁸ the UNGA passed Resolutions 2253 and 2254 at its fifth emergency special session (17 June–18 September 1967) calling on Israel to rescind all of the measures it had already taken to alter the status of Jerusalem, and to desist from taking any further measures.⁸⁹ Although the United States abstained from UNGA Resolutions 2253 and 2254, Ambassador Arthur Goldberg read out a statement that had been released by the Department of State on 28 June, which stated that, “The hasty administrative action taken [by Israel] today cannot be regarded as determining the future of the holy places or the status of Jerusalem in relation to them.” The statement added that, “The United States has never recognized such unilateral action by any State in the area as governing the international status of Jerusalem.”⁹⁰ The ambassador continued, “My Government does not recognize that the administrative measures taken by the Government of Israel on 28 June can be regarded as the last word on the matter, and we regret that they were taken. We insist that the measures taken cannot be considered as other than interim and provisional, and not as prejudging the final and permanent status of Jerusalem.”⁹¹

In Resolution 242, issued in November 1967, the Security Council called on Israel to withdraw “from territories occupied in the recent conflict” after emphasizing the inadmissibility of the acquisition of territory by war.⁹² This would include East Jerusalem, which was occupied in that conflict. Following the 1973 October War, the Security Council adopted Resolution 338, which called for the implementation of Resolution 242 “in all of its parts.”⁹³

On 21 May 1968, after receiving a complaint from Jordan, the Security Council adopted Resolution 252, which stated that “all legislative and administrative measures and actions taken by Israel, including expropriation of land and properties thereon, which tend to change the legal status of Jerusalem are invalid and cannot change that status.”⁹⁴ The resolution was adopted by thirteen votes to none with two abstentions (Canada and the United States).

U.S. policy towards Jerusalem was subsequently clarified in a statement made by Ambassador Charles Yost at the UNSC on 1 July 1969, when Yost told the council that “the expropriation or confiscation of land, the construction of housing on such land, the demolition or confiscation of buildings, including those having historic or religious significance, and the application of Israeli law to occupied portions of the city are detrimental to our common interests in the city.”⁹⁵ Yost explained that the U.S. position was that East Jerusalem, “like other areas occupied by Israel, is occupied territory and hence subject to the provisions of international law governing the rights and obligations of an occupying Power.”⁹⁶ Among the provisions that bound Israel, explained Yost, were “that the occupier has no right to make changes in laws or in administration other than those which are temporarily necessitated by his security interests, and that an occupier may not confiscate or destroy private property.”⁹⁷ Yost explained that an occupying power is obliged to maintain the occupied territory “as intact and unaltered as possible, without interfering with the customary life of the area, and any changes must be necessitated by the immediate needs of the occupation.”⁹⁸ Yost then expressed regret that the actions of Israel in East Jerusalem “gave rise to understandable concern that the eventual disposition of East Jerusalem may be prejudiced, and that the private rights and activities of the population are already being affected and altered.”⁹⁹

After Yost made this statement, the United States voted in favor of Security Council Resolution 267, which confirmed that “all legislative and administrative measures and actions taken by Israel which purport to alter the status of Jerusalem, including expropriation of land and properties thereon, are invalid and cannot change that status.”¹⁰⁰

On 25 September 1971, after receiving another complaint from Jordan, the Security Council adopted Resolution 298, which confirmed “in the clearest possible terms that all legislative and administrative actions taken by Israel to change the status of the City of Jerusalem, including expropriation of land and properties, transfer of populations and legislation aimed at the incorporation of the occupied section, are totally invalid and cannot change that status.”¹⁰¹ Resolution 298 was adopted by fourteen votes to one, with Syria abstaining.

UN SECURITY COUNCIL RESOLUTION 478 (1980) IS BINDING

On 20 August 1980, the Security Council passed Resolution 478.¹⁰² The resolution reaffirmed “again that the acquisition of territory by force is inadmissible.”¹⁰³ After referring to its previous resolutions on Jerusalem, and noting that Israel had not complied with them, the Security Council expressed its deep concern “over the enactment of a ‘Basic Law’ in the Israeli Knesset proclaiming a change in the character and status of the Holy City of Jerusalem, with its implications for peace and security.”¹⁰⁴ The resolution censured “in the strongest terms the enactment by Israel of the ‘Basic Law’ on Jerusalem and the refusal to comply with relevant Security Council resolutions.”¹⁰⁵ The council determined “that all legislative and administrative measures and actions taken by Israel, the occupying Power, which have altered or purport to alter the character and status of the Holy City of Jerusalem, and in particular the recent ‘Basic Law’ on Jerusalem, are null and void and must be rescinded forthwith.”¹⁰⁶ The council further decided not to recognize the Basic Law and such “other actions by Israel that, as a result of this law, seek to alter the character and status of Jerusalem” and it called upon “those States that have established diplomatic missions at Jerusalem to withdraw such missions from the Holy City.”¹⁰⁷

