

harm to British shipping. One Luke Ryan, who claimed French birth in preference to his probable Irish origins, presents an example of both opportunism and entrepreneurship. First securing letters from the British commissioning him as a privateer, he found better employment commanding a vessel with American papers issued by Franklin (p. 57). Ryan applied the prize rules, as he understood them, with some measure of humanity. Petrie trenchantly observes that in most privateers, "a decent, civilized greed outweighed vainglory and bloodlust" (p. 69). Ryan survived the war even though he was captured, imprisoned, tried, convicted, and condemned to hang. He escaped the traditional penalty for piracy only because the peace treaty in 1783 brought a more lenient British government into office. Many privateers—after capture, dubbed pirates—were not so fortunate. This privateering part of the prize game was effectively abolished in 1854 when, during the Crimean War, Great Britain and France mutually agreed to abolish the practice.

Petrie concludes that prize law worked when self-interest so dictated (p. 145). Prize captains and crews hoping for reward, merchants eager for a system conveying valid property claims, and insurance carriers knowing the increased costs to cargo could be passed on, all shared a common interest. Indeed, in New England as well as in Great Britain, the distribution of the spoils resulting from the prize game resulted in large homes, if not large fortunes, for the winners. The book concludes with an appendix synthesizing the rules of the prize game—a useful guide for the fans of Horatio Hornblower and the heroes of Patrick O'Brien.

Petrie's zealous research and commentary supply grounds for further inquiry. Matters of disputed property inspire general interest, if not claimants' greed. For example, in the exploitation of disorder engulfing parts of Africa and Asia today, captors commonly take booty and then profit from its sale. What comes to mind is the sale to collectors of relics from ancient civilizations in the Middle East and diamonds in Sierra Leone. If there are doubts—as I believe there are—concerning the property rights of persons who purchase such relics and diamonds, would not proceedings analogous to those in prize help to resolve contesting claims? Petrie tells great and true stories, and happily leaves to academics the chores of finding larger values.

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*Jerusalem in America's Foreign Policy, 1947–1997.* By Shlomo Slonim. The Hague, London, Boston: Kluwer Law International, 1998. Pp. xiv, 421. Index. Fl 250, \$135, £85, cloth; \$35, paper.

As negotiations between Israel and the Palestinian Authority enter the final phase, the most difficult issue confronting the parties concerns Jerusalem. In this context, Shlomo Slonim's *Jerusalem in America's Foreign Policy, 1947–1997* is not only fascinating and informative, but very timely. The author traces U.S. policy on Jerusalem, beginning with the positions taken by the United States in the United Nations in 1947, up to the current disagreement between Congress and President Clinton on U.S. recognition of Jerusalem as the capital of Israel and on the transfer of the U.S. Embassy from Tel Aviv to Jerusalem. The book describes each successive president's position on Jerusalem as reflected in speeches, diplomatic correspondence, and UN votes, and the positions of Congress as reflected in its resolutions, in letters by members of the House and Senate to the president, and, ultimately, in the Jerusalem Embassy Act, which mandates transfer of the U.S. Embassy from Tel Aviv to Jerusalem. The book is divided into four parts: Part A, The Quest for Territorial Internationalization, 1947–1950; Part B, The Dormant Interlude, 1951–1967; Part C, Jerusalem Reunified in the Wake of the 1967 Six-Day War; and Part D, Jerusalem Under the Oslo Accords. Slonim, a professor of American Studies at Hebrew University who holds a law degree from the University of Melbourne and a doctorate in international relations from Columbia University, is especially successful in conveying the atmosphere that prevailed at each stage.

