

Competing Claims, Contested City: The Sovereignty of Jerusalem under International Law

By Victor Kattan¹

Key Words: Jerusalem; history; sovereignty; mandate; critique of theories displacing Palestinian sovereignty; British Foreign Office legal advice; legal status of Security Council Resolution 478; Israeli-Palestinian treaties; status of Christian and Muslim Holy Places; internationalization.

Abstract. This paper traces the rival claims to the City of Jerusalem from the colonial era to the present. First it examines the status of Jerusalem under the Ottoman Empire; second its status under the British mandate; third, its status as a divided city by Israel and Jordan respectively; and fourth, its status under Israeli control. In addition to these historical stages this paper critiques the view of those scholars who have argued that there was a sovereignty vacuum upon the termination of the mandate on 15 May 1948 that could only be legitimately filled by Israel. These scholars have mischaracterised the status of the territory after 1948 and have failed to take into account the progressive development of self-determination in international law, the unique status of the Holy Places, and the non-recognition of Jerusalem as Israel's capital by the international community. Whilst joint Israeli-Palestinian sovereignty would be the optimal paradigm in which to resolve the contesting claims to Jerusalem, some form of internationalized administration should nonetheless be considered, due to the unique character and international interest in the City. In this regard, reconsidering the proposals to internationalize Jerusalem, might provide some scope to re-articulate and resolve the dispute.

1. INTRODUCTION

Your Royal Highness, Mr President, your excellencies, distinguished guests, ladies and gentlemen, it is both a pleasure and an honour to have the occasion to address you today on a subject of the utmost importance: The sovereignty of Jerusalem under international law. As many of you know, since last September, Israel has re-established its settlement policy in and around Jerusalem, and in other parts of the West Bank, in spite of widespread international criticism and condemnation, even from its closest allies. Israel's policy has been the same since 1967, to create facts on the ground in the hope that this will prejudice, pre-judge, and detrimentally affect any future negotiations over resolving the status of the city.

Israel's persistent refusal to negotiate with the Palestinians over Jerusalem has not, however, gone unnoticed. At the end of last year, the heads of the European diplomatic missions in Jerusalem and Ramallah completed a report which recommended that EU officials and politicians refuse to visit Israeli government offices that are located beyond the Green Line and that they decline any Israeli security in the Old City and elsewhere in East Jerusalem. The report also recommended that the EU encourage Israel to allow the reopening of Orient House in East Jerusalem, in keeping with the Road Map.² These suggestions reflect the consistently held view

¹ Teaching Fellow, School of Oriental and African Studies, University of London. This paper was drafted to present at the Arab League's Conference on Jerusalem in Doha, Qatar on 2-3 February 2011. The author would like to thank Ms. Dena Qaddumi for her assistance with this paper. Victor can be reached at vk1@soas.ac.uk
² See Nir Hasson, 'EU diplomats say East Jerusalem should be treated as Palestinian capital', Ha'aretz, 10 January 2011.

of the international community that Israel's annexation of East Jerusalem is both unlawful and illegitimate.

It should be stressed, however, that the question of who has sovereignty over Jerusalem does not only concern the eastern fringe of the city. Whilst the provisions of international humanitarian law apply to East Jerusalem, this does not mean that Israel has sovereignty over west Jerusalem. No state recognises Israel's sovereignty over Jerusalem in neither its eastern nor western half.

Of course, the Government of Israel makes no distinction between East and West Jerusalem. Its official position is that: 'Jerusalem is and will remain the capital of the state of Israel, undivided, and under exclusive Israeli sovereignty'.³ The Palestinian position, in contrast, is that: 'Jerusalem should be an open city. Within Jerusalem, irrespective of the resolution of the question of sovereignty, there should be no physical partition that would prevent the free circulation of persons within it'.⁴ In other words, like the Israelis, the Palestinians do not seek to re-divide the city. They simply dispute the categorical Israeli claim that it has exclusive sovereignty over the city. The sovereignty question is precisely what the Palestinians want to negotiate with Israel.

Pending a resolution of this issue before the final status negotiations, it would be useful to recapitulate the different opinions that exist with regard to the question of who has sovereignty over Jerusalem. Although in the past, the view had been expressed that 'the parties seem bent on territorially dividing the city',⁵ it is clear that this is no longer the case and that the thorny question of sovereignty is still an open one. Moreover, due to irreconcilable differences, and in the light of unilateral actions being pursued by both sides, it is possible that the status of Jerusalem may not ever be resolved in the permanent status negotiations. In the event that the negotiation process breaks down, joint sovereignty would seem to provide an optimal solution, with an international presence to administer the needs of the population in and around the Old City as well as to secure and safeguard the Holy Places.

