

DEFENDING ISRAEL'S LEGAL RIGHTS TO JERUSALEM

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In modern history, nations are measured not by their military strength or economic performance alone, but by their inner conviction about the justice of their cause. Forty-four years ago, at the end of the 1967 Six-Day War, when Israeli paratroopers reached the Western Wall and their commander, Motta Gur, announced “*Har Habyit Beyadainu*” (“the Temple Mount is in our hands”), there was no doubt over the fact that Israel had waged a just war. Overseas, Israel’s representatives in the 1960s and 1970s, like Abba Eban and Chaim Herzog, reiterated Israel’s rights to Jerusalem before the world community, which may not have always supported them, but at least understood Israel’s determination to defend them.

But something has happened since those days. While the arguments they used are still relevant today, they have been forgotten in many quarters. Therefore, Jerusalem is in a paradoxical situation. While Israel has legal rights to retain a united city as its capital, there is a sense that its claim is being challenged more than ever. Indeed, there are multiple arguments being sounded as to why Israel should acquiesce to Jerusalem’s re-division.

What makes this particularly troubling is that Jerusalem, in the words of the British historian Sir Martin Gilbert, has always been seen as a “microcosm” of Jewish historical rights.¹In 70 CE when the Jewish people lost their national sovereignty to the Roman Empire, it was the fall of Jerusalem that marked the end of the Jewish state. Conversely, when the Jewish people restored their majority in Jerusalem in the mid-nineteenth century, they did so before reaching a majority in any other part of their ancestral homeland. Indeed, their movement for the revival of a Jewish state was called “Zionism,” exemplifying the centrality of Jerusalem for the overall Jewish national movement.

Jerusalem, in short, has been the focal point of the idea of Jewish national self-determination. Ernst Frankenstein, a British-based authority on international law in the inter-war period, made the case for arguing the legal rights of the Jewish people to restore their homeland by stating that they never relinquished title to their land after the Roman conquests. For that to have happened, the Romans and their Byzantine successors would have had to be in “continuous and undisturbed possession” of the land with no claims being voiced. Yet Jewish resistance movements continued for centuries, most of which were aimed at liberating Jerusalem.²

From the standpoint of international law, the fact that the Jewish people never renounced their historic connection to their ancestral homeland provided the basis for their assertion of their historical rights.³ This came to be understood by those who wrote about the Jewish legal claim to the Land of Israel, as a whole. In the Blackstone Memorial, which was signed by Chief Justice of the U.S. Supreme Court Melville Fuller, university presidents, and members of Congress before it was submitted to President Benjamin Harrison in 1891, Palestine is characterized as “an inalienable possession” of the Jewish people “from which they were expelled by force.”⁴ In short, they did not voluntarily abandon their land or forget their rights. This was most fervently expressed through centuries of lamentation for Jerusalem’s destruction and their constant prayer for its restoration. Jerusalem was the focal point for the historical connection of the Jewish people to the Land of Israel.

That is why it is essential to understand Israel’s rights in Jerusalem, as they were known once before. That is also why it is necessary to identify the arguments that have been employed in recent years with the aim of eroding those rights, and the conviction that once underpinned them, in order to protect Jerusalem for future generations. In addition to the historical rights of the Jewish people to Jerusalem that were voiced in the nineteenth century, and were just briefly reviewed, there is a whole new layer of legal rights that Israel acquired in modern times that need to be fully elaborated upon.

MODERN SOURCES OF ISRAEL’S INTERNATIONAL RIGHTS IN JERUSALEM

In 1970, three years after the 1967 Six-Day War, an article appearing in the most prestigious international legal periodical, *The American Journal of International Law*, touched directly on the question of Israel’s rights in Jerusalem.⁵ It became a critical reference point for Israeli ambassadors speaking at the UN in the immediate decades that followed and also found its way into their speeches. The article was written by an important, but not yet well-known, legal scholar named Stephen Schwebel. In the years that followed, Schwebel’s stature would grow immensely with his appointment as the legal advisor of the U.S. Department of State, and then finally when he became the President of the International Court of Justice in The Hague. In retrospect, his legal opinions mattered and were worth considering very carefully.

Schwebel wrote his article, which was entitled “What Weight to Conquest,” in response to a statement by then Secretary of State William Rogers that Israel was only entitled to “insubstantial alterations” in the pre-1967 lines. The Nixon administration had also hardened U.S. policy on Jerusalem as reflected in its statements and voting patterns in the UN Security Council. Schwebel strongly disagreed with this approach: he wrote that the pre-war lines were not sacrosanct, **for the 1967 lines were not an international border.** Formally, they were only armistice lines from 1949. As he noted, the armistice agreement itself did not preclude the territorial claims of the parties beyond those lines. Significantly, he explained that when territories are captured in a war, the circumstances surrounding the outbreak of the conflict directly affect the legal rights of the two sides, upon its termination.

Two facts from 1967 stood out that influenced his thinking:

First, Israel had acted in the Six-Day War in the lawful exercise of its right of self-defense. Those familiar with the events that led to its outbreak recall that Egypt was the party responsible for the initiation of hostilities, through a series of steps that included the closure of the Straits of Tiran to Israeli shipping and the proclamation of a blockade on Eilat, an act that Foreign Minister Abba Eban would characterize as the firing of the first shot of the war. Along Israel’s eastern front, Jordan’s artillery had opened fire, pounding civilian neighborhoods in Jerusalem, despite repeated warnings issued by Israel.