While it is true that U.S. secretary of state Edmund Muskie said that United States did not consider as binding the provision calling on states that had established diplomatic missions in Jerusalem to withdraw them, and despite U.S. abstention from voting in favor of the resolution, Shmuel Berkovitz explains that “within a short period of time, all thirteen countries, which had diplomatic missions in Jerusalem, moved them to Tel Aviv.”¹⁰⁸ While Berkovitz points out that El Salvador and Costa Rica returned their embassies to West Jerusalem in April 1984, in 2006 the Israeli press reported that they had moved them back to Tel Aviv following the recent Israeli operation known as the Lebanon War.¹⁰⁹

The refusal of the international community to acknowledge the legality of Israeli action in Jerusalem was reiterated not just at the UN, but also outside the organization by various Western countries—normally friendlier, or at least less hostile to Israel than most of their counterparts around the world.¹¹⁰ The Italian legal scholar Antonio Cassese refers to American, British, French, German, Belgian, Italian, Dutch, Canadian, and Japanese statements to this effect.¹¹¹ He explains that despite the length of Israel’s occupation of Jerusalem, Israel has never acquired valid legal title to the city.¹¹²

While UNSC Resolution 478 was not adopted under Chapter VII of the Charter of the United Nations, it restated a basic principle of international law that reflected the preexisting obligation of

nonrecognition under general international law.¹¹³ Some scholars have also argued that UNSC resolutions can be legally binding even if they have not been adopted under Chapter VII of the UN Charter—the ICJ accepted this argument in its 1971 advisory opinion on Namibia, for example.¹¹⁴ This is especially relevant as UNSC Resolution 478 uses the word “decides” in relation to the statement “not to recognize the ‘Basic Law,’” which suggests that the resolution is binding by virtue of being a decision adopted under Article 25 of the charter.¹¹⁵

The United States Voted in Favor of UNSC Resolution 465

In 1980, during the Palestinian autonomy negotiations between Israel and Egypt, the Security Council passed Resolution 465. The resolution criticized Israel’s attempts to annex the city by constructing new settlements around the eastern fringes of Jerusalem four months before the Knesset adopted the Basic Law declaring Jerusalem, complete and united, the capital of Israel.¹¹⁶ Before Egyptian president Anwar Sadat agreed to enter into negotiations with Israel on the Sinai withdrawal, he extracted assurances from U.S. president Jimmy Carter and Israel’s prime minister, Menachem Begin, on the removal of settlers from Sinai. Because Sadat and Begin could not reach agreement on Jerusalem, they published two letters to President Carter setting out their respective positions. Sadat’s letter, which was accepted by Carter, stated the following:

1. Arab Jerusalem is an integral part of the West Bank. Legal and historical Arab rights in the City must be respected and restored.
2. Arab Jerusalem should be under Arab sovereignty.
3. [. . .]
4. Relevant Security Council resolutions, particularly resolutions 242 and 267, must be applied with regard to Jerusalem. All the measures taken by Israel to alter the status of the City are null and void and should be rescinded.¹¹⁷

Significantly, the United States voted in favor of UNSC Resolution 465, which condemned Israel’s policy in Jerusalem in no uncertain terms and determined that all measures taken by Israel to change the physical character, demographic composition, institutional structure, or status of the Palestinian and other Arab territories occupied since 1967, including Jerusalem, or any part thereof, had no legal validity; the resolution also affirmed that both the policy and practice of settling parts of Israel’s population and new immigrants in those territories constituted a flagrant violation of the Fourth Geneva Convention, and also formed a serious obstruction to achieving a comprehensive, just, and lasting peace in the Middle East.¹¹⁸

In the same resolution, the Security Council called on Israel “to dismantle the existing settlements and in particular to cease, on an urgent basis, the establishment, construction and planning of settlements.”¹¹⁹ The U.S. vote in favor of this resolution, with its call to dismantle existing settlements in the West Bank and Gaza, including Jerusalem, shocked Israel’s supporters in the United States. It also shocked Israel’s prime minister, whose cabinet “unequivocally” rejected the resolution and U.S. support for it, and reiterated what it termed the “inalienable right” of Israelis to settle anywhere they liked in the West Bank.¹²⁰

The U.S. vote in favor of the resolution became the object of furious controversy.¹²¹ President Carter, who was running for reelection, tried to “retract” the U.S. vote.¹²² However, Washington’s

