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The United States' Recognition of Jerusalem as the Capital of Israel and the Challenge to the International Consensus

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"When I use a word," Humpty Dumpty said, in a rather scornful tone,
"it means just what I choose it to mean—neither more nor less."
"The question is," said Alice, "whether you can make words mean
so many different things."
"The question is," said Humpty Dumpty, "which is to be the master—that's
all."

—Lewis Carroll, *Through the Looking Glass, and What Alice Found There*
(1872)

On December 6, 2017, US President Donald Trump announced that the US was recognizing Jerusalem as the capital of Israel and would be moving its embassy there from Tel Aviv in fulfillment of the 1995 Jerusalem Embassy Act (henceforth Embassy Act). In one fell swoop, the US has seriously challenged 70 years of international consensus enshrined in international law as regards the status of the city, and put the potential for a two-state solution into a tail-spin (although, like many other commentators, we have been

skeptical of its possibility for a while). In keeping with the general chaos surrounding his presidency, Trump and his administration then announced a series of contradictory remarks regarding this historic decision. The original declaration insisted that the decision did not affect final status negotiations regarding Jerusalem, a position that was confirmed by then secretary of state, Rex Tillerson, a few days later. In a startling display of Humpty Dumpty-style semantics, Trump had thrown the diplomatic equivalent of a Molotov cocktail into the incendiary issue of Jerusalem's status, but then denied he had done so, arguing that his decision was "nothing more, or less, than a recognition of reality." [1] But then Trump contradicted himself in a January 3, 2018 tweet, where he stated: "we have taken Jerusalem, the toughest part of the negotiation, off the table." [2] As with Humpty Dumpty's explanation of the politics of semantics to Alice, deciphering the different meanings in Trump's statements and language is less important than the implications that this decision will have for future diplomatic policy and practice.

The responses to the embassy move decision were predictable. Israel was delighted, the Palestinians were not, and the international community condemned it but is largely powerless to prevent it or its ramifications.

There are multiple ways of considering this decision, but the main ones covered here are: first, the main motivating factors behind Trump's decision; second, how to understand it in terms of US policy; third, its impact on the international consensus and potential bearing on the final status of Jerusalem in any future peace deal; and fourth, the response in the region.

What Motivated the Decision?

The role of evangelical Christianity and Christian Zionism in the US is vital to any serious explanation of the political context of Trump's declaration on Jerusalem. Trump clearly understands the importance of this community for his presidency and has accordingly surrounded himself with evangelicals and other pro-Israel advisers and cabinet ministers—all of which have voiced support for the Jerusalem decision and for Israeli settlements in the occupied West Bank.

Most prominent amongst these voices is that of Vice-President Mike Pence, who is an evangelical Christian and a Christian Zionist. His role in the Jerusalem decision was crucial. Pence is the first sitting vice-president to give a keynote speech (in July 2017) at the annual meeting of Christians United for Israel, the most important Christian Zionist organization in the US which claims more than 3 million members. Indeed, while Trump signed the declaration, Pence can clearly be seen in the background, which was a clever signal to Trump's evangelical support base.

Another important figure in Trump's circle of friends, who has long lobbied for the US to implement the Embassy Act, is Sheldon Adelson, the Jewish-American casino billionaire, who backed Trump's election campaign to the tune of \$35 million, and has reportedly offered to pay for the construction or refurbishment of the building to host the new embassy.

Support was also strong from David Friedman, US ambassador to Israel. Friedman, who is an Orthodox Jew, is probably the most partisan US ambassador to date. He was the chair of American Friends of Beit El, a US NGO that financially supports a Jewish settlement located in the West Bank near Ramallah (which also received a large donation from Trump in 2003), and does not hide his admiration for the current Israeli administration and for Israel in general. In 2016, he called the two-state solution "a scam" and has referred to Jews who support it as "kapos"—a highly derogatory term that signifies collaboration with the enemy, but which originated for Jews who were enlisted by the SS during the Holocaust to serve as administrators or functionaries in the concentration camps. Unsurprisingly, relations between Friedman and the Palestinian leadership are not good, with both sides frequently trading insults.

Trump's son-in-law, Jared Kushner, the senior adviser tasked with preparing the peace "deal of the century", who is also an Orthodox Jew, supported the Jerusalem announcement, and his family foundation has also donated to Israeli settlements. The US's chief envoy to the Middle East peace process, Jason Greenblatt, who was a Yeshiva student in the West Bank settlement of Gush Etzion, has also unsurprisingly stated that the settlements are not an

obstacle to peace, although he has voiced support for a negotiated two-state solution.