Given this background, Israel had not captured territory as a result of aggression, but rather because it had come under armed attack. In fact, the Soviet Union had tried to have Israel labeled as the aggressor in the UN Security Council on June 14, 1967, and then in the UN General Assembly on July 4, 1967. But Moscow completely failed. At the Security Council it was outvoted 11-4. Meanwhile at the General Assembly, 88 states voted against or abstained on the first vote of a proposed Soviet draft (only 32 states supported it). It was patently clear to the majority of UN members that Israel had waged a defensive war.⁶

A second element in Schwebel’s thinking was the fact Jordan’s claim to legal title over the territories it had lost to Israel in the Six-Day War was very problematic. The Jordanian invasion of the West Bank – and Jerusalem – nineteen years earlier in 1948 had been unlawful. As a result, Jordan did not gain legal rights in the years that followed, given the legal principle, that Schwebel stressed, according to which **no right can be born of an unlawful act** (*ex injuria jus non oritur*). It should *not* have come as a surprise that Jordan’s claim to sovereignty over the West Bank was not recognized by anyone, except for Pakistan and Britain. Even the British would not recognize the Jordanian claim in Jerusalem itself.

Thus, by comparing Jordan’s illegal invasion of the West Bank to Israel’s legal exercise of its right of self-defense, Schwebel concluded that “Israel has better title” in the territory of what once was the Palestine Mandate than either of the Arab states with which it had been at war. He specifically stated that Israel had better legal title to **“the whole of Jerusalem.”**

Schwebel makes reference to UN Security Council Resolution 242 from November 22, 1967, which over the years would become the main source for all of Israel's peace efforts, from the 1979 Egyptian-Israeli Treaty of Peace to the 1993 Oslo Accords. In its famous withdrawal clause, Resolution 242 did not call for a full withdrawal of Israeli forces from all the territories it captured in the Six-Day War. There was no effort to re-establish the *status quo ante*, which, as noted earlier, was the product of a previous act of aggression by Arab armies in 1948.

As the U.S. ambassador to the UN in 1967, Arthur Goldberg, pointed out in 1980, Resolution 242 did not even mention Jerusalem "and this omission was deliberate." Goldberg made the point, reflecting the policy of the Johnson administration for whom he served, that he never described Jerusalem as "occupied territory," though this changed under President Nixon.⁷ What Goldberg wrote about Resolution 242 had added weight, given the fact that he previously had served as a Justice on the U.S. Supreme Court.

Indeed, among the leading jurists in international law and diplomacy, Schwebel was clearly not alone. He was joined by Julius Stone, the great Australian legal scholar, who reached the same conclusions. He added that UN General Assembly Resolution 181 from 1947 (also known as the Partition Plan) did not undermine Israel's subsequent claims in Jerusalem. True, Resolution 181 envisioned that Jerusalem and its environs would become a *corpus separatum*, or a separate international entity. But Resolution 181 was only a recommendation of the General Assembly. It was rejected by the Arab states forcibly, who invaded the nascent State of Israel in 1948.

Ultimately, the UN's *corpus separatum* never came into being in any case. The UN did not protect the Jewish population of Jerusalem from invading Arab armies. Given this history, it was not surprising that Israel's first prime minister, David Ben-Gurion, announced on December 3, 1949, that Resolution 181's references to Jerusalem were "null and void," thereby anticipating Stone's legal analysis years later.⁸

There was also Prof. Elihu Lauterpacht of Cambridge University, who for a time served as legal advisor of Australia and as a judge ad hoc of the International Court of Justice in The Hague. Lauterpacht argued that Israel's reunification of Jerusalem in 1967 was legally valid.⁹ He explained that the last state which had sovereignty over Jerusalem was the Ottoman Empire, which ruled it from 1517 to 1917.

After the First World War, the Ottoman Empire formally renounced its sovereignty over Jerusalem as well as all its former territories south of what became modern Turkey in the Treaty of Sevres from 1920. This renunciation was confirmed by the Turkish Republic as well in the Treaty of Lausanne of 1923. According to Lauterpacht, the rights of sovereignty in Jerusalem were vested with the Principal Allied and Associated Powers, which transferred them to the League of Nations.

But with the dissolution of the League of Nations, the British withdrawal from Mandatory Palestine, and the failure of the UN to create a *corpus separatum* or a special international regime for Jerusalem, as had been intended according to the 1947 Partition Plan, Lauterpacht concluded

that sovereignty had been put in suspense or in abeyance. In other words, by 1948 there was what he called “a vacancy of sovereignty” in Jerusalem.

It might be asked if the acceptance by the pre-state Jewish Agency of Resolution 181 constituted a conscious renunciation of Jewish claims to Jerusalem back in 1947. However, according to the resolution, the duration of the special international regime for Jerusalem would be “in the first instance for a period of ten years.” The resolution envisioned a referendum of the residents of the city at that point in which they would express “their wishes as to possible modifications of the regime of the city.”¹⁰ The Jewish leadership interpreted the *corpus separatum* as an interim arrangement that could be replaced. They believed that Jewish residents could opt for citizenship in the Jewish state in the meantime. Moreover, they hoped that the referendum would lead to the *corpus seperatum* being joined to the State of Israel after ten years.¹¹

Who then could acquire sovereign rights in Jerusalem given the “vacancy of sovereignty” that Lauterpacht described? Certainly, the UN could not assume a role, given what happened to Resolution 181. Lauterpacht’s answer was that Israel filled “the vacancy in sovereignty” in areas where the Israel Defense Forces had to operate in order to save Jerusalem’s Jewish population from destruction or ethnic cleansing. The same principle applied again in 1967, when Jordanian forces opened fire on Israeli neighborhoods and the Israel Defense Forces entered the eastern parts of Jerusalem, including its Old City, in self-defense.