UN General Assembly Resolution 181, adopted in 1947, recommended partition of Palestine,<sup>1</sup> the establishment of an Arab and a Jewish state, and the internationalization of Jerusalem. The resolution was never implemented, however. The Jews in

<sup>1</sup> Britain administered Palestine under a League of Nations Mandate, adopted on July 24, 1922. See 8 LEAGUE OF NATIONS O.J. Annex 391, at 1007 (1922). The mandate provided that the "Mandatory shall be responsible for placing the country under such political, administrative and economic conditions as will secure the establishment of the Jewish national home . . ." *Id.*, Art. 2. In 1923 Britain established Transjordan (now Jordan) in almost 80% of the territory that was originally included in the Palestine Mandate. According to Sir Alec Kirkbride, Britain's envoy to Eastern Palestine, Britain justified the establishment of Transjordan on territory that had been designated for the Jewish national home on the ground that it would be necessary for the resettlement of Arabs from Western Palestine once a Jewish state was established. He wrote, "At the time of the issue of this mandate the areas which lay to the east of the river . . . were intended to serve as a reserve of land for use in the resettlement of Arabs once the National Home for the Jews in Palestine . . . became an accomplished fact." ALEC KIRKBRIDE, *A CRACKLE OF THORNS* 19 (1956).

Palestine accepted the resolution, but the Arab states and Arabs in Palestine adamantly opposed it. Moreover, although the United States supported the resolution, it did so over the objections of some State Department officials, who continued to work against its implementation<sup>2</sup> even after the United Nations adopted the resolution with U.S. backing. As a result, the United States not only failed to support action to ensure that the UN resolution was implemented, but imposed an embargo on arms to the Middle East and persuaded the Security Council to adopt a resolution calling on all governments to restrict entry of weapons and war matériel into Palestine. Since Great Britain continued to supply arms to the Arab states, the Jews in Palestine were left in a precarious position.

On May 14, 1948—when the Mandate for Palestine was terminated and Great Britain, the mandatory power, withdrew its forces—the Jewish inhabitants of Palestine proclaimed an independent state, Israel.<sup>3</sup> The new state was immediately attacked by the armies of six neighboring Arab States: Egypt, Iraq, Jordan, Lebanon, Saudi Arabia, and Syria. Although Israel survived, the cost was very high; it lost one percent of its population. When the fighting terminated, Israel held West Jerusalem, and Jordan had control of East Jerusalem, including the Jewish Quarter, the Mount of Olives (the oldest Jewish cemetery), and Mount Scopus (with the Hadassah Hospital and the Hebrew University). The city was divided by barbed wire; Jews were denied access to the Western Wall (the holiest site for Jews); the Mount of Olives cemetery was desecrated; and over fifty synagogues in East Jerusalem were destroyed. Two decades later, in 1967, Egyptian President Gamal Abdel Nasser again threatened to destroy Israel and ordered the UN peacekeeping forces, stationed in the Sinai following the 1956 war between Egypt and Israel, to leave. Surprisingly, UN Secretary-General U Thant complied. In a note transmitted to Jordan through the United Nations, Israel asked Jordan not to join with Egypt in the attack on Israel and promised not to attack Jordan if it acceded to Israel's request. Jordan refused, and in the war that followed, Israel captured East Jerusalem from Jordan and reunited the city.

Jerusalem is holy to Christianity, Islam, and Judaism, and all three religions have a strong interest in the city. Nevertheless, it is the holiest site only in Judaism. Jerusalem was the capital of

Israel some three thousand years ago<sup>4</sup> and is, without question, the most important city for Jews—historically, religiously, and culturally. Every Israeli prime minister—whether Labor or Likud, including Itzhak Rabin (who signed the Oslo Accords) and Shimon Peres (one of the architects and strongest supporters of the Oslo Accords)—has declared that Jerusalem would remain united as the capital of Israel. In contrast, Jerusalem was never the capital of any Arab or Muslim state during the several hundred years that it was under Muslim rule; the city is not mentioned in the Koran; and no one suggested making it the capital of an Arab state during the nineteen years that East Jerusalem was under Jordanian control.<sup>5</sup> Nevertheless, Palestinian Authority Chairman Yasir Arafat has stated that Jerusalem must be the capital of a Palestinian state, and has repeatedly urged a jihad, or holy war, for Jerusalem.

