HAS ISRAEL ANNEXED EAST JERUSALEM?

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The Israel-PLO agreement in Oslo permitted a delay before the parties would begin negotiations over "permanent-status issues"—including settlements, boundaries, refugees and Jerusalem. That delay, until the beginning of the third year of the "interim period," ended in May 1996 when the permanent-status negotiations were formally begun. Shortly afterward Benjamin Netanyahu was elected, replacing Shimon Peres as Israel's prime minister and putting those negotiations on hold. Many wonder whether the tangled dispute over details of Israeli redeployment from Hebron and provocative Israeli moves in East Jerusalem signal the new government's determination to stonewall the peace process while expanding settlements and de facto annexation.

From this point of view, the Netanyahu-Likud government is doing to the Oslo negotiating process what the Begin-Likud government did to the 1979-81 autonomy negotiations and what the Shamir-Likud government did to the post-Madrid talks. Prime Minister Netanyahu officially denies this is his policy. He has repeatedly expressed his commitment to the successful completion of the peace process and has demonstrated his readiness to find some way to implement an Israeli redeployment in, if not from, Hebron. But it is on the question of Jerusalem that Netanyahu's sincerity will really be tested. His government's repeated and categorical refusal to consider compromises on the future of expanded East Jerusalem suggests that he may wish to enjoy the benefits of appearing to take the peace process seriously while insuring its failure with an unyielding position on the key issue of Jerusalem.

Indeed on no issue has the Netanyahu government been more explicit about its opposition to compromise than with respect to the future of expanded East Jerusalem. Its official guidelines read as follows:

> Jerusalem, the capital of Israel, is one city, whole and united, and will remain forever under Israel's sovereignty....The government will thwart any attempt to undermine the unity of Jerusalem, and will prevent any action which is counter to Israel's exclusive sovereignty over the city.

In a study of the Jerusalem question published shortly before the 1996 election, top Netanyahu foreign-policy adviser Dore Gold argued that even if a compromise might be possible, involving a Palestinian capital in Abu-Dis and additional neighborhoods of East Jerusalem, Israel should do everything it can to prevent such an outcome, relying on unilateral actions of Judaization and American diplomatic support to consolidate permanent Israeli control, not only of expanded East Jerusalem, but of a large Jerusalem metropolitan region and of a strip of land connecting the Jerusalem

metropolitan region to the northern edge of the dead sea.[1]

Such rhetoric, and such grandiose schemes about the future of Jerusalem have been a staple of Israeli politics for years, camouflaging the very real divisions and disputes within Israel about how to govern and/or share the city and its environs.[2] But regardless of the catechisms on Jerusalem that the Israeli right-wing has lately tried to force all Israeli politicians to recite, and the premature closure of the question they wish to achieve, the future of expanded East Jerusalem *is*, in a legally and politically binding way, subject to negotiation between Israel and the Palestinians. Regardless of what happens in Hebron, and even if they are delayed until the election of a new government in Israel, Israeli-Palestinian negotiations will resume their forward momentum only after an agreement that the future of "al-Quds," if not "Yerushalayim," will be a central item on the agenda of those negotiations. Once those permanent-status negotiations, or negotiations about the negotiations, begin, it will quickly become apparent how much the problems associated with the issue of Jerusalem have been clouded and complicated by misconceptions so basic that few have even thought to examine them.

One such misconception is the mistaken claim, asserted by many, including Dore Gold in his 1995 publication on Jerusalem, that the Levi Eshkol government "annexed" East Jerusalem by the legal and administrative measures it implemented in 1967.[3] In fact, this did not occur. As I shall show, even the Eshkol government itself, in the last such official announcement ever made by an Israeli government on the subject, declared that the measures taken to expand the jurisdiction of the Israeli municipality of Jerusalem did *not* entail annexation of the 71 square kilometers involved and were only implemented as an administrative convenience for the city's Arab inhabitants and in order to protect the holy places. Nonetheless, the widely held view, both in Israel and outside it, is that the State of Israel actually annexed East Jerusalem—either in 1967 or in 1980, when the Knesset promulgated the *Basic Law: Jerusalem, Capital of Israel*—and has fully asserted its sovereignty there. This mistaken impression unnecessarily complicates an already tangled problem and tends to obscure available legal, political and administrative options for the city's future that otherwise might well be capable of garnering significant support among both Israelis and Palestinians. In this essay I seek to clarify the exact administrative and political status of expanded East Jerusalem within the *Israeli* legal framework.