A fourth legal authority to contribute to this debate over the legal rights of Israel was Prof. Eugene Rostow, the former dean of Yale Law School and Undersecretary of State for Political Affairs in the Johnson administration. Rostow’s point of departure for analyzing the issue of Israel’s rights was the Mandate for Palestine, which specifically referred to “the historic connection of the Jewish people with Palestine” providing “the grounds forreconstituting their national home in that country.” These rights applied to Jerusalem as well, for the Mandate did not separate Jerusalem from the other territory that was to become part of the Jewish national home.

Rostow contrasts the other League of Nations mandates with the mandate for Palestine. Whereas the mandates for Iraq, Syria, and Lebanon served as trusts for the indigenous populations, the language of the Palestine Mandate was entirely different. It supported the national rights of the Jewish people while protecting only the civil and religious rights of the non-Jewish communities in British Mandatory Palestine.¹² It should be added that the Palestine Mandate was a legal instrument in the form of a binding international treaty between the League of Nations, on the one hand, and Britain as the mandatory power, on the other.

Rostow argued that the mandate was not terminated in 1947. He explained that Jewish legal rights to a national home in this territory, which were embedded in British Mandatory Palestine, survived the dissolution of the League of Nations and were preserved by the United Nations in Article 80 of the UN Charter.¹³ Clearly, after considering Rostow’s arguments, Israel was well-positioned to assert its rights in Jerusalem and fill “the vacancy of sovereignty” that Lauterpacht had described.

WHY DO ALL THESE LEGAL OPINIONS MATTER?

There will be those who will ask: What is the significance of all these legal opinions by various scholars? Why do they matter? Are they important for establishing Israel's legal claims in Jerusalem? International law is not like domestic law – there is no global government that adopts legislation. So what then determines what is legal and what is illegal? Of course there are treaties and international custom. The Statute of the International Court of Justice in The Hague (ICJ) specifically describes “the teachings of the most highly qualified publicists of the various nations” (Article 38) as one of the four sources of international law upon which international courts are to rely.

In short, what the leading experts of international law wrote after the 1967 Six-Day War matters. When it came to defending Israel's rights to Jerusalem, their writings were extremely clear. Israel had rightful claims to be sovereign in Jerusalem. Of course that does not preclude the UN General Assembly rejecting Israel's argument and denying its legal rights. However, if one compares the relative authority of what the intellectual giants of international law wrote after the Six-Day War to non-binding resolutions of the UN General Assembly, then the writings of Schwebel and Lauterpacht win hands-down.

In the years that followed, Israel's rights to preserving a united Jerusalem became axiomatic. In 1990, both houses of the U.S. Congress adopted Senate Concurrent Resolution 106, which acknowledged that “Jerusalem is and should remain the capital of Israel.” It expressed its support for Jerusalem remaining “an undivided city.” It acknowledged that since Jerusalem's unification under Israel, religious freedom had been guaranteed. More Congressional resolutions to this effect on Jerusalem were adopted in 1992 and 1995. Israel's legal rights to Jerusalem were not even an issue. Moreover, those rights were not just theoretical. They had strong political backing.

THE EFFORTS TO ERODE ISRAEL'S RIGHTS

However, this discussion about the legality of Israel's claims to a united Jerusalem raises a fundamental question. If Israel's legal case is so strong, why is Israel's back against the wall in the diplomatic struggle over Jerusalem today? What happened? What has eroded Israel's standing on this issue? Was this change caused by skillful Palestinian diplomacy or by a shifting Israeli consensus – or both? The defense of Israel's rights in Jerusalem today requires first and foremost an answer to this question.

What is undeniable is that in the last seventeen years a number of **key misconceptions** about Jerusalem took hold in the highest diplomatic circles in the West as well as in the international media. Some misconceptions were the product of misinformation. Others were the result of deliberate efforts to misrepresent what happened in past negotiations and to mislead the public. Regardless of their source, these misconceptions provided the political ammunition to those who sought to erode and undermine Israel's standing in Jerusalem, forcing it to consider concessions

that were unthinkable twenty years ago. Israeli foreign policy had managed to protect Jerusalem for decades, but the diplomatic armor that it had employed began to crack from a determined political assault that followed.

1. DISTORTING ISRAEL'S STANCE: THE GROWING IMPRESSION IN THE 1990s THAT ISRAEL WAS PREPARED TO CONCEDE EASTERN JERUSALEM

When Israel signed the Oslo Agreements in 1993, for the first time since 1967 it agreed to make Jerusalem an issue for future negotiations. That did not mean that Prime Minister Yitzhak Rabin planned to divide Jerusalem. But Palestinian leaders celebrated Israel's acquiescence at the time to putting Jerusalem on the negotiating table.

Nabil Shaath, a Palestinian minister and negotiator, commented at the time: "The Israelis up to this agreement never accepted that the final status of Jerusalem be on the agenda of the permanent status negotiations." Faisal al-Husseini, who became a minister without portfolio for Jerusalem Affairs in the Palestinian Authority, also remarked: "In the Oslo Accords it was established that the status of Jerusalem is open to negotiations on the final arrangement, and the moment you say yes to negotiations, you are ready for a compromise."

Rabin, it should be stated, did not accept this position. To his credit, on October 5, 1995, one month before he was assassinated, he detailed to the Knesset his vision for a permanent status arrangement with the Palestinians, in which he stated: "First and foremost, united Jerusalem, which will include both Ma'ale Adumim and Givat Ze'ev – as the capital of Israel, under Israeli sovereignty, while preserving the rights of the members of the other faiths, Christianity and Islam, to freedom of access and freedom of worship in their holy places, according to their customs and beliefs." In short, Rabin, who had agreed to the Oslo Agreements two years earlier, firmly opposed the re-division of Jerusalem.

