Executive Summary

The July 2000 Camp David Summit was clearly a diplomatic failure. It resulted largely, though not exclusively, from the insurmountable gap between Israel and the PLO over the issue of Jerusalem. Prime Minister Ehud Barak and President Bill Clinton insisted on holding the summit apparently assuming that the diplomatic gaps between the parties could ultimately be bridged. Were they equipped with a more accurate assessment of the positions of the principal parties on the Jerusalem question, they might have anticipated that the summit would not succeed. For the PLO, the various Clinton proposals were a non-starter. But for Israel, as well, Barak's readiness to even consider concessions on Jerusalem led to the collapse of parliamentary support for his government, a massive public demonstration against the U.S. proposals, and finally, when combined with Palestinian violence, Barak's loss in national elections by an unprecedented majority to Ariel Sharon.

Israel suffered from a more fundamental diplomatic failure of its own, beyond its misreading of the Palestinian position on Jerusalem. The structure of the peace process, whereby Israel has focused all its energies on an abstract, albeit worthy, goal of peace, while the Palestinians' diplomatic energies were concentrated on a concrete goal of achieving a Palestinian state with a capital in Jerusalem, inevitably led the negotiations in the direction of the party with the more articulated objective -- namely, the Palestinian goal of sovereignty in Jerusalem. This diplomatic asymmetry led to a clear-cut erosion of Israel's own claims.

Yet, a careful reading of the historical record of the Jewish presence in Jerusalem and an understanding of the international legal rights of the Jewish people to their historical capital might have led negotiators to take a stronger stand on behalf of Israel's rights in the city. This study was conceived with the purpose of providing both a more realistic understanding of the actual positions
of the principal parties to the Jerusalem question and a deeper appreciation of the rights Israel possesses in Jerusalem for any future negotiations.

Prior to 1948

Since its independence in 1948, and indeed even in prior times, Israel's rights to sovereignty in Jerusalem have been firmly grounded in history and international law:

- Even before the rise of modern Zionism, a Jewish plurality was restored in Jerusalem under the Ottoman Empire in the early nineteenth century. Since the destruction of the ancient Jewish capital of Jerusalem by the Roman armies in 70 CE, Jews streamed back to their holy city over the centuries, whenever possible. Efforts to restore Jewish political sovereignty were accompanied by the re-establishment of Jerusalem as the national political capital of the Jewish people, even if briefly, in 135 CE and 614 CE.
- There has been a Jewish majority in Jerusalem for nearly 150 years since at least 1864, when out of a total population of 15,000 there were 8,000 Jews, 4,500 Muslims and 2,500 Christians, according to British consular sources. By 1914, there were 45,000 Jews in Jerusalem out of a total population of 65,000.
- Israel's international legal position in Jerusalem emanates from the Palestine Mandate, by which the League of Nations, the source of international legitimacy prior to the United Nations, recognized "the historic connection of the Jewish people with Palestine" and called for "the establishment in Palestine of a national home for the Jewish people." The League of Nations did not draw a distinction between Jewish rights to Jerusalem and the rest of the area of Palestine.
- Despite the fact that the League of Nations was formally terminated in April 1946, the rights of the Jewish people in Palestine (and in Jerusalem particularly) were preserved by the successor organization to the League of Nations, the United Nations, through Article 80 of the UN Charter, which negated efforts "to alter in any manner the rights whatsoever of any states or any peoples (emphasis added) or the terms of existing international instruments" at the time of the UN's creation.
- The 1947 UN proposal for internationalizing Jerusalem as a "corpus separatum," under UN General Assembly Resolution 181 (II), was only a non-binding recommendation which was rejected by the Palestinian Arabs and the Arab states by the use of force. The UN did nothing when Jerusalem's Jewish population was placed under
siege by invading Arab armies in 1948, so that Israel regarded the internationalization proposals as "null and void." Israel's first prime minister, David Ben-Gurion, established Jerusalem as the capital of Israel in 1950.