To be sure, there are Israeli jurists and scholars who maintain that annexation has been accomplished. Their arguments are weak and often calculated to create the political and legal reality that they implicitly admit does not now exist. From virtually any international legal perspective, according to prima facie consideration of the relevant documents and laws inside of Israel, consistent with the claims implicit in the behavior of Israeli politicians and based on the explicit judgment of leading Israeli judges and legal scholars, neither annexation nor the extension of sovereignty that attaches to annexation, has occurred.

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[1]Dore Gold, *Jerusalem* (Tel-Aviv: Jafee Center for Strategic Studies, 1995), Final Status Issues Series, No. 7, pp. 27-28 and 36-43.

[2]On this point see Ian S. Lustick, "The Fetish of Jerusalem: A Hegemonic Analysis," in *Israel in Comparative Perspective: Challenging the Conventional Wisdom*, Michael N. Barnett, ed. (Albany: SUNY Press, 1996), pp. 143-172.

[3]Gold, *Jerusalem*, op. cit.pp. 5-7.

First let us carefully consider what was done in 1967 and what the government of Israel thought and announced that it had done with respect to the areas across the Green Line that are now included within the Israeli municipality of Jerusalem. Although the Eshkol government wanted to treat East Jerusalem differently from other territories occupied during the June fighting, and although it is clear that the government wanted to establish the basis for permanent Israeli control there, its desire to avoid publicly announcing that fact was also apparent.

There were four primary reasons for this reluctance. First, Israel did not want a confrontation with the world community over this issue. Because of the religious and symbolic importance of the city to Muslims and Christians, because of the historical role played there by many of the great powers, and because Israeli officials had declared during the war that Israel entertained no territorial ambitions but sought only peace, it was feared that a confrontation over Israeli annexation of the city would trigger a firestorm of opposition that would deprive Israel of the international goodwill it enjoyed after the war and would need in post-war bargaining over peace agreements.

Second, Israel seemed uncomfortable with the international legal implications of annexation. Its subsequent defense of the actions it did take emphasized their conformity with the requirements and expectations of international law, in particular the Hague Regulations of 1907, which did not admit the right of annexation, even following a war of self-defense, unless agreed upon as part of a peace settlement.

Third, clear imposition of Israeli sovereignty on part of the Land of Israel occupied during the June war, but not all of it, would have raised ideological and political difficulties with those in Israel who favored imposing Israeli sovereignty on all parts of the Land of Israel under the state's control. Finally, of course, outright annexation of expanded East Jerusalem would have made it impossible, or at least more awkward, to have not also imposed Israeli citizenship on its Arab inhabitants.

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Rather than expand the borders of the State of Israel *per se* what Israeli leaders chose to do was to expand the municipal borders of one Israeli city, Jerusalem. This was accomplished by the following series of actions, no one of which contained the word "annexation" (*sipuach*) or "sovereignty" (*ribonut*).

First, on June 27, 1967, the Knesset passed an amendment to the "Law and Administration Ordinance" that was published in the Official Gazette on September 22, 1948. As it stood before this amendment, that Ordinance declared that all laws applying within the State of Israel would apply to "any part of Palestine which the minister of defence has defined by proclamation as being held by the Defence Army of Israel." The 1967 amendment to this ordinance reads as follows:

> In the Law and Administration Ordinance, 1948, the following section shall be inserted after section IIA:
> IIB. The Law, jurisdiction and administration of

> the state shall apply in any area of Eretz Yisrael designated by the government by order.

Three things are changed here. First, it is not the minister of defense that is specifically and solely named as having the power to make the necessary declaration; it is "the government." Second, no specific importance is attached to the defense minister's designation of an area as "being held by the Defence Army of Israel." Third, the larger area within which this power is capable of being exercised is within "Eretz Yisrael" rather than "Palestine" (a provision of some semantic but no operative significance).

This amendment thereby made it possible for the minister of defense to consider some parts of the Land of Israel (Gaza or the larger West Bank, for example) as held by the Israeli army but without Israeli law in force, while other areas (i.e. the 71 square kilometers of expanded East Jerusalem), also held by the army, could be designated, by "government order," as areas wherein Israeli law could be enforced.