In fact, Rabin had a completely different scenario for handling the question of Jerusalem. He secretly negotiated with Jordan what became known as the 1994 Washington Declaration, recognizing the traditional role of the Hashemites as the custodians of the Muslim shrines on the Temple Mount. This Israeli recognition of Jordan's role in the Islamic sites was incorporated into the Israeli-Jordanian Treaty of Peace.

The Jordanian role in Jerusalem envisioned by Rabin had nothing to do with dividing sovereignty, but was supposed to be confined to strictly religious functions. Its practicability was dependent on Jordan's resolve to maintain this role, despite Palestinian encroachments. Yet regardless of the clarity of Rabin's position, there was a growing perception that Israel was preparing itself to make concessions over sovereignty that Rabin never intended.

2. THE MYTHOLOGY OF BACKCHANNEL CONTACTS: BUILDING THE CASE IN THE WEST THAT THERE WAS A WORKABLE FORMULA FOR DIVIDING JERUSALEM

With Jerusalem defined as an issue for future negotiations, there has been an entire intellectual industry that has been busy trying to prove that an Israeli-Palestinian deal on Jerusalem is doable. Take, for instance, what is known as the Beilin-Abu Mazen understandings from October 31, 1995. The idea put forward in those backchannel contacts was that the Palestinians would obtain a capital in the village of Abu Dis, outside of Jerusalem's municipal borders, as defined by Israel, but inside the area that was defined as the county of Jerusalem (*muhafiz*) under Jordan.

These negotiations were hailed worldwide for their creativity in the most important print media outlets from the *New York Times* to *Ha'aretz*. It is interesting to look back and see how the *New York Times* reported them on August 1, 1996; it wrote, "the Palestinians had dropped demands to establish their capital in East Jerusalem." The newspaper reported additionally later on in the article that there would be future negotiations on sovereignty over East Jerusalem, but few noticed this fine print.

In time, Israelis gained the impression that there was a painless formula that could be used for resolving Israeli-Palestinian differences over this extremely difficult subject. Thomas Friedman was also convinced and wrote on September 22, 1997, that a possible final settlement deal on Jerusalem "had been worked out" based on a Palestinian capital in Abu Dis. In his memoirs, Dennis Ross writes that the Beilin-Abu Mazen understandings proved "that even the most existential issues could be resolved."

But was this true? What few knew at the time was that the Palestinian leadership never viewed Abu Dis as an acceptable alternative to its claims to Jerusalem, but rather as a forward position that it would obtain on an interim basis, so that it could increase its hold on its true objective: the Old City of Jerusalem. Moreover, there was the question of the exact status of these understandings. The fact of the matter was that Abu Mazen never signed the 1995 document. Neither Rabin nor Peres approved of its contents. Yasser Arafat called the unsigned Beilin-Abu Mazen exchanges "a basis for further negotiations."

In typical fashion, Arafat managed to pocket the Israeli concessions without undertaking any firm Palestinian commitments himself. More importantly, he managed to pull Israel into a detailed negotiation over Jerusalem, which would set it down the road of more concessions in the future. By May 1999, Abu Mazen appeared on Palestinian Television and disassociated himself completely from the record of his backchannel contacts. He declared: "there is no document, no agreement, and no nothing."¹⁴ Nonetheless, the legacy of these backchannel contacts fired up the imaginations of Israeli and American negotiators years later, who confidently went to Camp David in July 2000 with the expectation that they just might resolve the Israeli-Palestinian conflict, especially the dispute over Jerusalem.

Even after negotiations failed, the myth of bridgeable differences over Jerusalem persisted. After the Camp David summit adjourned in July 2000, Israelis and Palestinians subsequently met in Taba at the end of the year.

At the end of the Taba talks, Israel's foreign minister, Shlomo Ben Ami, was interviewed on Israel Radio and asserted that the parties had "never been so close to reaching an agreement." The Israeli interviewer then asked Muhammad Dahlan, the Gaza security chief, if indeed the parties had never been so close. Dahlan replied in Hebrew slang: "*Kharta barta*" (baloney). Ben Ami's Palestinian counterpart, Abu Ala, was more diplomatic than Dahlan but did not differ with his conclusions: "Now that the ambiguity has been removed, there has never before been a clearer gap in the positions of the two sides."¹⁵

In fact, in the European Union summaries of the Taba talks, Ambassador Miguel Moratinos revealed that Israel and the Palestinians could not even agree over who had sovereignty over the Western Wall. To this day, the belief persists that a deal over Jerusalem is possible. While this myth is based on misconceptions about the history of Israeli-Palestinian diplomacy, it still feeds misinformed policymakers worldwide.

3. CREATING QUASI-LEGALITY FROM THE PAST DIPLOMATIC RECORD: IS ISRAEL SOMEHOW BOUND TO DIVIDE JERUSALEM BECAUSE IT WAS PROPOSED IN PAST NEGOTIATIONS?

The failed negotiations over Jerusalem, while not producing any signed agreements, nonetheless badly eroded Israel's claims for successive governments. The diplomatic experiment that former Prime Minister Ehud Barak attempted was based on a rule that was supposed to reassure the Israeli side: "**nothing is agreed until everything is agreed.**" This approach assumed that if Barak wanted to test the Palestinian side with an idea for dividing Jerusalem, it would be removed from the negotiating table if no overall agreement was reached.

In this spirit, when President Bill Clinton put forward his famous "parameters" for a peace settlement at the White House on December 23, 2000, which contained a proposal for dividing Jerusalem along ethno-religious lines, he stipulated: "These are my ideas. If they are not accepted, they are off the table, they go with me when I leave office." This was not just a theoretical commitment, for Clinton refused to go along with initiatives to take his parameters to the UN Security Council and lock future Israeli governments into the concessions that they would have required, through a new UN Security Council resolution.¹⁶

At the heart of Clinton's proposal was an idea that sounded simple but would have been disastrous for Jerusalem: "The general principle is that Arab areas are Palestinian and Jewish ones are Israeli. This would apply to the Old City as well." In practice, if Jerusalem was a checkerboard of Jewish and Palestinian squares, Clinton's idea would have put each square under a different sovereignty.