UN ambassador Donald McHenry told his British colleagues at the UN that “he had perfectly clear instructions, which he had fulfilled to the letter.”¹²³ In a confidential report to the Foreign Office, Marrack Goulding, a British diplomat based at the UN in New York, explained that the White House statement suggesting that Carter wanted all the references to Jerusalem removed from the resolution before the United States voted for it, was not “compatible with the facts as we observed them here. . . . The main discrepancies,” Goulding explained, “relate to the ‘dismantling’ reference. The claim in the White House statement that ‘we made strenuous efforts to eliminate the language with reference to the dismantling of settlements in the resolution’ is simply not true.”¹²⁴

The explanation for the changing U.S. position between 1 March 1980 when Resolution 465 was adopted, and 20 August 1980 when Resolution 478 was adopted, can be explained by U.S. domestic politics: it was an election year, and Carter was concerned that he could lose the vote to Ronald Reagan, given that his policy had upset an important political constituency within the Democratic Party who then shifted their allegiance to the Republican Party.¹²⁵ Indeed, the U.S. vote for Resolution 465 was mentioned as one reason (among others) for Carter’s failure to win reelection, as it affected the New York primary in which the presidential candidate lost to his Democratic rival Ted Kennedy.¹²⁶

THE UNITED STATES CANNOT RELY ON THE JERUSALEM EMBASSY ACT TO BREACH INTERNATIONAL LAW

On 8 November 1995, the U.S. Congress passed Public Law 104-45, the Jerusalem Embassy Act.¹²⁷ The act set out the policy of the United States as follows:

- a) STATEMENT OF THE POLICY OF THE UNITED STATES.—
 - (1) Jerusalem should remain an undivided city in which the rights of every ethnic and religious group are protected;
 - (2) Jerusalem should be recognized as the capital of the State of Israel; and
 - (3) The United States Embassy in Israel should be established in Jerusalem no later than May 31, 1999.
- b) OPENING DETERMINATION.—Not more than 50 percent of the funds appropriated to the Department of State for fiscal year 1999 for “Acquisition and Maintenance of Buildings Abroad” may be obligated until the Secretary of State determines and reports to Congress that the United States Embassy in Jerusalem has officially opened.

Section 7 of the act contained a presidential waiver:

- a) WAIVER AUTHORITY.—
 - (1) Beginning on October 1, 1998, the President may suspend the limitation set forth in section 3(b) for a period of six months if he determines and reports to Congress in advance that such suspension is necessary to protect the national security interests of the United States.

Although the Jerusalem Embassy Act called for establishing the U.S. embassy in Jerusalem “no later than May 31, 1999” and provided funding for the move, every U.S. president, whether Republican or Democrat, has signed the waiver and refrained from moving the embassy in order not to prejudice peace talks between Israelis and Palestinians. That particular date was chosen as

the deadline for the move because the bill's supporters expected final status negotiations on Jerusalem to have been completed by then.¹²⁸

The adoption of the Jerusalem Embassy Act was highly controversial: it was opposed by President Bill Clinton, by the State Department, and even by the Labor government of Israel.¹²⁹ During the congressional debate, Rep. Lee Hamilton (D-IN) explained: "No hearings were held; no committee consideration occurred; the administration was not given a chance to state its case before the Members; few members will be allowed to speak today; no amendments are in order; the bill was placed on the suspension calendar without consulting the minority; and no opportunity has been given to assess the impact of this bill on the fragile peace process."¹³⁰ Hamilton made it clear that "the bill was being rushed through the Congress today for reasons of domestic politics, not foreign policy."¹³¹

By recognizing Jerusalem as the capital of Israel, the United States has committed an internationally wrongful act. It cannot invoke its own law for its refusal to comply with international law.¹³²

Backtracking

President Trump's decision to recognize Jerusalem as the capital of Israel and to move the U.S. embassy to the city has been universally condemned, as it is contrary to a well-established rule of international law that states must not recognize the fruits of conquest. While the United States chose to exercise its veto at the Security Council to block a resolution criticizing its decision, this did not prevent others (including several close allies) from censuring Washington in the council. Similarly, the UNGA, the EU, the Arab League, and the OIC have all passed strongly worded resolutions saying that they would not recognize any changes to the pre-1967 borders, including in Jerusalem.

