Jerusalem's Status and the Evolution of U.S. Policy

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Brief Analysis

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The Myth of Consistency Since 1967, U.S. administrations have varied their policy regarding the status of East Jerusalem. Under the Johnson and Reagan administrations, East Jerusalem was not considered occupied territory, and, consequently, Israeli control of the city in its entirety was implicitly accepted. Johnson emphasized that the international interest lay only with the holy sites of Jerusalem, and Reagan indicated that Jerusalem as a whole should remain under exclusive Israeli administration. In contrast, the Nixon and Bush administrations viewed East Jerusalem as occupied territory, therefore implicitly calling for a reorganization, if not redivision, of the city. The Nixon administration was the first to declare East Jerusalem "occupied" under the provisions of the 1949 Geneva Convention, and Bush went so far as to declare Jewish settlements in East Jerusalem as contrary to international law. The Carter and Clinton administrations were both ambiguous about the status of East Jerusalem.

It is unclear what Nixon meant when he declared that the United States regarded East Jerusalem as occupied. First, Israel could not have occupied the city from Jordan. After all, Washington did not recognize Jordan as having title to East Jerusalem, any more than it recognized Israel has having title to West Jerusalem. Indeed, the Jordanian claim to East Jerusalem was recognized only by Pakistan, and not a single Arab country recognized Jordan's claim. Perhaps Nixon meant that Israel occupied a United Nations (UN)-controlled East Jerusalem. That would be a peculiar interpretation, because while the 1947 UN partition plan envisaged an internationalization of Jerusalem, the UN never actually exercised authority over the city. Furthermore, no UN resolution has ever asserted a UN title to the city. Alternatively, Nixon may have meant that Israel took control of East Jerusalem from its indigenous population. That would also be an unusual interpretation, since the indigenous population did not have status under international law.

U.S. Embassy The suggestion to move the American embassy to Jerusalem was first introduced in 1951 by a lower-level official in the State Department. The secretary of state at the time, Dean Acheson, dismissed the idea on the grounds that this move would contravene international law as embodied in the 1947 UN partition plan calling for the internationalization of Jerusalem. In fact, the 1947 UN plan became defunct when British troops pulled out of Mandate Palestine in 1948. The most recent revisiting of the issue in the United States produced the Jerusalem Embassy Act of 1995 in which Congress declared that a) Jerusalem should remain undivided while it protects all of its ethnic and religious groups, b) Jerusalem should be recognized as the capital of Israel, and c) the U.S. embassy should be moved to Jerusalem. While the Jerusalem Embassy Act is not binding, it should lead to a logical policy outcome.

GEOFFERY WATSON

International Law The waffling of U.S. policy with regard to the status of East Jerusalem is no surprise in light of the ambiguity of the most relevant treaty in international law, the Fourth Geneva Convention on the Protection of Civilians in Time of War signed in 1949. It is debatable whether the treaty applies to East Jerusalem. When U.S. administrations have declared East Jerusalem to be occupied, lawyers have used the first paragraph in Article 2,

which states that the convention applies to "all cases of declared war or of any other armed conflict." In contrast, Israel and sympathetic U.S. administrations have used the second paragraph of Article 2, which states that the convention will "also apply to all cases of partial or total occupation of the territory of a high contracting party," to argue that East Jerusalem was never the territory of a high contracting party, being part of neither Jordan nor any Palestinian state. Israel has been pilloried in the UN for what is in fact a plausible interpretation of Article 2. Ultimately, however, whether or not East Jerusalem is occupied has no implications with regard to how the two parties will ultimately resolve the Jerusalem issue.

Current Negotiations There are several legal considerations which apply to the current Israeli-Palestinian peace negotiations. First, both sides are obligated by the Oslo Accords signed in 1993 to negotiate in good faith. Second, there is a duty to respect the self-determination of both the Israelis and Palestinians in Jerusalem. However, this duty is more of a procedural issue than a substantive one, meaning that both sides have the right to be fairly represented in negotiations. Third, although both sides promised to reach an agreement by certain deadlines, of which the most recent is September 13, 2000, a deadline is not a condition, and the various accords do not become null and void after this date, contrary to Palestinian Authority chairman Yasir Arafat's suggestion. Fourth, if the two parties reach a deal and then ratify it, it will not be easy for either side to later push the agreement aside claiming duress or coercion by threat of force; international law lays out narrow restrictions for invalidating an agreement based on duress once it is internally ratified by both sides.

Roles of the U.S. President and Congress Under the U.S. Constitution, only the President has the power to conduct foreign relations. In contrast, it is the Congress that is empowered to determine funding-including funding for the construction of embassies. Ruling on a case involving a different matter, the Supreme Court determined that Congress can establish financial penalties for governmental offices and agencies if they do not adopt certain policies. But that determination was made in the context of an appropriation set to be reduced by 5 percent if the policy in question were not adopted. In contrast, the Jerusalem Embassy Act provides for a 50 percent reduction in State Department construction funds if the embassy is not moved to Jerusalem. It is by no means clear that the Supreme Court would allow such a severe penalty, since it would begin to look like Congress were trying to use its appropriations authority to assert a power it does not otherwise enjoy. In other words, it is quite possible that the Jerusalem Embassy Act is constitutional only because the President is allowed to wave its provisions.

In the event of an Israeli-Palestinian agreement, the President may make some commitment to one or both of the parties. Whether those commitments are binding international agreements does not depend on the form they take: a short letter can be a binding agreement legally. The test is whether the document looks like a formal accord; for instance, does it use legal language, does it commit the United States (using language like "shall" instead of "should," for example), and so on. To be sure, any side agreements the President may make during the Camp David summit that involve appropriating funds or transferring weapons are subject to congressional approval. Any international agreement approved by Congress is binding on successor administrations, but that does not mean it will endure perpetually: a country is always free to renounce an agreement. For that matter, a country may violate an agreement it has signed if it is willing to forego the benefits it receives from the other side under that agreement.

This Special Policy Forum Report was prepared by Liat Radcliffe.

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