As Slonim demonstrates, the positions taken by U.S. presidents concerning Jerusalem have varied more than may be immediately apparent. Although each president stated that he was continuing the policy of his predecessors with respect to Jerusalem, there were significant differences in the positions taken. President Johnson and his administration's ambassador to the United Nations, Arthur Goldberg, were careful not to label Jerusalem as "occupied territory" and deliberately avoided any reference to Jerusalem in Security Council Resolution 242, which was adopted in the wake of the 1967 war and called for the "[w]ithdrawal of Israeli armed forces from territories occupied" in that conflict. In contrast, the U.S. representative during the Nixon administration, Charles A. Yost, stated in a speech to the UN Security Council that "[t]he United States considers that the part of Jerusalem that came under the control of Israel [in the 1967 war] . . . is occupied territory" (p. 200). According to Slonim, this represented "a radical departure from the preceding administration" (p. 201). During the Carter administration, the United States for the first time voted for a Security Council resolution (No. 465) calling on Israel to cease "the establishment, construction and planning of settlements in the Arab territories occupied since 1967, including Jerusalem" (pp. 237–38). Two days after the adoption of that resolution, however, the White

<sup>2</sup> President Truman reportedly stated that "the State Dept. has reversed my Palestine policy . . . . There are people on the third and fourth levels of the State Department who have always wanted to cut my throat. They've succeeded in doing it" (p. 62 n.38; see also p. 63 n.40).

<sup>3</sup> President Truman recognized the new state of Israel eleven minutes after it was proclaimed.

<sup>4</sup> David Ben Gurion, the first prime minister of Israel, stated: "For the State of Israel there has always been and always will be one capital only—Jerusalem the Eternal. Thus it was 3,000 years ago—and thus it will be, we believe, until the end of time" (p. 144).

<sup>5</sup> Slonim notes that Daniel Pipes, a prominent authority on the Middle East, believes that "Muslim interest lies not so much in controlling Jerusalem as in denying control over the city to anyone else" (p. 324 n.56, citing Daniel Pipes, *If I Forget Thee: Does Jerusalem Really Matter to Islam?* NEW REPUBLIC, Apr. 28, 1997, at 18).

House announced that the U.S. vote resulted from a "breakdown in communication" and that approval of the resolution was conditional on "the understanding that all references to Jerusalem would be deleted" (p. 238). In a subsequent press conference, President Carter stated that the "resolution was in violation of my policy" (p. 240). Under President Carter the United States also criticized and abstained from, but did not veto, a Security Council resolution (No. 478) calling on member states to withdraw their missions from Jerusalem.<sup>6</sup>

The chapter on "Jerusalem at Camp David" suggests that Carter was less than forthright with the Israelis and that he either did not fully comprehend the significance of referring to Jerusalem as "occupied territory" or deliberately obfuscated the issue to save the Camp David agreement. Jerusalem is not mentioned in the text of the Camp David Accords, but only in letters by Carter, Begin, and Sadat appended to the agreement setting forth their respective positions. The agreement had included a clause on Jerusalem, proposed by the United States and accepted by Sadat and Begin, which provided that Jerusalem would remain undivided. Sadat, however, subsequently expressed reservations concerning the Jerusalem clause to Carter, who then promised Sadat to append a letter to the agreement—a letter that, in Slonim's words, would have had the effect of "contradicting and nullifying" that clause (p. 229). Moreover, despite Carter's assurances on the first day of the conference that "we would have no bilateral secrets" (p. 230), he did not fully disclose the text of the proposed letter to the Israelis. When they learned that the letter referred to Jerusalem as "occupied territory," both Begin and Dayan were adamant that under no circumstances would Israel sign an agreement that even raised the possibility of a redivided Jerusalem. Dayan stated that had the Israelis known that the United States intended to take this position on Jerusalem, they never would have come to Camp David. Begin told Carter that he did not want him to think "even for a minute that Israel will ever entertain the thought of a redivided Jerusalem" (pp. 232–33). In the end, all references to Jerusalem were deleted from the agreement. Instead, Carter, Begin, and Sadat each stated their positions on Jerusalem in the separate letters appended to the agreement. Carter's letter stated only that the "position of the United States remains as stated by Ambassador[s] Goldberg . . . and . . . Yost" (p. 225)—who, as indicated above, had taken diametrically oppos-

ing positions on the propriety of using the term "occupied territory" in reference to Jerusalem.<sup>7</sup>