It was no wonder that the Israeli security establishment completely rejected Clinton's plan. At the end of December 2000, Israel's chief of staff, Lt.-Gen. Shaul Mofaz, told the Barak government: "The

Clinton bridging proposal is inconsistent with Israel's security interests and if it will be accepted, it will threaten the security of the state."¹⁷ He specifically warned that the Clinton Plan would turn Jewish neighborhoods in Jerusalem into enclaves within Palestinian sovereign territory that would be hard to defend.

Mofaz was not only speaking for himself, but for the entire general staff of the IDF. These conclusions were not a secret; they appeared in the headlines of a Friday *Yediot Ahronot*. Nonetheless, the people of Israel could be comforted that the State of Israel was not legally bound in any way to the Clinton Parameters, which had been so strongly condemned by the heads of the IDF.

Unfortunately, these formalities turned out to be a total fiction. True, in 2001, the Bush administration informed the Sharon government that the Clinton Parameters were indeed off the table. But many former Clinton officials kept them alive behind the scenes. They began using the refrain that "we all know what the outline of a solution is supposed to look like." That outline included the re-division of Jerusalem. These ideas were not supported by the elected government of Israel, under Prime Minister Ariel Sharon. The Bush administration did not advocate them either. These ideas survived, however, in well-funded research institutes and think tanks inside Washington's capital beltway.

For example, appearing at the Council on Foreign Relations in June 2003, President Clinton's national security advisor, Sandy Berger, typified this approach when he said: "I believe that the contours that we were talking about at Camp David and that later were put out in the Clinton plan in December, and then later [were] even further developed in Taba are ultimately the contours that we will embrace." These ideas also re-surfaced in the 2003 Geneva Initiative, which did not represent the official positions of the Israeli government, but nonetheless kept alive the idea that Jerusalem was to be divided.

The mantra that "we all know what the outline of a solution is supposed to be" turned out to be extremely problematic. What was the underlying assumption behind these statements? How do we all know? How can anyone make this assertion with any degree of certainty? Did Israel sign anything? Did it obligate itself to make concessions on Jerusalem? Instead of asking why Arab-Israeli diplomacy failed during the later 1990s, conducting a reassessment, and coming up with a different approach, former officials dug in deeper into the ideas that had been raised in Camp David and Taba, and tried to enshrine them – including on the issue of Jerusalem. It seemed that there was a shared interest by those who engaged in this activity in binding Israel to the diplomatic record of failed negotiations and to the concessions of previous Israeli governments.

What happened in the course of time was that these proposals seeped back from Washington think tanks and research institutes through the back door to the official level. It was a natural though highly problematic process. There were conferences, seminars, and brown-bag lunches held in private Washington offices where former officials mingled with their successors. The veterans of the diplomacy of the 1990s briefed new politicians coming to Washington, as well. Presidential candidates also sought advice for their future positions, and the record of Camp David and Taba became the new conventional wisdom that was bantered about, without much thought. What

emerged was a kind of inevitability that foreign policy experts shared that Jerusalem would have to be divided and Israel's historic rights to a united city were simply forgotten.

Palestinian negotiators contributed to this process. After the U.S. elections in 2008, they presented a summary of their past negotiations with Prime Minister Olmert to the incoming Obama foreign policy team. Secretary of State Condoleezza Rice summarized this material in an 11-page document presented to President Obama. Was this a signed Israeli-Palestinian agreement? No. But it was followed by Palestinian claims that negotiations needed to be resumed where they last broke off, as though a new Israeli government had to accept the concessions of its predecessor, including on the issue of Jerusalem. For example, in a U.S.-Palestinian meeting on September 16, 2009, Saeb Erekat asked: "Why not 'resume' negotiations where parties let off?" David Hale, the deputy to U.S. Middle East envoy George Mitchell, appropriately responded: "We prefer 'relaunch' since there was no agreement – nothing is agreed until everything is agreed."¹⁸

4. THE JEWISH PEOPLE AS COLONIALIST LATECOMERS TO JERUSALEM

The most ubiquitous argument used against Israel's claims in Jerusalem contends that the Jewish people are an alien presence and at best latecomers to the Holy City. Professor Walid Khalidi, one of the most prominent and articulate Palestinian historians, spoke before a UN committee convened to consider the question of Jerusalem on November 30, 2009. Unfortunately, he started out with this feature of the Palestinian narrative. He placed Israel's control of Jerusalem right in the middle of the struggle between Islam and the West. The effort by Israel to re-unify Jerusalem, he explained, was a "latter-day Western crusade by proxy." Jewish immigration and colonization emanated from Zionism, which he characterized as a "Russian nationalist movement."¹⁹

Khalidi's narrative left out the simple truth that the Jewish people actually restored their clear-cut majority in Jerusalem not in 1948 or in 1967 but in 1863, according to British consular records.²⁰ Prussia's consulate was reporting a Jewish plurality already in 1845, when the Jews constituted the largest religious group in Jerusalem. This transformation in Jerusalem occurred well before the arrival of the British Empire in the First World War and the issuing of the Balfour Declaration. It even preceded the actions of Theodor Herzl and the First Zionist Congress. Indeed, in 1914 on the eve of the First World War there were 45,000 Jews in Jerusalem out of a total population of 65,000.²¹

The Jewish majority in Jerusalem reflected the simple fact that the Jewish people had been streaming back to their ancient capital for centuries, despite the dangers to their physical well-being that this entailed and the discriminatory taxes imposed by the Ottoman Empire on its non-Muslim subjects. In the mid-nineteenth century, Baghdad and Damascus were Arab cities, but Jerusalem was already a Jewish city. A careful reading of the Mandate document in fact indicates that the British and the League of Nations were fully cognizant that the Jewish rights they acknowledged were not created with the advent of the First World War. The Mandate itself referred to a pre-existing Jewish claim by specifically basing itself on the "historical connection of the Jewish people with Palestine."