After the Six-Day War

The aftermath of the 1967 Six-Day War only reinforced the strength of Israel's claims:

- From 1948 to 1967, Jordan denied the Jewish people access to the Western Wall in violation of its Armistice Agreement with Israel; over fifty synagogues in the Old City's Jewish Quarter were destroyed or desecrated; its Jewish residents were expelled. The Christian population of Jordanian Jerusalem fell from 25,000 to 11,000, as restrictive laws were imposed on Christian institutions. Considering that Jordan's position in Jerusalem had resulted from its 1948 invasion of the city, while Israel's standing in Jerusalem in 1967 resulted from a war of self-defense, Israel could claim that it had a superior title to unified Jerusalem.
- This line of argument was largely consistent with the analysis of major international legal experts like State Department Legal Advisor Stephen Schwebel, who would later head the International Court of Justice in The Hague. Schwebel indeed argued in 1970 that "Israel has better title in the territory of what was Palestine, including the whole of Jerusalem (emphasis added), than do Jordan and Egypt."
- UN Security Council Resolution 242 of November 1967, which began as a British draft resolution, did not even mention Jerusalem and did not insist on a full withdrawal to the pre-1967 lines in the resolution's operative language (only a withdrawal from "territories" to "secure and recognized boundaries"). Britain's Foreign Secretary, George Brown, later noted: "The proposal said 'Israel will withdraw from territories that were occupied,' not from 'the territories,' which means that Israel will not withdraw from all the territories." Writing retrospectively, the U.S. Ambassador to the UN in 1967, Arthur Goldberg, noted: "I never described Jerusalem as occupied territory....Resolution 242 in no way refers to Jerusalem, and this omission was deliberate."
- Resolution 242, which was adopted unanimously by the UN Security Council, served as the basis of UN Security Council Resolution 338 of October 1973, that formally launched the Arab-Israeli peace process and continued to provide the only agreed
basis for the 1978 Camp David Agreements and the 1991 Madrid Peace Conference.

- With the liberation of the Old City of Jerusalem as a result of the Six-Day War, the Eshkol government, with the backing of the Knesset, extended Israeli law, jurisdiction, and administration to the eastern part of Jerusalem on June 27, 1967. While Israeli sovereignty applied to the Temple Mount, nonetheless, Israel agreed that administration of the compound would continue to be maintained by the Jordanian Waqf, under the Jordanian Ministry of Religious Endowments.

From the Oslo Agreement to Camp David

The September 1993 Declaration of Principles between Israel and the PLO -- the Oslo Agreement -- represented a fundamental change in past policy, for Israel's very willingness to negotiate the Jerusalem issue, as specifically stipulated in Oslo, was not narrowly circumscribed to the religious dimension alone as it had been under past Israeli governments. Yet Prime Minister Yitzhak Rabin himself nonetheless remained firm on retaining Israeli sovereignty over all of Jerusalem; he told a group of Tel Aviv schoolchildren in mid-1995, during his last year in office: "If they told us that peace is the price of giving up on a united Jerusalem under Israeli sovereignty, my reply would be 'let's do without peace.'" Despite the fact that Oslo had made Jerusalem negotiable, it was still based on UN Security Council Resolutions 242 and 338, which did not call for a full Israeli withdrawal.

Seven years after the implementation of the 1993 Oslo Agreement, Prime Minister Ehud Barak became the first Israeli prime minister to consider re-dividing Jerusalem in response to an American proposal at the July 2000 Camp David Summit. The December 2000 Clinton Plan attempted to codify Barak's possible concessions on Jerusalem. Yet Barak's Camp David concessions proved to be insufficient for PLO Chairman Yasser Arafat, who rejected the U.S. proposals for Jerusalem, leading to a breakdown in the peace process and an outburst of Palestinian violence with regional implications:

- Arafat's post-summit comments on the negotiations revealed the bottom line of the Palestinian position on Jerusalem: the PLO's demands for sovereignty "not only refer to the Church of the Holy Sepulchre and the Temple Mount mosques, and the Armenian quarter, but it is Jerusalem in its entirety, entirety, entirety."
- At Camp David, Arafat denied core Jewish claims in Jerusalem, even insisting that there never were Jewish temples on the Temple Mount. Arafat's claims even extended to the Western Wall: "The British Mandate administration stated as early as 1929 that the Western Wall is the Al-Buraq Wall and that it is considered a
Muslim religious endowment (waqf) to which Palestinians hold historic rights." This diplomatic experience demonstrated that there was an *unbridgeable gap* between the most conciliatory Israeli position on Jerusalem and the PLO position, as articulated by Yasser Arafat.

- Yet it would be an error to link these hard line Palestinian positions to Yasser Arafat alone. Palestinian claims to the 1967 lines, including the entire Old City, were widespread among all levels of the PLO leadership. Moreover, there was significant evidence that the local Palestinian leadership in Jerusalem still harbored claims to the western portions of the city. Thus, there was little basis for concluding that, in a post-Arafat era, Palestinian positions on the Jerusalem question would become more flexible.