That the different presidential policies do not depend on party affiliation is strikingly illustrated in the administrations of the two presidents who followed Carter. President Reagan was probably the U.S. president who was most supportive of Israel. Reagan rejected the view that settlements in the territories were illegal, and refrained from labeling East Jerusalem as occupied territory. Moreover, on the last day of the Reagan administration, the United States acquired a site in Jerusalem for the construction of the U.S. Embassy. President Bush and his secretary of state, James Baker, were probably the most hostile to Israel, both in tone and substance. Bush created a furor when he spoke at a press conference of U.S. opposition to "settlements in the West Bank or in East Jerusalem" (pp. 276–77). Slonim comments, "[given that] the Jewish quarter in the Old City, as well as other Jewish communities, had existed in East Jerusalem for countless generations" and that "Jerusalem, after all, had had a Jewish majority for over a century,"<sup>8</sup> the "pronouncement against Jewish building in East Jerusalem was an astonishing development and reflected an appalling ignorance of the demographic facts of the City" (p. 365). Under Bush the United States voted for a Security Council resolution (No. 726) that referred to the lands acquired by Israel in 1967 as "Palestinian territories occupied by Israel since 1967, including Jerusalem." According to Slonim, no previous administration had referred to the territories as Palestinian.

Although presidential policies varied and were sometimes ambiguous and even contradictory on the question of Israeli sovereignty over Jerusalem, Congress has consistently and unequivocally supported both U.S. recognition of Jerusalem as the capital of Israel and the transfer of the U.S. Embassy to Jerusalem. A March 1995 letter by

<sup>7</sup> Ambassador Goldberg wrote a letter to the *New York Times* that stated, in part:

The facts are that I never described Jerusalem as occupied territory. Ambassador Yost did, in his speech of July 1, 1969, under instructions from President Nixon, and his statement represented a departure from the policy I, President Johnson and the Department of State pursued with respect to Jerusalem during the period of my tenure.

....

Resolution 242 in no way refers to Jerusalem, and this omission was deliberate.

P. 202, quoting Arthur J. Goldberg, *N.Y. TIMES*, Mar. 12, 1980, at 26.

<sup>8</sup> A chart shows the Jewish, Christian, and Muslim populations in Jerusalem from 1844 to 1967 (p. 13 n.15).

<sup>6</sup> Thirteen states moved their embassies from Jerusalem. The administration's failure to veto the resolution was sharply criticized by Senator Moynihan.

Senators Moynihan and D'Amato to Secretary of State Warren Christopher—signed by ninety-three senators—summarized and further spelled out the position of Congress. It stated, in part,

We believe that Jerusalem is and shall remain the undivided capital of the State of Israel. It is now over eleven years since 50 United States Senators and 227 members of the House of Representatives joined in endorsing the transfer of the United States [E]mbassy in Israel from Tel Aviv to Jerusalem.

In the subsequent decade both Houses of Congress have passed, by near-unanimous margins, a total of four resolutions calling on the United States Government to acknowledge United Jerusalem as the capital of the State of Israel. A fifth resolution adopted last year called on the administration to veto language in United Nations Security Council Resolutions that states or implies that Jerusalem is occupied territory.

....

The United States enjoys diplomatic relations with 184 countries. Of these, Israel is the only nation in which our embassy is not located in the functioning capital. This is an inappropriate message to our friends in Israel and, more importantly, a dangerous message to Israel's enemies.