The influence of pro-Israel voices in Trump's administration also includes national security adviser John Bolton and Secretary of State Mike Pompeo. And, of course, there is Nikki Haley, US ambassador to the UN, who courted the evangelical vote as governor of South Carolina, and clearly outlined her pro-Israel credentials at the AIPAC conference in March 2018 and frequently in the UN.

There is little doubt therefore that the Jerusalem announcement is of huge significance to the Republican Party's base, which is 73 percent white Christian. [3] Trump was therefore delivering and shoring up his support in the GOP, while proclaiming to be merely implementing a long-standing US policy.

What It Means in Terms of US Policy

Implementing the Embassy Act and moving the embassy to Jerusalem signifies both a continuity and a departure of US policy towards the city. The continuity lies in the fact that the US's position on Jerusalem has constantly shifted as its (largely) unconditional support for Israel has grown but that it has always done so within the parameters of international consensus. The departure has occurred through the rupture of US policy with the international consensus and its violation of international law.

This, however, was not always the case. The US's position for many years was in line with the 1947 UN Partition Plan for Palestine (enshrined in General Assembly Resolution 181), formulated after Britain terminated its mandate and referred the question of Palestine to the UN. This plan proposed that while Palestine would be divided into a Jewish state and an Arab state, neither would have sovereignty over Jerusalem. Instead, the city would have its own special international regime as a *corpus separatum* administered by the UN Trusteeship Council, it would have its own governor and elected legislative council, and it would be demilitarized and neutral.

But events overtook this international consensus. At the end of the first Arab-Israeli war in 1948, Jordan had seized the eastern part of the city and the newly established state of Israel had seized the western part, thus *de facto* dividing it—a situation that was acknowledged in the 1949 Armistice Agreement between the two. Israel promptly announced Jerusalem as its capital. Despite immediately recognizing the new state, the US, in line with UN policy and most other states, did not recognize the *de jure* sovereignty of either Jordan or Israel over any part of the city.

Following the 1967 Arab-Israeli war, Israel captured and occupied the rest of the territory of Mandate Palestine. Almost immediately, it expanded the boundaries of the Jerusalem municipality by unilaterally annexing 70 square kilometers, thus bringing an expanded East Jerusalem under Israeli *de facto* control, law, jurisdiction and administration. [4] From this point, incremental shifts in US practice and pronouncements can be witnessed. This was the result of four factors: the impact of “facts on the ground” (i.e. as Israel imposed more control over the city, the US has shifted); the increasing importance of Israel to US foreign policy in the region (in the context of the Cold War and Arab nationalist regimes, it became a key ally); changes in the US administration; and Israel’s emergence as an important US domestic political issue (commanding levels of support in the Congress that could not be ignored).

Yet, despite these factors, the US still did not recognize Jerusalem as the capital of Israel or its annexation, *de jure* or *de facto*, of territory seized in 1967—and thus its position remained within the international consensus and international law. Pro-Israel groups in the US, however, were determined to force the administration to relocate the Embassy and lobbied the Congress in pursuit of this aim. This lobbying bore fruit in the shape of:

1. The 1988 Helms Amendment, which endorsed the opening of two “diplomatic facilities” (one in Tel Aviv, one in Jerusalem).
2. The 1989 Lease Agreement between the US and Israel for a plot of land in West Jerusalem (the ownership of which was subsequently challenged

because it was confiscated Palestinian refugee property and part of an Islamic *waqf*). [5]

3. The 1995 Jerusalem Embassy Act, which called on the US to recognize Jerusalem as the capital of Israel, and to relocate its embassy from Tel Aviv.

The passing of the 1995 Act was hugely significant as it recognized Jerusalem as the “undivided” and “united” capital of Israel in US public law. The Act also contained a punitive clause that in the failure to move (originally to take place no later than May 31, 1999), the State Department’s annual embassy maintenance and building budget would be cut by half. However, waiver authority was granted to the President for periods of six months if it was deemed to be in the “national security interests of the United States” not to move the embassy. Every president has used this waiver authority including initially Trump, despite all of them voicing support for the Act’s implementation during their election campaigns. But while Trump’s decision is completely in line with current US domestic policy and law towards Jerusalem, it is a complete break with the international consensus and international law.