- After rejecting the U.S. proposals at Camp David, Yasser Arafat initiated what the Palestinians called the Al-Aqsa Intifada. In its earliest stages, it began with rock attacks by Palestinian mobs situated on top of the Temple Mount against Jewish worshippers praying at the Western Wall below, on the day before the Jewish holy day of Rosh Hashanah, the Jewish New Year. The Western Wall area had to be evacuated as it became completely covered with stones.

- Moreover, since September 2000, the Muslim Waqf closed off the Temple Mount entirely from any archeological oversight by the Israel Antiquities Authority; some 13,000 tons of rubble were removed from the Temple Mount by the Waqf that included archeological remnants from the First and Second Temple periods, so that new underground mosques could be completed. These remains were dumped in city waste sites. The complete disregard that the Waqf demonstrated toward the pre-Islamic ancient Jewish heritage of Jerusalem was reminiscent of the behavior of the Taliban in Afghanistan during 2001 toward the pre-Islamic Buddhist presence in the Bamian Valley. Continuing Palestinian attacks against Jewish holy sites in Nablus (Joseph’s Tomb), Jericho, and Rachel’s Tomb bordering Bethlehem only reinforced the view among Israelis that the holy sites of Jerusalem could only be protected under continued Israeli sovereignty.

- The Clinton Plan's vision for Jerusalem that would have divided the city into a checkerboard of different sovereignties was completely unacceptable to the Israeli security establishment, including the Chief of Staff of the Israel Defense Forces, Lt. General Shaul Mofaz. In fact, Mofaz reportedly stated that the Clinton Plan, if implemented, would "threaten the security of the state."

**The Taba Negotiations**

The last chapter of Israeli-Palestinian negotiations during the Barak period took place in Taba, Egypt, during the latter part of January 2001. Unlike the Camp David summit and the Clinton Plan, the Taba negotiations were mostly bilateral, with only a low-level American diplomatic presence. The Taba negotiations illustrated the problem Israeli negotiators had in reading Palestinian positions. Foreign Minister Ben-Ami asserted that the parties "had never been closer to an agreement." Yet the Palestinians presented a completely contradictory assessment; Saeb Erekat said that Taba "emphasized the size of the gap between the positions of the two sides." It appeared that throughout the negotiating process from Camp David to Taba, Israeli and American assessments of the Palestinians were based more on wishful thinking than on hard analysis:

- The Palestinians appeared to have taken a harder line on many issues in comparison to what Israeli negotiators had anticipated, including settlement blocs. Israeli negotiators tested with the Palestinians the idea of creating a special international regime for the "Holy Basin" -- an area including the Old City and some areas outside the walls including the Mount of Olives cemetery. The Palestinians rejected the proposal, insisting on Palestinian sovereignty instead.
- U.S. and Israeli negotiators discerned from their private discussions with some of Arafat's closest advisors that the PLO could be more flexible on some of these Jerusalem issues. Yet this purported flexibility was not borne out in repeated Palestinian public statements made at all levels since the end of the Camp David Summit. Clearly, there was a vast discrepancy between these private diplomatic discussions and repeated public remarks; ultimately, the failure of the Jerusalem negotiations indicated that the public Palestinian positions represented the real policy of the PLO.
- Unfortunately, there was increasing evidence that mainstream Palestinian spokesmen ultimately rejected any compromise at all; thus Faysal al-Husseini declared in March 2001: "We may lose or win [tactically] but our eyes will continue to aspire to the strategic goal, namely, to Palestine from the river to the sea." A month earlier, Salim Za'anun, the Chairman of the Palestine National Council, stated that the PLO Covenant, calling for Israel's destruction, was never changed, despite actions taken in 1996 and 1998, so that it remained in force.

At least the failed Clinton Plan and the Israeli proposals at the Taba talks did not bind future Israeli governments or U.S. administrations, leaving open the possibility of new diplomatic alternatives. Only by avoiding premature negotiation

over an unbridgeable issue such as Jerusalem can the U.S., Israel, and the Palestinians stabilize the volatile situation that has emerged and restore hope that a political process can be resumed in the future. Given its fundamental rights in Jerusalem, as well as its recent experiences with the Al-Aqsa Intifada, Israel must continue to preserve Jerusalem as its unified capital under Israel's exclusive sovereignty. This will not only best protect the interests of the Jewish people in Jerusalem, but also the interests and access of all faiths, as well.