We believe that the United States Embassy belongs in Jerusalem. (Pp. 319–20)

In May 1995, Senators Dole and Kyl introduced a bill requiring the United States to move its embassy to Jerusalem. President Clinton opposed the bill, threatened to veto it, and, when it passed by a veto-proof majority of 93 to 5 in the Senate and 374 to 37 in the House, refused to sign it. The Jerusalem Embassy Act<sup>9</sup> became law on November 8, 1995, without the president's signature.<sup>10</sup>

The Jerusalem Embassy Act, included as an appendix to the book, states that it is "the policy of the United States" that "Jerusalem should remain an undivided city" and "should be recognized as the capital of Israel;" mandates establishment of the U.S. Embassy in Israel in Jerusalem "no later than May 31, 1999";<sup>11</sup> provides that "not less than \$25,000,000" in fiscal year 1996 and "not less than \$75,000,000" in fiscal year 1997 "should be made available . . . for construction and other costs associated with the establishment of the United States Embassy in Israel in the capital of Jerusalem";<sup>12</sup> requires the secretary of state to submit periodic reports on the implementation of the

act;<sup>13</sup> and provides that "[n]ot more than 50 percent of the funds appropriated to the Department of State for fiscal year 1999 for 'Acquisition and Maintenance of Buildings Abroad' may be obligated until the Secretary of State determines and reports to Congress that the United States Embassy in Jerusalem has officially opened."<sup>14</sup> In discussing U.S. Ambassador Indyk's failure to attend the opening ceremony of the three thousandth anniversary celebrations of the establishment of Jerusalem as the capital of Israel, Slonim states that it was "a reminder of the fact that the United States had still not formally acknowledged Israeli sovereignty even over west Jerusalem" (p. 337). Surely, a U.S. law providing that it is "the policy of the United States" that "Jerusalem should remain an undivided city" and "should be recognized as the capital of Israel" constitutes U.S. acknowledgment of Israeli sovereignty over Jerusalem. The administration's refusal to implement that policy does not make it any less the law of the United States.

Although the book does not follow events past 1997, it should be noted that the U.S. Embassy was not opened in Jerusalem by May 31, 1999, as provided for in the Jerusalem Embassy Act, and has not been moved to Jerusalem to date. The Clinton administration has, until recently, largely ignored the Jerusalem Embassy Act. Even the official reports that the secretary of state is required to file every six months have been so uninformative that they evoked letters of protest from members of the Senate. In a letter to Secretary of State Warren Christopher, Senator Kyl listed conduct by the administration that he considered inconsistent with the act and warned that "by these actions and omissions your department comes dangerously close to violating both the letter and spirit of the law."<sup>15</sup> In 1999, to avoid the funding limitation imposed by the act if the embassy is not moved by May 1999, President Clinton invoked a waiver provision that permits the president to suspend the limitation set forth in section 3(b) for a period of six months "if he determines and reports to Congress in advance that such suspension is necessary to protect the national security interests of the United States."<sup>16</sup>

<sup>13</sup> *Id.* §§5–6.

<sup>14</sup> *Id.* §3(b).

<sup>15</sup> Letter from Jon Kyl, U.S. Senator, to Warren Christopher, former Secretary of State (Oct. 31, 1996) (on file with author) [hereinafter Letter].

<sup>16</sup> Embassy Act, *supra* note 9, §7(a). President Clinton invoked the waiver on June 24 and on December 29, 1999, *see* 64 Fed. Reg. 33,739, 72,887 (1999), and again on June 16, 2000, *see* 65 Fed. Reg. 38,713 (2000). The Justice Department took the position that an earlier version of the act was unconstitutional. The administration did not reassert that claim, however, either when submitting the reports required by sections 5 and 6, or when invoking the national security waiver. For a discussion of the constitutionality of the act, *see* Malvina

<sup>9</sup> Jerusalem Embassy Act of 1995, Pub. L. No. 104-45, 109 Stat. 398 (1995) [hereinafter Embassy Act].

<sup>10</sup> *See* U.S. CONST. Art. 1, §7, cl. 2.

<sup>11</sup> Embassy Act, *supra* note 9, §3(a).

<sup>12</sup> *Id.* §4.