A second Knesset action, also taken on June 27, 1967, was to amend the "Municipal Corporations Ordinance" by inserting a paragraph which would add to the powers of the interior minister to act, "at his discretion and without holding an inquiry...." The power added by this law allowed the interior minister to "enlarge, by proclamation, the area of a particular municipal corporation by the inclusion of an area designated by order under section IIB of the Law and Administration Ordinance, 1948. [referring to the above-described amendment to that law]." It is significant to note that although this law also gave the Interior Ministry the right to appoint municipal councilors from among the inhabitants, there was no mention of whether these inhabitants would need to be Israeli citizens.

The third crucial measure taken was publication on June 28, 1967, by the interior minister, of the following declaration:

> In accordance with my powers under paragraph 8 of the Municipal Corporations Ordinance [i.e. that amendment, passed the day before, and described above], I declare as follows:
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> 1. The Boundaries of the Jerusalem Municipal Corporation will be the inclusion of the area described in the Annex [this "Annex" was a three-page list of latitudinal and longitudinal points describing the current, but never pre-existing, municipal border in the north, east, and south].
> 2. This declaration shall be referred to as "The Jerusalem Declaration" (extension of the boundaries of the municipal corporation), 1967.[4]

The immediate explanation for these measures offered by the Israeli government emphasized what it characterized as the practical requirements of the inhabitants of the affected area–a rationale directly in keeping with the logic and requirements of the Hague Regulations, which permit no change in the permanent status of belligerently occupied territory but do permit and require the occupier to assume responsibility for the basic needs of the inhabitants. An official government press release, dated June 28, 1967, read (in part) as follows:[5]

> In order to dispel any possible misunderstanding the Foreign Ministry

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[4]On June 27, 1967, the Knesset also passed the "Protection of Holy Places Law." Like the other two laws, this law does not mention Jerusalem. Its main purpose was to make desecration of a holy place or interference with free access to a holy place (anywhere where Israeli law was in force) punishable by substantial prison terms.

[5]Three more paragraphs dealt with protection of the Holy Places.

> spokesman declared tonight that the basic purpose of the ordinance concerning the fusion of the Jerusalem municipal areas is to provide full municipal and social services to all inhabitants of the city. The fusion of the municipal services will ensure that no social inequality and legal differences in respect of services, welfare and education enjoyed by all inhabitants of Jerusalem will exist. From now on all residents will be in a position to receive all the services normally extended by the municipality such as water, electricity, public health, welfare, education, etc.[6]

From a practical point of view, however, it was precisely the passage of these sweeping laws and adminstrative declarations that caused problems. Many in the government understood very well how many difficulties would be created by an actual attempt to separate East Jerusalem from the West Bank. In September 1967, the Ministerial Committee for Jerusalem Affairs decided "not to establish a barrier between the West Bank and Jerusalem" since it was acknowledged that "it is impossible to ignore the historic connection of *Arab Jerusalem* to its periphery."[7] Even inside enlarged Jerusalem itself, actual enforcement of the law would create an impossible situation. Had the full scope of Israeli law really been imposed on the inhabitants of the designated area, then any activities performed within it that required any sort of Israeli permit or license (practicing medicine or law, construction, operation of businesses, driving motor vehicles, etc.) would have been proscribed. Not only that, but all property owned by inhabitants of the area would, by the terms of the Absentee Property Law, immediately have reverted to the Israeli government's Office of the Custodian of Absentee Property. It took many acts of administrative discretion, and a law passed in August 1968, to alleviate some of these absurdities.

Many anomalies remained, however. One important anomaly was the Education Ministry's abandonment of its efforts to enforce Israeli curricula on Arab schools in expanded East Jerusalem, permitting them instead to continue using Jordanian curricula and testing arrangements. This is a precedent of some importance now, as discussions proceed concerning the PNA's authority over public-school education in expanded East Jerusalem. It is also worth noting that the problem posed by the refusal of Arab businessmen and professionals in expanded East Jerusalem to apply for Israeli licenses and permits was "solved" by recognizing Jordanian permits and licenses as valid without requiring individuals involved to make application to the Israeli authorities.[8] It is most significant that this same procedure, which turned virtually all Arabs in the territories made part of Israel in 1948, 1949 and 1950 into Israeli citizens, was *not* adopted toward the Arabs of expanded East Jerusalem. According to Yoram Dinstein, Israel's leading specialist on international law as it pertains to such matters, a distinctive element of annexation of territory is that citizenship is automatically imposed upon the territory's inhabitants without their application or request.[9]

In this context it is worth noting the specific manner in which the Arabs of the

[6] Again, it is worth noting that the wording of both the laws passed and the explanation offered says nothing about the citizenship status of the inhabitants of the affected area.