2. THE NOTION OF TERRITORIAL SOVEREIGNTY UNDER INTERNATIONAL LAW

Sovereignty is a Eurocentric idea that originated in fourteenth century Florentine Italy to refer to the exclusive competence of a sovereign over the administration and laws of a specific territory.⁶ Although historians trace the idea to the thought of Niccolò Machiavelli (1469-1527), Jean Bodin (1530-1596), and Thomas Hobbes (1688-1679), the notion of sovereignty only really acquired its modern meaning in international law and relations at the height of western imperialism during the colonial encounter with the non-western world in the nineteenth and early twentieth centuries.⁷

It is for this reason that I am always slightly bemused when I come across statements made by Israeli spokespersons to the effect that the Jewish people held sovereignty over Jerusalem in biblical times when King David built a temple there. This would require a serious stretch of the imagination since the very concept of sovereignty did not then exist. This is not to downplay the importance of Jerusalem to the Jewish people or for that matter its importance to

³ See 'The Status of Jerusalem', 14 March 1999, document on the website of Israel Ministry of Foreign Affairs.

⁴ See 'Summary of Jerusalem' on the website of the PLO's Negotiations Affairs Department.

⁵ See Amr A. Shalakany, 'Privatizing Jerusalem or an Investigation into the City's Future Legal Stakes', 15 *Leiden Journal of International Law* (2002), p. 431 at p. 432.

⁶ See Quentin Skinner, 'The State', in Terence Ball, James Farr, and Russell L. Hanson (eds.), *Political Innovation and Conceptual Change* (Cambridge: Cambridge University Press, 1989), p. 90.

⁷ See Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005).

Christians and Muslims. Rather I am suggesting that to use the notion of sovereignty to legitimate exclusive Jewish claims to Jerusalem based on a 2000 year-old historical event is misplaced.

So what does one mean by sovereignty? In general, for international law purposes, sovereignty is understood to denote the legal competence which a state enjoys in respect of its territory.⁸ State territory is important in international law because it is the space within which the state exercises its supreme, and normally exclusive, authority.⁹ This is why when international lawyers use the word sovereignty they really mean 'territorial sovereignty'. In a famous case in the early twentieth century, a learned arbitrator explained that sovereignty meant the right to exercise in a territory the functions of a state to the exclusion of any other state, and with no authority over the state than that of international law.¹⁰ In a word sovereignty is tantamount to independence.

This view of sovereignty is, however, extremely dogmatic, positivist, and increasingly alien to modern international affairs. Extrapolated to the context of Jerusalem it would exclude the possibility of joint sovereignty, functional sovereignty, suspended sovereignty, or any other solution that did not allow for another state or political entity to exercise authority over territory. A better description of sovereignty would be one in which a state or an organization with international personality is vested with specific rights and duties under international law such as the right to legislate for areas subject to its jurisdiction and to preserve law and order.

Accordingly, the term sovereignty is used in this paper to refer to the right of either Israel, the Palestinians, or a third party, such as an international body established by a binding UN Security Council resolution, with the agreement of all interested parties, to exercise exclusive competence solely or jointly over the administration of Jerusalem.

The term sovereignty will be used along with the word 'title', which is understood to refer to the right to exercise sovereignty authority. One speaks of title when assessing competing claims to sovereignty or when trying to assess where sovereignty is vested, for instance, upon a succession of states, or in the aftermath of armed conflict where there are several claims.

Also connected to sovereignty disputes, is the notion of legitimacy. Only a state whose sovereignty over a specific territory is widely recognised is deemed legitimate. In this regard states usually withhold de jure recognition from a state asserting sovereignty over territory that is disputed whilst recognising that it exercises de facto sovereignty. This is currently the position as regards to Israel's status in Jerusalem today. While most states recognise that Israel exercises unilateral de facto authority in the city, they do not recognise that authority to be lawful.

Finally, a word should be said about self-determination. Historically the colonial powers would parcel out sovereignty between themselves over territories in the aftermath of armed conflict as if it were a vast piece of empty real estate. No consideration was taken towards the identity of the people whose lives they had to govern; the conquered community was irrelevant. During decolonization, however, the now widely accepted belief that all peoples have a right to self-determination was promoted and accepted. Thus a community that self-identifies as a people, and which is given specific international recognition, should have a say over the cultural, economic, political, and social development of their homeland. Today it is widely recognized that the Palestinian people have a right to self-determination which they seek to exercise by establishing a Palestinian state in East Jerusalem, the rest of the West Bank, and Gaza.¹¹

⁸ See Ian Brownlie, *Principles of Public International Law* (Oxford: Oxford University Press, 1998), p. 120.