This historical connection is precisely what Palestinian spokesmen have been determined to refute and challenge. In order to reinforce the image of the Palestinian Arabs as the authentic native population of Jerusalem, former PLO Chairman Yasser Arafat added another twist. In his UN speech, Khalidi traces Islamic claims to Jerusalem to the year 638, when the second caliph, Umar bin al-Khattab, came out of the Arabian Peninsula and captured it from the Byzantine Empire.

But Arafat tied Palestinian historical claims to the Jebusites that ruled Jerusalem before King David made it the capital of ancient Israel. Arafat said his ancestors were Canaanite kings. Moreover, he rejected all ancient Jewish connections to Jerusalem by even denying the very existence of the Temple, when he argued over the future of Jerusalem with President Bill Clinton at the Camp David negotiations in July 2000.²² It is too bad that during his many trips to Rome to meet with the Italian government, Arafat never stopped at the Arch of Titus where he could have seen the menorah and the vessels of the Temple that he claimed did not exist.

This doctrine of Temple denial in the Palestinian narrative has spread like wildfire in recent years. It has been used by Palestinian leaders from Saeb Erakat to Nabil Shaath. PLO Chairman Mahmoud Abbas has also adopted them. When Palestinian Prime Minister Salam Fayyad spoke at the UN General Assembly in November 2008 and devoted his remarks to Jerusalem, it was glaringly noticeable that he spoke about Christian and Muslim links to the city without mentioning a single word about Jewish ties to Jerusalem.

Unfortunately, Western audiences have often bought uncritically into much of this false narrative which was devised to erode Israel's rights. For example, *Time* magazine described the Temple Mount in October 2003 as a place "where Jews *believe* Solomon and Herod built the First and Second Temples (emphasis added)." The Temple was no longer a fact of history but part of an Israeli narrative. It might have existed or maybe it didn't exist. With this doubt embedded, academia began to slip as well. The prestigious University of Chicago Press published a work by Nadia Abu El Haj calling the Temples a "national-historical tale." She subsequently taught at Barnard College.

The irony of this revisionist history is that the Temple is very much part of the history of traditional Islam. The great commentators of the Quran acknowledged the Temple, like al-Jalalayn, who sought to interpret the famous verse about Muhammad's night journey that opens Sura 17, "Glory to him who made His servant go by night from the Sacred Mosque to the Farther Mosque." The Sacred Mosque was in Mecca, but what did the "Farther Mosque" refer to? Their answer was that the Farther Mosque was *Beit al-Maqdis*, which means the Temple, and sounds just like the Hebrew term, *Beit Hamikdash*.²³ That also became the Arabic term for Jerusalem. The Palestinians' use of Temple denial to undermine Israel's claims to Jerusalem not only flew in the face of archaeology and recorded history, it ironically negated their own Islamic tradition.

ISRAELI PUBLIC OPINION AND JERUSALEM

Despite the proliferation of misconceptions about Jerusalem, and the questions that have arisen about Israel's diplomatic stance in past years, the Israeli public, in fact, had not lost faith in



During 1948 synagogues and religious academies come under attack in the Old City of Jerusalem and are shelled by the artillery of the Arab Legion. Here, the Porat Yosef Yeshiva is destroyed. (Phillip John, Getty Images, 1948)

Jerusalem, despite articles that assert the Israeli consensus no longer insists on an undivided city.²⁴ The efforts to erode public support have not succeeded. According to a poll conducted for the Jerusalem Center for Public Affairs and released on June 6, 2011, by Dahaf Research under the direction of Dr. Mina Tzemach, the Israeli public still backs keeping Jerusalem united. When asked how important is preserving a united Jerusalem in the framework of a peace agreement, 69 percent answered very important, while 16 percent said important. That means **85 percent of the Israeli public still believes a united Jerusalem should be preserved.**

When asked about particular sites in Jerusalem, the results of the poll are very revealing. Responding to different possible concessions in the peace process, 62 percent said that they absolutely would not agree to a solution by which Israel would turn over the Temple Mount to the Palestinians, while Israel keeps the Western Wall. That was one of the scenarios for the Old City in the Clinton Parameters. Approximately 13 percent said they tend to disagree with such a proposal. **Putting these numbers together, 75 percent of Israelis who were asked, opposed giving up the Temple Mount as part of a peace settlement, even if Israel gets to keep the Western Wall.**



Palestinians stand atop the biblical Tomb of Joseph in the West Bank town of Nablus, October 7, 2000. Palestinian gunmen and civilians stormed the Israeli enclave, trashing Hebrew texts and setting fire to the holy site in a show of triumph just hours after Israeli troops evacuated the site. (AP Photo/Lefteris Pitarakis)

THE IMPORTANCE OF PROTECTING JERUSALEM'S HOLY SITES

This data illustrates that the people of Israel are attached to their holy sites in Jerusalem and understand what could happen to them if Israel were to concede them. These positions undoubtedly have been affected by Israel's own experiences. In 1948, after all, the Arab Legion took over the Jewish Quarter and began to systematically destroy or desecrate 55 synagogues and study halls, like the great Porat Yosef Yeshiva. The Old City's Jewish population was ethnically cleansed. The Yohanan Ben Zakai Synagogues became stables for the mules of the Old City's Arab residents. Meanwhile, the Jewish people were denied access to the Western Wall and their other holy sites from 1948 through 1967.