[7] *Haaretz*, August 1, 1991. (emphasis added)

[8] Uri Stendal, *The Arabs in Israel: Between Hammer and Anvil* (Hebrew) (Jerusalem: Academon, 1992), p. 331-32.

[9] Cited by Nathan Krystall in "Urgent Issues of Palestinian Residency in Jerusalem," Alternative Information Center, Jerusalem, October 1993, p. 3.

Little Triangle, transferred by agreement with Transjordan to Israeli jurisdiction on June 1, 1949, were made Israeli citizens. This was a case of expansion of the borders of the state, which Israeli courts explicitly described as "annexation." Under the terms of the Nationality Law of 1952 the 30,000 Arabs who lived in the Little Triangle were made citizens of the state by virtue of having been registered on March 1, 1952, as inhabitants under the Registration of Inhabitants Ordinance of 1949. In other words, these individuals became citizens of Israel without applying for naturalization, simply by virtue of having been registered as inhabitants of territory that had been annexed to the state. Now, in fact, a census was carried out of the inhabitants of expanded East Jerusalem. On June 26, 1967 a quick and rather inaccurate registration was done of the Arab population in the area of what was to be added to the Israeli municipality. But those registered in the census received Israeli identity cards describing them, not as citizens, but as "Permanent Residents." To obtain citizenship, these Arabs have had to apply for it through the normal naturalization channels available to any non-Jew in the world who might wish to apply for Israeli citizenship.

In this specific respect, at least, Israel did abide by the official declarations made by the government, in 1967 and again in 1968, that expanded East Jeruasalem had *not* been annexed. This explanation was officially advanced by Minister of Foreign Affairs Abba Eban, who made the first and last formal Israeli declaration concerning the putative "annexation" of enlarged East Jerusalem. In his speeches during and prior to the U.N. General Assembly resolution of July 4, 1967 (which declared Israel's acts in the city invalid), Eban asserted that in their intent and their effect these acts had been implemented in order to ease the difficulties of the Arab inhabitants of the city who otherwise would be severely inconvenienced by the difficulties they would encounter in gaining access to necessary services. Secretary-General U Thant then requested Israel's reply to the resolution. According to Eban, the official reply that he prepared was drafted with assistance from Minister of Religious Affairs Zerah Warhaftig and Minister-without-Portfolio Menachem Begin. Delivered to the U.N. Secretary General on July 10, 1967, the letter repeated Eban's earlier disclaimers, arguing that criticism of the steps Israel had taken was based on a fundamental misunderstanding:

> The term "annexation," is out of place. The measures adopted related to the integration of Jerusalem in the administrative and municipal spheres and furnish a legal basis for the protection of the Holy Places.[10]

Despite its official position, successive governments in Israel have tried, in their policies and propaganda, to create the impression that the fate of Jerusalem has been sealed–that politically and legally and in every other respect the portions of the municipality

[10]Letter of Israel's foreign minister, Abba Eban, to the U.N. secretary-general concerning General Assembly Resolution 2253 (ES-V), July 10, 1967, GAOR, 5th Emergency Special Session, 1967, 1(A/6753 or S/8052); reprinted in *The Jerusalem Question and its Resolution: Selected Documents* (Dordrecht: Martinus Nijhoff Publishers, 1994) Ruth Lapidoth and Moshe Hirsch, eds., p. 172. See also Abba Eban, *Abba Eban: An Autobiography* (New York: Random House, 1977), p. 442; and Ruth Lapidoth, "Jerusalem--Legal and Political Background," Israel Government Internet Gopher Information Client, vol. 2.0 16 (September 1994). Lapidoth's characterization of the argument in Eban's letter is that the measures taken in June 1967 "did not constitute annexation, but only administrative and municipal integration."

over the Green Line are as much a part of the country as any other district. This is not the place to detail or evaluate the success of these efforts, or the arguments of those who claim that in many if not most respects the city is divided between Arabs and Jews as deeply as it has ever been since 1948.[11] It is clear though, that a fundamental lack of confidence on this point is what resulted in Knesset passage of the somewhat bizarre "Basic Law: Jerusalem, Capital of Israel" in 1980.