⁹ Sir Robert Jennings and Sir Arthur Watts, *Oppenheim's International Law, Vol. 1* (London: Pearson, 1996), p. 564.

¹⁰ *Island of Palmas Arbitration* 2 RIAA (1928), p. 829.

¹¹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, p. 136 at pp. 171-172, para. 88; p. 183, para. 118; p. 197, para. 149; p. 199, para. 155; and p. 200; para. 159.

3. THE SOVEREIGNTY OF JERUSALEM: HISTORICAL STAGES

In order to assess the competing claims to Jerusalem one must first identify the claimants and the respective bases for their assertions. Israel and the Palestinians are the two principle actors in this respect, asserting sovereignty over Jerusalem through their differing analyses and understandings of the events that have given rise to these conflicting claims. Accordingly, by definition, any assessment of the sovereignty of Jerusalem necessitates historical analysis.

There are of course other actors who would want to be consulted over the future administration and governance of the city although they do not claim sovereignty. These include the Vatican, the various protestant denominations, and the states of Jordan and Saudi Arabia.¹² We should not forget that approximately thirty of the most important Holy Places for the monotheistic faiths are located in Jerusalem in addition to over a thousand synagogues, 52 mosques, 65 churches, and 72 monasteries. Of these 30, only 3 of the important Holy Places are situated in the western half of the city.¹³

The main controversy on the question of sovereignty in Jerusalem originates to the moment when Britain withdrew its administration on 15 May 1948 after it became clear that the UN Partition Plan, which sought to establish a *corpus separatum* in the city, could not be enforced. Indeed the entire legal argument advanced by most Israeli jurists to sovereignty over Jerusalem is based on this moment. Any assessment of this claim must therefore place it in context, through considering the status of Jerusalem during the Ottoman Empire and the British Mandate.

In this regard, the legal status of Jerusalem cannot be viewed in isolation from the conflict as a whole. Statements concerning Jerusalem in treaties and official correspondence were seldom isolated, and often addressed the status of Palestine more generally.

3.1 Jerusalem and the Ottoman Empire (1517-1923)

Jerusalem has been a contested city for the past 3,500 years with one scholar estimating that over the course of that long history the city changed hands more than 25 times.¹⁴ It is, however, unnecessary to revisit ancient history for the purposes of international law as the discipline itself is of more recent vintage, with most scholars tracing its roots to the 1648 Peace of Westphalia when Jerusalem was already an integral and sovereign part of the Ottoman Empire.

For 400 years, from 1517 until 1917, the Ottoman Empire was sovereign in Jerusalem until the city and the rest of the Holy Land was conquered by Britain at the end of the First World War. This is one of the few facts jurists supporting the Israeli and Palestinian positions agree on.¹⁵ It is what happened after the Ottoman Empire ceased to have sovereignty over Jerusalem

¹² For a summary of the various claims see Larry Kletter, 'The Sovereignty of Jerusalem under International Law', 20 *Columbia Journal of Transnational Law* (1981), p. 319 at pp. 335-356.

¹³ See Shmuel Berkowitz, 'The Holy Places in Jerusalem: Legal Aspects', 11 *Justice* (December 1996), at p. 6.

¹⁴ Kletter, 'The Sovereignty of Jerusalem under International Law', supra n. 12, p. 321.

¹⁵ See Elihu Lauterpacht, *Jerusalem and the Holy Places* (London: The Anglo-Israel Association, October 1968), p. 38; Yehuda Zvi Blum, *The Juridical Status of Jerusalem* (Jerusalem: The Hebrew University of Jerusalem 1974), p. 23; Joseph B. Tulman, 'The International Legal Status of Jerusalem', 3 *ASILS International Law Journal* (1979), p. 39; Kletter, 'The Sovereignty of Jerusalem', *ibid*, p. 330; Henry Cattán, *Jerusalem* (Saqi Books, 2000, first published with Croom Helm, 1981), pp. 27-30; Antonio Cassese, 'Legal Considerations on

after 1917 that is contested. Before revisiting this debate, it would, however, be appropriate to inquire into the status of Jerusalem under Ottoman rule, not only to provide some historical context, but also to explain why the great powers came up with plans to internationalize the city.

