



THE INTERNATIONAL
LEGAL FORUM

LEGAL ANALYSIS
OF PROPOSED U.S. REOPENING OF
CONSULATE TO PALESTINIANS
IN JERUSALEM



The United States Biden administration has made it a top foreign policy priority to reopen the American consulate to the Palestinians in Jerusalem, with Secretary of State Anthony Blinken reiterating as recently as 13th October 2021, that the United States sees it as a key step in advancing peace efforts and will therefore be “moving forward with the process of opening a consulate as part of deepening of those ties with the Palestinians.”¹

Such a decision, however, is fraught with major policy and diplomatic implications, as well as questions of possible breaches of American domestic legislation and the application of international law. This brief paper will discuss these issues, focusing on the legal analysis of the proposed reopening of the consulate.

INTRODUCTION

Jerusalem has been the capital of the Jewish people, and only the Jewish people, since the days of King David, some 3,000 years ago. Following the establishment of the State of Israel, in 1950, the Knesset issued a declaration stating that “with the establishment of the State of Israel, Jerusalem has returned to be its capital.”²

In 1967, Israel reunified the Jerusalem, following Jordan’s illegal occupation of the eastern part, including the Old City and Temple Mount between 1948 – 1967, in the wake of Israel’s War of Independence. Since Israel’s reunification, Jerusalem has become an open city to all faiths, however, the seat of government, judiciary, the Presidency and capital to only the Jewish state.

Furthermore, in 1980, the Knesset passed a Basic Law, reiterating that “Jerusalem, complete and united, is the capital of Israel,”³ notwithstanding that most of the international community refused to accept this basic and fundamental fact.

The United States had maintained a consulate in Jerusalem since 1844, predating the reunification of Jerusalem and the establishment of the State of Israel, when the area was still under Ottoman rule. Since the Oslo process in the 1990’s until its closure in 2019, the American consulate served as the diplomatic channel to the Palestinian Authority and for Palestinian residents, separate and independent from the American embassy to Israel, which had been located in Tel Aviv until 2018.

1 <https://www.state.gov/secretary-antony-j-blinken-and-israeli-alternate-prime-minister-and-foreign-minister-yair-lapid-and-united-arab-emirates-foreign-minister-sheikh-abdullah-bin-zayed-al-nahyan-at-a-joint-press-availab/>

2 <https://mfa.gov.il/Jubilee-years/Pages/1967-The-Reunification-of-Jerusalem.aspx>

3 <https://www.mfa.gov.il/mfa/mfa-archive/1980-1989/pages/basic%20law-%20jerusalem-%20capital%20of%20israel.aspx>

On 6th December 2017, President Donald J. Trump announced⁴ “it is time to officially recognize Jerusalem as the capital of Israel”, reiterating that “Israel is a sovereign nation with the right like every other sovereign nation to determine its own capital” and that “acknowledging this as a fact is a necessary condition for achieving peace.”

On 14th May, 2018, the United States formally opened its Embassy in Jerusalem, thereby rendering the consulate obsolete and closing the mission, with matters concerning Palestinian residents being handled by a newly created ‘Palestinian Affairs Unit’ within the Embassy.⁵

This decision was also the natural fulfillment of the Jerusalem Embassy Act of 1995⁶ that declared it to be U.S. policy that Jerusalem “remain an undivided city” and be “recognized as the capital of the State of Israel”, calling on the U.S. Embassy in Israel to be established in Jerusalem.

Although the Biden Administration has reiterated its acceptance of Jerusalem as Israel’s capital and insisted it does not intend to move the Embassy, re-opening of the consulate would effectively water down such recognition and bring into question Israel’s sovereignty and control in the capital. The move would also be unprecedented in American foreign policy, given the United States does not have an Embassy and Consulate in any other capital anywhere else in the world, let alone an Embassy and Consulate for separate countries or entities in one such city.

Israeli leaders meantime, have unanimously opposed the re-opening of the consulate. Prime Minister Naftali Bennett unequivocally said⁷ “No,” instead proposing the U.S. consulate be reopened in Ramallah, where the Palestinian Authority is based, or in Abu Dis, just outside of Jerusalem. Foreign Minister and Alternate Prime Minister Yair Lapid, has said⁸ “We think it’s a bad idea, and we’ve told the Americans we think it’s a bad idea.” Meanwhile, Justice Minister Gideon Sa’ar said “No way, no way. I want to make it very clear, we oppose it 100%. It needs Israeli approval. For us it’s a generational commitment and we will not compromise on this issue.”⁹

The reopening of the American consulate in Jerusalem today would be not only a potential breach of American law, accepted diplomatic protocols and the most basic foundations of the international legal system, but also an affront to Israel, undermining Israeli sovereignty over its capital and counter-productive to advancing meaningful peace efforts with the Palestinians.