This legislation began as a private bill advanced by Geula Cohen, who left Menachem Begin's Herut party in protest against the Camp David accords. In her original version, the Bill declared that "the integrity and unity of greater Jerusalem (*Yerushalayim rabati*) in its boundaries after the Six-Day War shall not be violated." Had this clause been allowed to remain within the bill as passed into law, the legislation would at least have had some operative meaning. The clause, however, was dropped after the first reading of the bill. As passed by the Israeli parliament, the relevant clause of the Basic Law reads as follows: "Jerusalem, complete and united, is the capital of Israel."

As is apparent, the law, insofar as it relates to the status of the city, is strictly declarative in nature (and redundant, since action taken in 1949 had already established Jerusalem as Israel's capital). Although "Yerushalayim" is referred to as "complete and united" (*shlema* and *meuchedet*), boundaries are not specified. As in 1967, neither the word "annexation" (*sipuach*) nor "sovereignty" (ribonut) were used. The consensus of legal scholars is that this action added nothing to the legal or administrative circumstance of the city,[12] although, especially at the time, its passage was considered to have political importance and sparked a vigorous protest reaction from the world community. As was true of the legislation and administrative measures taken in June 1967, the Basic Law-Jerusalem of 1980 neither proclaimed Israeli sovereignty in or over the city nor used the term "annexation." Added to the reasons for this avoidance in 1967 was the promise the Israeli government made to the United States at the time of the Camp David accords to refrain from advancing or implementing claims to sovereignty in parts of the land of Israel across the Green Line before the completion of the transitional period of "full autonomy" and before the end of negotiations on the final settlement. Evidence that the Begin government, even after passage of this law, understood that Israel had yet to fully annex this city and that it did not have a claim to sovereignty which could be defended before the International Court of Justice, is its decision to withdraw its attempt in October 1980 to take over the Palestinian-owned East Jerusalem Electric Corporation. According to press reports, officials believed that the move would interfere with the continuing process of establishing "the future status of Jerusalem as a unified city under full Israeli sovereignty."[13]

Above all, it has been the judgments of the Israeli Supreme Court and arguments made by Israeli jurists in the process of making those

[11]On one important aspect of this question, regarding the boundaries of Jerusalem, see Ian S. Lustick, "Reinventing Jerusalem," *Foreign Policy*, No. 93 (Winter 1993/94), pp. 41-59. On the pervasiveness of Arab-Jewish segregation in the Jerusalem municipality see Michael Romann and Alex Weingrod, *Living Together Separately: Arabs and Jews in Contemporary Jerusalem* (Princeton: Princeton Univ. Press, 1991)

[12]According to Lapidoth, the Basic Law "contains no innovation but merely repeats matters previously laid down." "Jerusalem--Legal and Political Background," op. cit.

[13]*Maariv*, October 20, 1980.

judgments that reveal the complexity of expanded East Jerusalem's status in Israeli law. What emerges from these judgments and the strained and awkward reasoning contained in some of them is that these 71 square kilometers exist in a kind of Israeli legal limbo. This status was created to obviate the need for formal announcements of annexation or sovereignty, but a status destabilized by legal principles that require such announcements, imposition of citizenship, and/or international recognition in order for questions of sovereignty to be definitively answered. Although the court had briefly observed in a 1968 case, Hanzalis vs. Tribunal of the Greek Orthodox Church, that the actions taken in June 1967 had established "United Jerusalem" as "an integral part of Israel," what that meant legally was left unresolved. The best-known and most commonly cited opportunity the Israeli Supreme Court had to speak clearly on this matter came in 1969 when an unusual case (Ruidi vs. Hebron Military Tribunal) came before it on appeal. Although it has been incorrectly cited to prove the opposite of the conclusions it contains, the reasoning in this case and its outcome are strong evidence for my interpretation of the legal situation in the context of which the Israeli government remains extremely reluctant to make or test any official claim to have annexed expanded East Jerusalem to the State of Israel.

Ruidi was an Arab antiquities dealer who transferred antiquities from Hebron to his store in East Jerusalem. The military government charged him with breaking the Jordanian law against exporting antiquities "out of the country" since, in view of the military government, East Jerusalem was no longer in the same country as Hebron. Ruidi's lawyers successfully demanded a restraining order against the military government. The military then brought the matter to the Supreme Court, which ruled against the dealer. It is not the ruling, however, but the basis of the ruling and the reasoning presented that are of interest.