The International Consensus on Jerusalem

The position of the UN and most member states has been consistent: The future of Jerusalem should be determined by Israel and Palestine through negotiations based on relevant UN resolutions. The Security Council regards Israel’s annexation of East Jerusalem to be illegal and subject to international humanitarian law and the laws of occupation, just like the rest of the territory occupied in 1967, as enshrined in UN Security Council Resolution 242. [6] Under UN Security Council Resolution 2334, all states must “distinguish, in their relevant dealings, between the territory of the State of Israel and the territories occupied since 1967.” And UN Security Council Resolution 478, which was adopted on August 20, 1980, as a response to Israel’s Jerusalem Law (which declared Jerusalem as Israel’s “undivided capital”), called on all states to withdraw their diplomatic missions from Jerusalem. Security Council Resolution 478 is one of seven UN Security Council resolutions condemning Israel’s annexation of East Jerusalem.

Israel's de facto control over West Jerusalem has, however, been accepted by most states. International law has therefore been applied inconsistently. Both East and West Jerusalem were obtained by Israel through military force, but the former is considered occupied whereas the latter is not. [7]

Nevertheless, international law is clear as regards the territory occupied since 1967 which includes East Jerusalem. The UN and most countries have therefore taken the Trump announcement very seriously as indicated by the resolution passed in the General Assembly on December 21, 2017, and the attempted resolutions in the Security Council designed to censure the US and reverse its decision. The UN Special Coordinator for the Middle East Peace Process, Nikolay Mladenov, reiterated the international body's position that the status of Jerusalem could only be decided through negotiations and based on UN resolutions.

The most important issue for both the international community and the Palestinians, argues Michael Lynk, the UN Special Rapporteur for Palestinian Human Rights, is that the US no longer appears to recognize the annexation of East Jerusalem as illegal, or that the West Bank and Gaza are occupied territory. [8] This was demonstrated by the removal of the terms "occupied" and "occupation" in reference to the territories occupied by Israel in 1967 from the 2017 State Department's annual human rights report.

At issue, therefore, is the international legal norm of the inadmissibility of the acquisition of territory through force, as affirmed countless times by the Security Council, General Assembly and International Court of Justice, explains Ardi Imseis, head of the UNRWA West Bank legal team from 2007 to 2014. Despite Trump's insistence to be merely implementing US law, international law supersedes domestic law in such matters. [9] Both Lynk and Imseis insist that the embassy move is most definitely a pronouncement on a final status issue and is shaping other states' policies, some of whom are now considering moving their embassies to Jerusalem. The storm predicted in the Arab and Islamic world was, however, surprisingly fairly muted thus indicating that the

issue of Palestine has become less important in international affairs, however much the US is legally and diplomatically isolated on this position.

Responses in the Region and the Occupied Palestinian Territories

Marginalized by a focus on the revolutions and counterrevolutions across the Arab world, and a victim of intense regional rivalries, Palestinian self-determination is no longer the *cause célèbre* it once was, especially for its Arab neighbors consumed by political unrest and regional rivalries, however much popular sentiment the Palestine cause still generates among the Arab peoples. Of course, Arab leaders publicly criticized the decision, actively proposed and participated in UN resolutions condemning it, called it a “dangerous violation of international law” and insisted that they would lobby the UN to recognize a Palestinian state with East Jerusalem as its capital. [10] But several sources have stated that the announcement was closely coordinated with several Arab states, particularly Egypt and Saudi Arabia, which are dependent on the US for security and support, preoccupied by concerns about their own domestic stability and regional rivalries and developing their own strategic alliances with Israel. [11] So, in addition to successfully shoring up his domestic support, Trump has also chosen an extremely propitious time to implement the Embassy Act in terms of Middle East politics.

In this context, the response of the Palestinian leadership in Ramallah to the announcement has remained within what is feasible given that entrenched interests prevent a radical change of strategy. The Palestine Liberation Organization (PLO) and the Palestinian Authority (PA) have stated they are boycotting the US administration and have refused to return to negotiations until the US as sole guarantor and mediator for peace talks has been replaced by multi-party mediation. They have lobbied other actors, particularly the EU and the UN, to condemn the US decision and take a bigger role in the peace process. And they have campaigned at the international level to get the decision reversed, including calling on the International Criminal Court to open an investigation against Israel, to which the US promptly responded by restricting the PLO's operations on US soil and threatening to close the offices

of the delegation in Washington, DC. The Ramallah leadership has, however, stopped short of renouncing its obligations under the Oslo Accords, which would include suspending security coordination with Israel, retracting its recognition of Israel, and possibly disbanding the PA. Despite threats to carry this out, the PLO/PA are unlikely to move in this direction. And, unfortunately, the Trump decision has not brought reconciliation any closer between Fatah and Hamas, and thus the West Bank and Gaza which have remained administratively divided since 2007.