By recognizing Jerusalem, without specifying whether the recognition applied to East or West Jerusalem, and by taking Jerusalem "off the table," President Trump would appear to have recognized only Israeli sovereignty over Jerusalem, including the holy places such as the Temple Mount/Haram al-Sharif as well as historical Christian sites in the Old City. This has brought the United States into disagreement with the Holy See, which has called on all sides to respect existing arrangements.¹³³ It has also caused disagreement with Jordan's King Abdullah II as the Hashemite Kingdom is the custodian of Muslim holy shrines in Jerusalem according to its peace treaty with Israel.¹³⁴

If we are to take President Trump's tweets and conversations with Netanyahu seriously, then by implication he seems to have endorsed Israel's expansive definition of "united Jerusalem" in all but word, including the extensive Arab areas in and around the city. On the other hand, since tweeting that he had taken Jerusalem "off the table" Trump seems to have backtracked. Two months after his initial announcement, he told *Israel Hayom* that "by taking Jerusalem off the table I wanted to make it clear that Jerusalem is the capital of Israel and as for specific boundaries, I would support what both sides agreed to."¹³⁵

The difficulty with trying to assess the policy of the Trump administration on any given issue is that the U.S. president makes assertions that he appears to hold with conviction, only to jettison

these strongly held views in later, more lucid, moments. Perhaps scholars would be better served by ignoring what Trump says fleetingly in front of the cameras, and what he writes on Twitter, and stick to the U.S. government's official position.

About the Author

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ENDNOTES

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- 2 See UN General Assembly, Resolution ES-10 (21 December 2017), addressed below.
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- 28 *Id.* at 2.
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- 30 *Id.* at 6.
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- 36 *Id.* at 11.
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- 38 *Id.* at 4.
- 39 *Id.* at 4.
- 40 A total of 128 states voted in favor of Resolution ES-10/19; 35 abstained; and 9 voted against. Twenty-one states did not vote. The resolution was sponsored by 36 states, including Palestine. The states that voted against the resolution were Guatemala, Honduras, Israel, Marshall Islands, Micronesia, Nauru, Palau, Togo, and the United States.
- 41 See 37th meeting of the 10th Emergency Special Session of the UN General Assembly, A/ES-10/PV.37 (21 December 2017), at 6, <https://undocs.org/en/A/ES-10/PV.37>.
- 42 *Id.* at 9.
- 43 *Id.* at 11.
- 44 *Id.* at 16.
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- 47 *Id.* at 18.
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- 50 UN Security Council, Resolution 478, S/RES/47834, (20 August 1980)—see below.
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- 92 UN Security Council, Resolution 242, S/RES/242 (22 November 1967); adopted unanimously.
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- 127 Jerusalem Embassy Act of 1995.
- 128 See 141 Cong. Rec. H 10681 (24 October 1995) (statement of Mr. Gilman).
- 129 *Id.*, H 10685 (statement of Mr. Rahall quoting statements by Rabin, Peres, and Indyk).
- 130 *Id.*, H 10681– H 10682 (statement of Mr. Hamilton).
- 131 *Id.*, H 10682.
- 132 See James Crawford, *The International Law Commission's Articles*, p. 207.
- 133 On 26 June 2015, the State of Palestine and the Holy See signed a comprehensive agreement. Article 1 (3) stipulates that the agreement "applies to the entire territory under Palestinian sovereignty in accordance with international law." In this regard, the preamble to the agreement declares "that unilateral decisions and actions altering the specific character and status of Jerusalem are morally and legally unacceptable." See Comprehensive Agreement between the State of Palestine and the Holy See (26 June 2015), in vigore: 2 gennaio 2016, ai sensi dell' Art. 30 dell'Accordo, <http://bibliotecanonica.net/docsaq/btcaqf.pdf>.
- 134 According to Article 9 (2) of the Israel-Jordan Peace Treaty (1994), Israel agreed to respect "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." See Article 9, Treaty of Peace between Israel and Jordan, 26 October 1994, 34 *International Legal Materials* (1995) at pp. 46–66. See also, "Agreement between His Majesty King Abdullah II ibn Al Hussein, the Custodian of the holy sites in Jerusalem, and His Excellency Dr. Mahmoud Abbas, President of the State of Palestine, Head of Palestinian Liberation Organisation, and President of the Palestinian National Authority" to jointly defend Jerusalem's Muslim holy sites, 21 March 2013, Amman, <http://en.lpj.org/2013/04/04/full-text-of-the-jordanian-palestinian-agreement-on-holy-places-in-jerusalem/>.
- 135 See Boaz Bismuth, "Trump to Israel Hayom: The Palestinians Are Not Looking to Make Peace," Newsletter, *Israel Hayom*, 11 February 2018, <http://www.israelhayom.com/2018/02/11/trump-to-israel-hayom-palestinians-are-not-looking-to-make-peace/>.