Justice Vitkon noted that "large and important questions can arise in this matter" but that the Court should and would avoid them in its decision. He rejected the deputy attorney general's argument that the imposition by Israel of its laws and administration on East Jerusalem was equivalent to annexation. He also criticized the military government for not asking the government for a formal determination about whether East Jerusalem had been made a part of the State of Israel or not. In any event, Vitkon reasoned that since East Jerusalem was "de facto" outside the jurisdiction governing Hebron, the Jordanian law could be applied. Thus he was pleased to be able to decide the case without deciding whether East Jerusalem had indeed been annexed to Israel or made a part of the State of Israel.[14]

Justice Haim Cohen, in his opinion, stressed that neither the Supreme Court of Israel nor the military government could make a determination as to whether East Jerusalem had been annexed or who was sovereign there. That, he stressed, was a political problem. He asserted that his judgment against the appellant

> was not a judicial determination in the extraordinary political question we have delineated, and does not constitute our authorization regarding a judicial

[14]For an example of how this decision has been cited incorrectly, to the effect that Ruidi did establish that enlarged East Jerusalem had been annexed to the State of Israel, see Devorah Housen-Couriel and Moshe Hirsch, *East Jerusalem and the Elections to Be held in Judea, Samaria, and Gaza, in Accordance with the Israeli Peace Initiative of May 1989*, Background Paper #8 (Jerusalem: Jerusalem Institute for Israel Studies, 1992), p. 2 (Hebrew).

determination of the Hebron military court, but was based only on the fact that the appellants agreed that East Jerusalem had been annexed to the State of Israel and that Hebron had not been annexed, there being no need to mention that such an agreement has no bearing outside this specific case and this appellant.[15]

In his authoritative analysis of this case, Yoram Dinstein noted the ironic fact that here, as in other fora, the Arabs have generally been the ones to exaggerate the meaning of Israel's actions and declarations, to interpret them as having constituted the "annexation" of East Jerusalem, whereas Israel itself has always refrained from making this claim.[16] Dinstein argued that it was a pity that the problem of East Jerusalem's legal status had ever been allowed to arise, since Israel was on very weak ground and had not in fact annexed the territory in question. Dinstein draws attention to the fact that the Knesset explicitly chose not to use the annexation law of 1948 to change the status of expanded Jerusalem from occupied territory to a part of the State of Israel.

In a subsequent article, Dinstein emphasized that he was reluctant to discuss the Jerusalem issue and thought it all in all an extremely bad thing for him to be forced to do so, but that Yehuda Blum's criticism of his position and the misunderstandings thus created required a response.[17] Blum's argument for Israeli sovereignty over all of the West Bank rested on the claim that the 1949 armistice line, at least on Israel's eastern frontier, was not a real border; thus Israel could assert sovereignty in that area (including in expanded East Jerusalem) without invoking legal formulas of annexation that would contradict international law. Dinstein argued that Israel had recognized the armistice line with Jordan (including the line in Jerusalem) as a border and that each state had recognized the sovereignty of the other across that line. He also stressed that it was dangerous to abandon the position that the armistice line was a border because the only other candidate was the 1947 partition lines. Dinstein concluded by noting that legally and formally Israel could not successfully assert (and had not asserted) its sovereignty over East Jerusalem or its annexation of it and sternly warned against making any kind of formal declaration of annexation or sovereignty over East Jerualem. On the other hand, he recommended that Israel proceed to settle the area massively, consider its rule of the area "*dayenu*" (enough for us) and hope that eventually the "statute of limitations" would run out, and Israeli annexation could be established and recognized.

Two 1988 cases also shed light on the actual legal status of enlarged East Jerusalem, from the Israeli perspective, as well as on the role which some justices see their interpretations as playing in the movement of that status from de facto Israeli control to full and recognized annexation and sovereignty. Mubarak Awad, a Palestinian activist from East Jerusalem, had emigrated to the United States

[15]The appellant had argued that since the military government had been charged with enforcing the laws operative in the West Bank on June 7, 1967, and since that date preceded Israel's decrees regarding expanded East Jerusalem, that for *that* reason, the antiquities dealer had not transferred the antiquities "out of the country." In his comment in the case, Justice Y. Kahan notes that the measures taken by the government of Israel in June 1967 were not annexation, although they were "not inconsistent with the conlcusion that the legislative intent...was to authorize the government to annex...." Thus Kahan makes it clear that in order to annex enlarged East Jerusalem another legal action by the State of Israel would be required.