At the grassroots level, several protests were staged worldwide, but they were short lived. This was also true for East Jerusalem where, for several weeks, Palestinians tried to organize sit-in actions outside Damascus Gate. But these sit-ins, which were met by an aggressive Israeli response, eventually faded away. During the month that followed the announcement, 16 protesting Palestinians across the occupied Palestinian territories were killed by Israeli soldiers, but demonstrations every Friday thereafter have been limited in scope and participation. Demonstrations on May 14, the day of the embassy inauguration, were the largest witnessed so far.

Nevertheless, the popular denunciation of the US announcement highlighted three key issues: first, that Jerusalem remains the center of gravity for Palestinians, and so the issue of the status of the Old City and in particular the Holy Sites will continue to spark protests; second, that despite decades of Israel's attempts to split East Jerusalem off from the rest of the occupied Palestinian territories, to "Judaize" the city and to integrate Palestinians into the Israeli system, Palestinian Jerusalemites still refuse to accept Israel's occupation and annexation; and third, that any form of collective action from Palestinians in Jerusalem is destined to fail unless a committed and representative leadership emerges from within its ranks. The actions of the al-Aqsa imams in summer 2017, when mass demonstrations forced the removal of surveillance equipment that Israel had installed outside the Haram al-Sharif, showed what could be achieved with trusted leadership.

Inadvertently, however, the Trump decision appears to have provoked an acceleration of political debates and discussions amongst Palestinians in East

Jerusalem about their future. The first of these debates relates to the viability of the two-state solution, and the validity of a one-state solution. An opinion poll carried out in January and February 2018 has indicated strong shifts in the positions of the Palestinian public compared to previous polls with regard to the two-state solution and the peace process. [12] Although responses were not broken down by area, East Jerusalem was included in the survey sample. The poll showed that the majority of respondents—96.1 percent—reject the establishment of a Palestinian state without East Jerusalem as its capital. There has been a further drop in support for the two-state solution to 35.8 percent from 49.6 percent in January 2017. This has not translated into increased support for one state (or a binational state), which only increased from 18.1 percent in February 2017 to 23.9 percent. Given that support for a one-state solution is higher amongst Palestinian citizens of Israel, this could, however, translate into similar changes in the opinions of Palestinians from East Jerusalem in the future.

The second debate is on the potential political realignment of Palestinians from East Jerusalem with Palestinians from inside Israel, as both now share the same conditions of being under Israeli law and sovereignty. Indeed, in the absence of PLO/PA political representation in the city, the Palestinian-Arab political parties in Israel and their members of the Knesset have emerged as champions of East Jerusalem issues; the Arab Joint List even has a “Jerusalem Committee.” This is a fact that has not gone unnoticed or unacknowledged in East Jerusalem’s streets and coffee shops. Such a potential realignment, however, would not necessarily require a full 180 degree turn for East Jerusalem Palestinians away from identifying with the rest of the occupied Palestinian territories (and thus the struggle for separate statehood) or joining with Palestinians in Israel and thus a struggle for equal rights inside the State of Israel. Perhaps, just like Palestinians inside Israel but with different emphasis, they could equally adhere to both struggles in recognition of the contradictory positions in which they are forced to live.

While this debate is still in its infancy, this trend may help to explain the increase in Palestinian residents of East Jerusalem applying for Israeli

passports. Only ten years ago, it was taboo for Palestinians from East Jerusalem to apply for Israeli citizenship, but now there are around a thousand applications every year. [13] This, of course, still constitutes a limited number given that there is a Palestinian population in Jerusalem of around 300,000-350,000. But in the context of an increase in the revocation of Jerusalem IDs and the injustices of Israel's "center of life" policy, it is hardly surprising that Palestinian from East Jerusalem are seeking to secure their status, and so this increase in applications may well merely imply that a very clever form of *sumud* (steadfastness) is being practiced and signifies no change in political opinion. The Israeli authorities may have recognized this by the fact that, as the number of passport applications has risen, so too have the number of rejections. [14]

The final debate concerns Palestinian attitudes towards the forthcoming Jerusalem municipal elections. Palestinians with Jerusalem ID cards have no right to vote in the elections for the national parliament (the Knesset); however, they do have a right to vote in the Jerusalem municipal elections. Few have exercised that right in the past (normally only one to two per cent), instead opting to boycott the elections in protest and fear that participation would be interpreted as an acceptance and normalization of Israel's occupation. The first municipal elections in five years are scheduled to take place in October 2018. There have been discussions amongst Palestinian from East Jerusalem about whether to participate or continue to boycott. Some Palestinians (albeit a limited few) have also announced their candidature either through their own parties or as part of a planned joint Palestinian-Israeli list.