In modern times it is equally clear what would happen to religious sites if the Palestinians obtained control of the Old City. Under the Oslo Agreements, the Palestinian Authority was given responsibility for Jewish holy sites in the territories under its jurisdiction. On October 7, 2000, Joseph's Tomb in Nablus came under attack by a Palestinian mob that included Palestinian civilians and security forces. Hebrew texts were trashed, while the mob tried to dismantle the stones of the tomb with crow bars and pipes. They also cracked the tomb's dome as well. In April 2011, Israelis received another reminder about how the Palestinians fail to fulfill their responsibilities at holy sites, when Palestinian security personnel murdered Ben Yosef Livnat, who had visited Joseph's



Black smoke billows over the Church of the Nativity compound in the West Bank town of Bethlehem on April 11, 2002, after the church was seized by a joint unit of Fatah and Hamas. The clergy were taken hostage and the interior was desecrated. (AP Photo/Peter Dejong)

Tomb with a group of Breslover Chasidim. These events have reinforced Israeli concerns about who will protect the holy sites.

Christian sites have also been attacked under Palestinian rule. On April 2, 2002, a joint Fatah-Hamas force of thirteen terrorists entered the Church of the Nativity in Bethlehem and held the clergy as hostages for thirty-nine days. Generally, over the last decade and a half, holy sites have lost much of their traditional immunity and have come under attack by radical Islamic groups. This trend began when 2,000-year-old Buddhist statues in Afghanistan's Bamiyan Valley were blown up by the Taliban. This act was ultimately supported by Yusuf Qaradawi, the spiritual leader of the Muslim Brotherhood, which is the parent organization of Hamas. These attacks on non-Muslim religious sites have since spread from Pakistan to Iraq and most recently to Egypt, under the banner of radical Islam.

Internationalization is not an answer for Jerusalem either. In 1947, internationalization, in accordance with UN General Assembly Resolution 181, was proposed but was unworkable and ultimately failed. Jerusalem was invaded by three Arab armies. The only force that protected 100,000 Jews in Jerusalem from certain destruction were the forces of Israel. The UN did not lift a finger in 1948 against the threat that was posed to Jerusalem. There is no basis for thinking that an international body, containing members with conflicting interests, would be any more effective in the future than the UN was in 1948.

In short, Israel's own history, as well as more recent events, illustrates what is at stake in Jerusalem. Were Israel to agree to a re-division of Jerusalem, losing control of the Old City, the security of its holy sites would undoubtedly be put in jeopardy. **What Israeli diplomacy must make clear is that only a free and democratic Israel will protect Jerusalem for all faiths.**

Keeping Jerusalem open for all faiths is a historical responsibility of the State of Israel. Yet, Jerusalem has been at the heart of a great internal debate in Israel and the Jewish world more broadly. Many with a more particularistic orientation understand its reunification in 1967 as part of the national renewal of a people who had faced centuries of exile and even attempted genocide just a few decades earlier. It was where the Jews first restored a clear-cut majority back in 1863 at a time when the world began to recall and recognize their historical rights and title. Jerusalem was the meeting point between the nation's ancient history and its modern revival.

Others with a more universalistic view make a priority of integrating the modern State of Israel with the world community by using Jerusalem as a bargaining chip in a peace process presently under the auspices of the EU, Russia, the UN, and the U.S. In fact, the elaborate international ceremonies of world leaders orchestrated around the signing of each peace accord in the 1990s were intended to remind Israelis that their international acceptance, as well as the normalization of their relations with their Arab neighbors, was tied to this very diplomatic process.

The clash between the particularistic instincts inside Israel and its universalistic hopes has been at the heart of the country's political debate for forty years. Jerusalem, however, is where these two national instincts converge, for by protecting Jerusalem under Israeli sovereignty, the State of Israel also serves a universal mission of keeping the holy city truly free and accessible for peoples of all faiths. Particularists will have to understand that there are other religious groups with a stake in the future of the Holy City, while universalists will have to internalize that they have a great national legacy worth protecting for the world and that conceding it would condemn it to total uncertainty at best.

CONCLUSIONS

Prior to the granting of the Mandate for Palestine to Great Britain by the League of Nations, there were many proposals to restore the Jewish people to their ancestral homeland. From Napoleon Bonaparte's proclamation in 1799 to Theodore Roosevelt's writings in 1918, the idea of the historical rights of the Jewish people to their ancient homeland was linked to their rights to Jerusalem. Israel's first president, Chaim Weizmann, quoted in this context the Archbishop of Canterbury during a debate in the late 1930s in the British House of Lords, saying:

It seems to me extremely difficult to justify fulfilling the ideals of Zionism by excluding them from any place in Zion. How is it possible for us not to sympathise in this matter with the Jews? We all remember their age long resolve, lament and longing: "If I forget thee, O Jerusalem, let my right hand forget her cunning." They cannot forget Jerusalem.²⁵

Thus the return to *Eretz Yisrael* (the Land of Israel) and the restoration of Jerusalem became understood in the West as inseparable aspirations.



*Jewish refugees stream out of the Old City of Jerusalem in 1948 escaping the invading Arab Legion.
(Phillip John, Getty Images, 1948)*

What struck legal experts writing in this period was the fact that the Jewish people never renounced those rights and indeed acted upon them through prayer, fasting, and pilgrimage. In the diplomacy of modern Israel, that refusal continued in one form or another, especially after the Six-Day War. Significantly, these rights were backed by some of the most important authorities on international law.