[16]*Hapraklit*, 1971, Vol. 27, 5-11.

[17]*Hapraklit*, 1971, Vol. 27, 519-522.

and then returned to East Jerusalem. He lived there on a tourist visa that the government refused to extend. He appealed the deportation order issued against him to the Supreme Court. The Court rejected Awad's argument that East Jerusalem's special status precluded the application to him of the law under which he was being deported. In its explanation of the case the court quoted from the amended law and Administration Ordinance of June 1967 to the effect that the state's "law, jurisdiction and administration" had been extended to enlarged East Jerusalem. "East Jerusalem," continued the court, "was unified with the rest of the city. This is the significance of the annexation of East Jerusalem to the State and its becoming an integral part thereof (see Kazidi [sic] vs. Military Tribunal of Hebron)."[18] As I have explained, this is a blatantly erroneous use of the Ruidi judgment, but employment by the justices of such a citation is explained by a subsequent passage in the Awad judgment in which the court observes that

> the trend of the legislation is to bring about synchronization between the law, etc., of the State on the one hand and East Jerusalem and its inhabitants on the other hand. The purpose of interpretation is to give effect to this trend as far as possible and to find a basis for it in the statutory language.[19]

... the still authoritative proclamation was the government of Israel's reply to the U.N. secretary-general in July 1967, which explicitly denied that Israeli actions in expanded East Jerusalem constituted annexation.

It is the obvious need for this judicial activism to achieve a legal status of annexation and sovereignty via layers of (mis)interpretation which speaks most clearly about the fundamental absence of an act of annexation or of an act extending Israeli sovereignty over enlarged East Jerusalem.

In a subsequent case, handled by the Jerusalem District Court, the High Court's reasoning was, in fact, abandoned in favor of a position that reflects more honestly and consistently the Ruidi decision. Yoel Davis, a fugitive from American justice who was arrested in East Jerusalem's Old City, sought to resist an extradition order by claiming that he was not arrested on sovereign Israeli territory and therefore could not be extradited under the terms of the Extradition Convention between the United States and Israel. In his judgment denying Davis's appeal, Judge Yaacov Zemach did not reject the claim that East Jerusalem had not been brought under Israeli sovereignty, but stressed instead that Israel did exert de facto control of the area, which was all that was

[18]Mubarak Awad vs. Yitzchak Shamir, H.C. 282/88, translated in *The Jerusalem Question and its Resolution: Selected Documents* Ruth Lapidoth, and Moshe Hirsch, eds. (Dordrecht: Martinus Nijhoff Publishers, 1994), p. 532. "Kazidi" is an erroneously transliterated reference to the "Ruidi" case, a mistransliteration which built upon an error the Court itself made by referring, in its 1988 ruling, to "Kauidi" instead of "Ruidi"(see above). A more important error, as I have shown, is the citation of this case, here by the Court itself, as a basis for claiming that the actions taken in 1967 had effected the annexation of enlarged East Jerusalem to the State of Israel.

[19]Ibid., p. 533 (emphasis added).

required under the terms of the convention. To be sure, he went on to cite the Ruidi and Hanzalis cases as a basis for rejecting Davis's argument that "East Jerusalem was not part of the territory of the State of Israel," but he studiously avoided concluding that Israel had either "annexed" or extended its "sovereignty" to the area.[20]

CONCLUSION

There has never been an official act that has declared expanded East Jerusalem as having been annexed by the State of Israel. Though politicians have referred to it as part of the territory over which Israel is sovereign, there has in fact never been an official declaration of Israel's sovereignty over this area. As far as official statements go, the still authoritative proclamation was the government of Israel's reply to the U.N. secretary-general in July 1967, which explicitly denied that Israeli actions in expanded East Jerusalem constituted annexation. In this connection it is also important to note that the law which extended Israeli administration and jurisdiction to the Golan Heights in 1981 used exactly the same language as that contained in the ordinance used to make the same extension of Israeli law to enlarged East Jerusalem. When Prime Minister Begin defended the Golan Heights bill against criticism in the Israeli parliament that it constituted "annexation" and for that reason was a dangerous affront to the world community, the prime minister responded in a manner more or less identical to the language used by Eban in his official response to the U.N. resolution condemning Israeli measures in East Jerusalem in 1967: "You," Begin said from the Knesset podium, "use the word annexation, but I am not using it."[21]