4 <https://il.usembassy.gov/statement-by-president-trump-on-jerusalem/>

5 <https://2017-2021.state.gov/on-the-merging-of-u-s-embassy-jerusalem-and-u-s-consulate-general-jerusalem/index.html>

6 <https://www.congress.gov/bill/104th-congress/senate-bill/1322>

7 <https://www.timesofisrael.com/bennett-suggested-biden-reopen-consulate-in-ramallah-or-abu-dis-us-said-no/>

8 <https://www.bloomberg.com/news/articles/2021-09-01/israel-criticizes-u-s-plans-to-reopen-its-jerusalem-consulate>

9 <https://www.facebook.com/GideonSaarIL/videos/418207339686255/>

LEGAL ISSUES

1. Is reopening of the consulate contrary to the Jerusalem Embassy Act?

In 1995, the US House and Senate overwhelmingly passed the Jerusalem Embassy Act, which provides that *“Jerusalem should remain an undivided city, in which the rights of every ethnic and religious group are protected... Jerusalem should be recognized as the capital of the State of Israel.”*¹⁰

Despite the Act’s unambiguous call to move the American embassy to Jerusalem, it contained a six month presidential waiver that was repeatedly exercised until President Trump’s moving of the embassy.

In June 2017, on the 50th anniversary of Israel’s reunification of Jerusalem, the Senate unanimously voted to reaffirm¹¹ “the Jerusalem Embassy Act of 1995 as U.S. law” and called upon the President and all U.S. officials to “abide by its provisions.”

In December 2017, President Trump announced that the United States recognized Jerusalem as Israel’s capital and instructed the State Department to move the embassy to Jerusalem, which was subsequently done in May 2018.

In February 2021, the Senate further voted 97-3 to support an amendment¹² to the COVID-19 budget resolution that affirmed the country’s intention to keep its embassy in Jerusalem. U.S. Senator Jim Inhofe, one of the originators of the amendment, said¹³ the intention of the amendment was to reaffirm Jerusalem as “the capital of Israel” and “introduce legislation to protect the U.S. Embassy from relocation or being downgraded.”

To re-open the consulate to the Palestinians in Jerusalem now, would represent a direct challenge to Israel’s sovereignty over the capital and effectively be deemed as an intention to divide the city, reversing the commitment made by the previous U.S. Administration’s recognition of Jerusalem.

10 <https://www.congress.gov/104/plaws/publ45/PLAW-104publ45.pdf>

11 <https://www.congress.gov/bill/115th-congress/senate-resolution/176?q=%7B%22search%22%3A%5B%22Jerusalem%22%5D%7D>

12 <https://www.jpost.com/israel-news/us-senate-approves-amendment-to-keep-us-embassy-in-jerusalem-657956>

13 <https://www.inhofe.senate.gov/newsroom/press-releases/inhofe-hagerty-amendment-to-protect-us-embassy-in-jerusalem-passes-senate-overwhelmingly>

In an interview dated 14th September 2021, Palestinian Prime Minister Muhammad Shtayeh even conceded:¹⁴

“Why is the [US] Consulate [in Jerusalem] and its opening important to us? Because it is the American address for taking care of the Palestinian cause, far from the embassy that the US transferred from Tel Aviv to Jerusalem on the pretext that Jerusalem is one city. The message from this [new US] administration is that Jerusalem isn’t one [united Israeli] city and that the American administration does not recognize the annexation of Arab Jerusalem by the Israeli side. We want the American Consulate to constitute the seed of a US embassy in the State of Palestine.”

Accordingly, the re-opening the consular diplomatic mission to the Palestinians in Jerusalem would be in direct violation of the Jerusalem Embassy Act, and specifically the Act’s requirement that the city remain undivided.

2. Is reopening of the consulate contrary to the Oslo Accord framework?

In a process that started in 1993 and continued to 1995, the State of Israel and the Palestinian Liberation Organization (PLO), mutually agreed to a series of agreements regarding governance of Judea, Samaria, and the Gaza Strip. These agreements, collectively known as the “Oslo Accords”, provided the basis for establishing the Palestinian autonomous governing body, the Palestinian Authority.