In the years of the Arab-Israeli peace process, proposals were raised and considered for the re-division of Jerusalem, but no binding agreements were actually reached and brought to the Knesset for ratification. Israeli opinion remained firm about the rights of the Jewish people to retain their united capital under the sovereignty of Israel. The recognition of those rights in the future by the international community will depend on Israel demonstrating that it alone will protect the Holy City for all faiths. This is a standard which Israel has met in the past and will undoubtedly continue to meet in the future.

NOTES

*This essay is an expanded version of an address given on June 6, 2011, for the Ingeborg Rennert Center for Jerusalem Studies.

- 1 Martin Gilbert, "Jerusalem: A Microcosm of Jewish Rights," *Israel at 60: Confronting the Rising Challenge to Its Historical and Legal Rights* (Jerusalem: Jerusalem Center for Public Affairs, 2009), p. 22.
- 2 William Foxwell Albright, et al., *Palestine: A Study of Jewish, Arab and British Policies*, Esco Foundation (New Haven: Yale University Press, 1947), vol. 1, p. 229. Ernst Frankenstein, *Justice for My People: The Jewish Case* (London: Nicholson & Watson, 1943), p. 88. The historical record in fact shows Jewish resistance continued with major armed revolts in 115 against Trajan, 135 against Hadrian, 351 against Gallus, and 614, when the Jews joined the Persians to fight Roman rule. See S. Safarai, "The Era of the Mishnah and Talmud," in H.H. Ben-Sasson (ed.), *A History of the Jewish People* (Cambridge: Harvard University Press, 1976), pp. 330-363.
- 3 J. Stoyanovsky, *The Mandate for Palestine: A Contribution to the Theory and Practice of International Mandates* (London: Longman, Green and Co., 1928), p. 65.
- 4 *Ibid.*, p. 241.
- 5 Stephen M. Schwebel, "What Weight to Conquest?" *American Journal of International Law* (1970):344-347.
- 6 John Norton Moore (ed.), *The Arab-Israel Conflict Volume IV: The Difficult Search for Peace (1975-1988), Part One* (Princeton: Princeton University Press, 1991), p. 815.
- 7 Arthur Goldberg, Letter to the Editor, *New York Times*, March 6, 1980.
- 8 "Letter of March 25, 1999, to the UN Security-General from the PLO Observer Concerning UN General Assembly Resolution 181," United Nations Document A/53/879, S/1999/334, March 24, 1999.
- 9 Elihu Lauterpacht, *Jerusalem and the Holy Places* (London: Anglo-Israel Association, 1968).
- 10 "United National General Assembly Resolution 181, November 29, 1947," The Avalon Project at Yale Law School, <http://www.yale.edu/lawweb/avalon/un/res181.htm>
- 11 Larry Kleter, "The Sovereignty of Jerusalem in International Law," *Columbia Journal of Transnational Law*, Vol. 20, 1981, p. 350.
- 12 Eugene V. Rostow, Correspondence, *American Journal of International Law*, July 1990.
- 13 Eugene V. Rostow, "The Future of Palestine," McNair Paper 24 (Washington: National Defense University, 1993), p. 10.
- 14 Yael Yehoshua, "Abu Mazen: A Political Profile," Special Report No. 15, MEMRI – The Middle East Media Research Institute, April 29, 2003, <http://www.memri.org/report/en/0/0/0/0/0/856.htm>.
- 15 "Palestinian Reports on the Taba Negotiations," MEMRI Special Dispatches, No. 184, February 7, 2001, <http://www.memri.org/report/en/0/0/0/0/0/419.htm>.
- 16 There have been reports that Foreign Minister Shlomo Ben Ami hoped to enshrine the concessions he offered on Jerusalem at the UN Security Council. He admits in his Hebrew memoirs that the U.S. Ambassador to the UN, Richard Holbrooke, warned him that the UN should only be used to endorse an agreement that would be achieved in the future, but it should not *mandate* the solution. See Shlomo Ben Ami, *A Front without a Rearguard: A Voyage to the Boundaries of the Peace Process* (Tel Aviv: Yediot Books, 2004) [in Hebrew], p. 309.
- 17 *Yediot Ahronot*, December 29, 2000.
- 18 "Meeting Minutes: Saeb Erekat and David Hale," *Aljazeera Transparency Unit*, <http://www.ajtransparency.com/files/4835.pdf>.
- 19 See Walid Khalidi, "Control of Jerusalem," <http://www.youtube.com/watch?v=3x8BM0ry1nM&feature=BFa&list=PL001B57CA656A0C49&index=1>.
- For the classic presentation of the Palestinian legal case on Jerusalem, see Henry Cattán, *Jerusalem* (London: Saqi Books, 2000).
- 20 For the actual British cable, see Dore Gold, *The Fight for Jerusalem: Radical Islam, the West, and the Future of the Holy City* (Washington: Regnery, 2007), pp. 290-291.
- 21 Martin Gilbert, "Jerusalem: A Tale of One City," *New Republic*, November 14, 1994.
- 22 *Ibid.*, pp. 11-13.
- 23 *Ibid.*, p. 17.
- 24 James Carroll, "Netanyahu's Extremist Mistake," *Boston Globe*, June 6, 2011.
- 25 Regarding Napoleon's declaration to restore Jerusalem to the Jewish people, see Albright, et al., Volume 1, Page 2. Teddy Roosevelt's ideas about starting a Zionist state around Jerusalem appear in Michael B. Oren, *Power, Faith and Fantasy: American in the Middle East 1776 to Present* (New York: W. W. Norton, 2007), p. 359. President Weizmann's address from December 1, 1948, in which he quotes the Archbishop of Canterbury, may be found at <http://www.mfa.gov.il/MFA/Foreign+Relations/Israels+Foreign+Relations+since+1947/1947-1974/3+Israel+Claims+Jerusalem-+Address+by+President+We.htm>