In the Israeli debate that rages over the future of the Golan Heights, few argue that the Golan Heights Law actually established Israeli sovereignty there. By contrast, almost no one argues that Israel is not sovereign over the western Galilee or the northern Negev. Those areas were transformed from "occupied territories" to parts of the sovereign State of Israel, not by a declaration but by the imposition of *both* Israeli citizenship and law upon all inhabitants of those territories and by international agreement to Israel's boundaries as delimited by the armistice lines of 1949. Absent the imposition of Israeli citizenship on the Arab inhabitants of enlarged East Jerusalem, absent a treaty with either Jordan or the Palestinians that recognizes Israeli sovereignty over enlarged East Jerusalem, and absent broad international agreement to permanent Israel rule of that area, the absence of official Israeli declarations of sovereignty or annexation with respect to expanded East Jerusalem is of great legal significance.

To perform a genuine act of annexation, i.e., to actually extend Israeli sovereignty to expanded East Jerusalem, Israel would, under international legal practice and to be

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[20]Attorney General vs. Davis, District Court of Jerusalem, October 10, 1988, *The Jerusalem Question and its Resolution: Selected Documents*, op. cit. p. 537. It is somewhat humerous to note that the Ruidi case is referred to, again inaccurately, as "Bravidi" in this judgment. The transliteration and citation errors I have noted, by producing mythical precedents such as "Bravidi" and "Kazidi," in addition to the flagrant misconstruction of the substance of the Ruidi decision in the Awad ruling, may have helped strengthen illusions that the High Court has ruled repeatedly and on separate occasions regarding the supposedly settled nature of Israel's legal regime in expanded East Jerusalem.

[21]Live Radio Broadcast, December 14, 1981, Jerusalem Domestic Service, transcribed by the Foreign Broadcast Information Service, *Daily Report: Near East and Africa*, December 15, 1981, p. 110.

consistent with both official policies and with Israeli constitutional history, have to do what it did in 1948 with respect to the western Galilee and the northern Negev. Another model of annexation that might be even more appropriate would be that followed in 1949 with respect to the incorporation of the Little Triangle into the State of Israel under the terms of the Armistice Agreement of 1949 between Israel and Transjordan or, more recently, the model of annexation implicit in the Israel-Jordan peace treaty, which changed Israel's sovereign borders by ceding territories to Jordan in the Naharayim/ Baqura area and in the Arava (south of the Dead Sea). These transfers of territory from the sovereignty of one country or people to another were both accomplished as parts of internationally recognized peace agreements ratified by the Israeli parliament and are now very widely accepted as legally and politically binding. While changing the boundary of Israeli jurisdiction in the Golan or in expanded East Jerusalem will, politically, be a much more difficult maneuver and may well entail referenda, votes of no-confidence in the Knesset or even special elections, the *legal* requirements for such adjustments are much less weighty than those associated with the ceding of sovereign Israeli territory to Jordan in the Naharyim and Arava areas. In the case of East Jerusalem, all that is needed is a simple administrative order by the Interior Ministry to change the boundary of the Israeli municipality of Jerusalem.[22]

The point of this essay is not to argue that legal niceties determine political outcomes. Nor am I claiming that there is one and only one possible meaning to terms like "annexation" or "sovereignty." I simply wish to show that from an Israeli perspective the legal and political status of expanded East Jerusalem is not the settled and deeply embedded constitutional question that most assume it is. These legal and political facts, combined with polls that show substantial flexibility in public opinion on both sides[23], can assist serious negotiators to construct a mutually satisfying set of arrangements for sharing the partly overlapping, partly separate districts of Jewish and Arab Jerusalem.

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[22]Indeed precisely this kind of order was issued, without much fanfare, in 1993, changing Jerusalem's municipal border in the west and the south (regarding Kibbutz Ramat Rachel).

[23]For recent polls showing many and even most Israeli Jews ready to accept Palestinian rule over various portions of enlarged east jerusalem see Elihu Katz, Shlomit Levy, and Jerome M. Seigal, *The Status of Jerusalem in the Eyes of Israeli Jews* (College Park, Maryland: Center for International and Security Studies at the University of Maryland, 1997)