Despite some criticism of the candidates and questioning of the utility of running for election, a survey conducted by the Israel/Palestine Center for Research and Information together with the Hebrew University suggests that almost 60 percent of East Jerusalem residents believe they should take part in the elections, while only 13 percent object, although such figures run contrary to conventional wisdom on the subject. [15] Palestinians constitute around 35-40 percent of the population inside Jerusalem's municipal borders, which

makes them an important electoral constituency. Perhaps if there was a change of policy akin to that implemented by Sinn Fein in Northern Ireland in the 1980s (where a parallel electoral strategy was developed and pursued), Palestinians in East Jerusalem could flex some political muscle if they went to the polls and remained united. However, the influence of the PLO is still paramount, and residents are unlikely to turn out to vote if not approved by the PLO and the political factions.

On the Israeli side, the political impact of the implementation of the Embassy Act was almost immediate: more settlement construction, including in East Jerusalem, was announced; plans to change the municipal boundaries of the city to gerrymander the city's demography are proceeding at pace; and there has been an increase in discussions and motions in the Knesset calling for annexation of large parts of the West Bank. While it is questionable whether any third-party actors would have made any meaningful attempt to stop these plans beyond the usual rhetorical flourishes, undoubtedly Trump's decision (and the end of US pretense of disapproving of the settlements) has emboldened Israel's plans to ensure a Jewish majority and its control over the whole city, as well as emboldening those who support the annexation of the West Bank settlements and those seeking to change the status quo regarding the al-Aqsa mosque compound.

Conclusion

The official opening ceremony of the US Embassy took place at its temporary site at 14 David Flusser Street in Arnona, West Jerusalem on May 14, 2018. Initially this site will house the ambassador and a reduced staff until more office space is constructed and the new embassy compound is built on the 25 *dunam* (6.2 acre) site. While the current building is located in the western half of the city, part of the new building will be in what was once a "no-man's land" between Israel and Jordan from 1948 to 1967 thus sparking some controversy. The opening ceremony—which was hosted by Friedman and attended by Kushner, Ivanka Trump, Greenblatt, selected members of Congress, and Israeli politicians—seemed less like a diplomatic event and more like a family party. The fact that the final speech was made by John Hagee, founder and

chair of Christians United for Israel, speaks volumes. The date was also chosen carefully: to coincide with the seventieth anniversary of the announcement of the State of Israel according to the Gregorian calendar (although Israelis celebrate this according to the Jewish calendar and so it fell in mid-April). It was also one day before the seventieth anniversary of the Nakba, where three-quarters of the Palestinian population became refugees and the remaining quarter became “present absentees”, i.e. denied the right to return to their homes and villages but allowed to remain within the borders of the new state. To commemorate this anniversary, and to draw attention to Gaza’s isolation and increasingly precarious situation, Palestinians have taken part in a weekly “March of Return” along Gaza’s “border” with Israel every Friday since March 30, culminating in a huge demonstration on May 14. Cumulatively over the six marches, nearly a hundred Palestinians have been killed and tens of thousands injured by the Israel army.

Covering the events of May 14, the TV channel Aljazeera provided a live stream through a split-screen view of the US Embassy ceremonies on one side, and the demonstration on the Gaza “border” on the other, with figures for the mounting death toll of Palestinians rolling underneath. This visual presentation and the US’s statement that the deaths in Gaza were solely the responsibility of Hamas surely drives home the conclusion: Through its actions, the US has rewarded Israel for creating “facts on the ground”, has set a dangerous precedent in terms of international law by recognizing Israeli sovereignty over territory acquired through force, has rejected the international consensus regarding Jerusalem, and has marginalized the rights of a people under occupation. In this context, perhaps it is time to consider reclassifying the US as no longer just a “third party” but now a party to the conflict, particularly because of the illegal actions of agents of the US government as relates to support for Israeli settlements, the existence of which is a war crime.

Endnotes

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