Article IX, paragraph 5(c) of the 1995 Israel-PLO Interim agreement provides for the establishment of “representative offices” by foreign states in the area under the authority of the Palestinian Authority, as a means of furthering economic, cultural, and implementation and other agreements, for the benefit of the Palestinian Authority.¹⁵

Accordingly, by opening up a consulate in Jerusalem, which is currently under full Israeli control, the United States, which was a signatory and effective guardian of the Oslo process, could be in violation of the accords. That said, under the terms of the Oslo agreements, there would be no legal impediment to the United States opening a consulate or diplomatic mission to the Palestinians, in territory under the control and governance of the Palestinian Authority, such as Ramallah.

¹⁴ <https://palwatch.org/page/29184>

¹⁵ <https://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/the%20israeli-palestinian%20interim%20agreement.aspx>

3. Is reopening of the consulate contrary to International Public Law?

The legal and diplomatic framework for consular relationships between states, among them the United States and Israel, is based on the 1963 *Vienna Convention on Consular Relations*.¹⁶

Pursuant to Article 4 of the Convention, “a consular post may be established in the territory of the receiving State only with that State’s consent.” Additionally, under Articles 7 and 8 of the Convention, consular functions may be established in one state on behalf of a third state, unless there is an “express objection” by one of the states concerned.

Accordingly, if Israel were to refuse to grant its consent or were to formally object to the United States opening a consulate or diplomatic mission to the Palestinians in Jerusalem, the United States would not be permitted to proceed under international law.

In a Senate Foreign Relations Committee Hearing on 27th October, 2021, Senator Bill Hagerty, who earlier this week proposed a bill¹⁷ enshrining that the only United States diplomatic presence in Jerusalem would be its Embassy to Israel, asked Deputy Secretary of State for Management and Resources Brian McKeon on the record:¹⁸

“Is it your understanding that, under US and international law, the government of Israel would have to provide its affirmative consent before the United States could open or reopen the US consulate to the Palestinians in Jerusalem, or does the Biden Administration believe it can move forward to establish a second US mission in the Israel capital city of Jerusalem without the consent of the government of Israel?”

Mr. McKeon responded,¹⁹ “Senator, that’s my understanding – that we’d need to get the consent of the host government to open any diplomatic facility.”

As noted above, Israeli leadership is unequivocally united in its objection to the United States opening a consulate or diplomatic mission of any kind to the Palestinians in Jerusalem, which the Jewish state regards as its united and indivisible capital. This ought to end immediately any discussion of the proposed consulate. Should the United States proceed to open such diplomatic mission over Israel’s express objections, this would be an unprecedented diplomatic move and flagrant violation of international law.

16 https://legal.un.org/ilc/texts/instruments/english/conventions/9_2_1963.pdf

17 <https://www.foreign.senate.gov/press/ranking/release/risch-joins-hagerty-colleagues-in-introducing-legislation-to-protect-us-embassy-in-jerusalem>

18 https://www.youtube.com/watch?v=ilcZ_H_9F1o

19 https://www.youtube.com/watch?v=ilcZ_H_9F1o

CONCLUSION

The proposed re-opening of the U.S. consulate in Jerusalem would be an extraordinary diplomatic act, undermining the basic and unequivocal historic truth that Jerusalem has been the capital of the Jewish people, and only the Jewish people, since the days of King David, some 3,000 years ago, and the capital of the State of Israel since 1950.

The move would not only be an affront to Israeli sovereignty and the United States' foremost ally, but also severely undermine peace efforts, by rewarding Palestinian intransigence and entertaining their fanciful intent to divide Israel's capital and deny Jewish connection to the city. It would also run contrary to the overwhelming bi-partisan support in Congress of Jerusalem as Israel's undivided capital, with the United States Embassy being the sole U.S. diplomatic presence in the city.

Most of all, the reopening of such a consulate in Jerusalem today would be in gross violation of American law pursuant to the Jerusalem Embassy Act, as well as international law framework that underpins the operation of diplomatic relations, including the Vienna Convention on Consular Relations and the Oslo Accords.

There are ample other opportunities for the United States to deepen their relationship with the Palestinians and advance meaningful peace efforts, that do not require compromising Israeli sovereignty, violating American domestic legislation or breaching sacrosanct principles of international law.

*The opinions and analysis expressed in this paper are exclusively those of
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