It is clear that Clinton does not intend to move the U.S. Embassy to Jerusalem because, in his view, doing so could affect the negotiations between Israel and the Palestinian Authority. There is no provision in the Jerusalem Embassy Act authorizing the president to suspend implementation of the act on that basis, however. As Senator Kyl wrote to the secretary of state in 1996, when it became clear to Kyl that the administration did not intend to move the embassy to Jerusalem:

Although Public Law 104-45 does contain a presidential waiver, the President cannot lawfully invoke that waiver simply because he thinks it would be better to relocate the embassy to Jerusalem at a later time. The waiver is designed to be read and interpreted narrowly. It was included to give the President limited flexibility—flexibility to ensure that Public Law 104-45 will not harm U.S. national security interests in the event of an emergency. The law states that the President “shall” implement the embassy move; the waiver does not change the “shall” to “may, if he chooses to.” This position is clear in the legislative record.<sup>17</sup>

It remains to be seen what, if anything, Congress will do to enforce the act.<sup>18</sup>

Halberstam, *The Jerusalem Embassy Act*, 19 FORDHAM INT'L L.J. 1379 (1996) (finding it constitutional); Robert F. Turner, *Foreign Affairs Under the Constitution: Only President Can Move Embassy*, LEGAL TIMES, Jan. 22, 1996, at 46 (finding it unconstitutional).

<sup>17</sup> Letter, *supra* note 15.

<sup>18</sup> During the discussion of the Jerusalem Embassy Act in Congress, Senator Dole, one of the original sponsors

The book, which is the product of years of meticulous research in American, British, Israeli, and UN archives, contains a wealth of information. It shows the importance that Israel and the Arabs attach to every word and nuance—even the omission of a word—in statements concerning Jerusalem. It should be read by everyone involved in the Arab-Israel negotiations and by everyone interested in their outcome.

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of the legislation, explained that the phrase “national security interest,” rather than “national interest,” was used in the waiver provision as a

way [of] ensuring that the waiver will not permit the President to negate the legislation simply on the grounds that he disagrees with the policy. “National security interests” is much narrower than the term “national interest”—and it is a higher standard than “national interest.” The key word is security. No President should or could make a decision to exercise this waiver lightly.

Senator Dole further stated:

The waiver authority should not be interpreted to mean that the President may infinitely push off the establishment of the American Embassy in Jerusalem. Our intent is that the Embassy be established in Jerusalem by May 1999. If a waiver were to be repeatedly and routinely exercised by a President, I would expect Congress to act by removing the waiver authority.

141 CONG. REC. S15532 (daily ed. Oct. 24, 1995).

## BRIEFER NOTICE

*Israel Among the Nations: International and Comparative Law Perspectives on Israel's 50th Anniversary*. Edited by Alfred E. Kellerman, Kurt Siehr, and Talia Einhorn. The Hague, Boston, London: Kluwer Law International, 1998. Pp. xvi, 392. Fl 250, \$150, £88.

*Israel Among the Nations* is an intellectually engaging Festschrift honoring Israel's fiftieth anniversary. The volume's essays are as varied and insightful as its twenty contributors, who range from Yoram Dinstein and Shabtai Rosenne, to several former and current members of Israel's Supreme Court, to distinguished American and European scholars of international law. The result is a rich and, as it were, catholic collection that includes numerous essays on international law that may be of particular interest to the readers of this *Journal*. The coeditors—Alfred E. Kellerman,

Kurt Siehr, and Talia Einhorn—are to be congratulated for producing this excellent volume.

Since the diversity and number of the essays precludes any straightforward summary of the volume's contents, this reviewer will simply touch on a few of its highlights and provide some sense of topics it covers. Yoram Dinstein, for example, provides a useful and succinct account of the role that international law has played in the Arab-Israeli conflict. Palestinians would surely agree with his comment that if the 1947 UN resolution to partition Palestine had been carried out, then “the whole recent history of the Middle East might have been different” (p. 142). Dinstein also reminds the reader, however, that the “Arab invasion of Israel on 15 May 1948 was the first time since the end of World War II that sovereign nations went to war against another state, proclaiming brazenly that they were launching an