Since the crusades, the Christian world has expressed an interest in the status of the Christian Holy Places in Jerusalem. When Jerusalem was a part of the Ottoman Empire, the Catholics and the Orthodox vied with each other in petitioning the Ottoman Sultan for decrees (or *firmans*), favourable to their cause. In this perennial struggle the Latin Christians courted the support of Catholic states, like Venice, Genoa, France, Austria, and Poland whilst the Orthodox Christians, prior to the emergence of Russia as a great power, relied on the strength of the local community in their efforts to influence the Court in Istanbul.¹⁶ It was only after 1774 that Russia obtained from the Ottoman sultan the same rights and privileges that he had accorded to France and England under the capitulations. Thereafter, Russia claimed to be the protector of the Orthodox in the Holy Land in the same manner as France had become the protector of the Latins.¹⁷ The British, uniquely of the Christian powers, peculiarly saw its role as protector of the Jews, and not only the Christians, as few Anglicans lived in the Holy Land.¹⁸

It was the Ottoman Sultan who first established the principle of the status quo, which some have likened to the modern legal principle of 'public order'.¹⁹ The Sultan published a *firman* in 1757, reaffirmed by a further *firman* in 1852 that was given international recognition in the Treaty of Berlin in 1878.²⁰ The principle was directed mainly towards the solution of the permanent controversies among the different Christian churches over the central Holy Places.²¹ However, by allowing the great powers to have a say in the status of Jerusalem for the first time, the Sultan had accepted that Jerusalem was a cause of international concern, and not merely a domestic matter.

Under the Ottoman Empire, Jerusalem did not have a distinct status until 1874 when it became the capital of an independent *sanjaq*, which sent one deputy to the parliaments of 1877-78, and three to those of 1908-1918.²² Although Jerusalem was important as the capital of the district of southern Palestine, Khalidi explains that its importance extended far beyond that. Its schools, newspapers, clubs, and political figures had an impact throughout Palestine, even before

the International Status of Jerusalem' 3 *The Palestine Yearbook of International Law* (1986), pp. 13-39 reprinted in Victor Kattan (ed.) *The Palestine Question in International Law* (London: The British Institute of International and Comparative Law, 2008), pp. 295-321 at p. 298; John Quigley, 'Old Jerusalem: Whose to Govern?', 20 *Denver Journal of International Law and Policy* (1991), p. 147; Michael Eisner, 'Jerusalem: An Analysis of Legal Claims and Political Realities', 12 *Wisconsin International Law Journal* (1993-1994), p. 223; Ruth Lapidot, 'Jerusalem and the Peace Process', 28 *Israel Law Review* (1994), p. 403; and Charles Bryan Baron, 'The International Legal Status of Jerusalem', 8 *Touro International Law Review* (1998), pp. 4-5.

¹⁶ See Walter Zander, 'On the Settlement of Disputes about the Christian Holy Places', 8 *Israel Law Review* (1973), p. 332.

¹⁷ Kattan, *Jerusalem*, supra n. 15, p. 28.

¹⁸ On the capitulations see Isaiah Friedman, *Germany, Turkey, and Zionism 1897-1918* (Oxford: At the Clarendon Press, 1977), pp. 32-49.

¹⁹ See Izhak England, 'The Legal Status of the Holy Places in Jerusalem', 28 *Israel Law Review* (1994), p. 593.

²⁰ See Article LXII of the Treaty between Austria-Hungary, France, Germany, Great Britain, Italy, Russia and Turkey for the Settlement of Affairs in the East, signed at Berlin, 13 July 1878, reproduced in Clive Parry (ed.) 153 *The Consolidated Treaty Series* (1878), pp. 171-191, at p. 190. (Les droits acquis à la France sont expressément réservés, et il est bien entendu qu'aucune atteinte ne saurait être portée au *statu quo* dans les Lieux Saints.)

²¹ See Izhak England, 'The Legal Status of the Holy Places in Jerusalem', 28 *Israel Law Review* (1994), p. 592.

²² Rashid Khalidi, *Palestinian Identity: The Construction of Modern National Consciousness* (New York: Columbia University Press, 1997), p. 35.

the country's British mandate boundaries were established after World War I.²³ In 1910, a Court of Appeal was established in Jerusalem and cases were heard there, rather than in Damascus.²⁴

At the start of the First World War the Ottoman Empire declared war against Britain. To garner support during the course of this conflict, Britain concluded a number of secret treaties soliciting the support of various stakeholders who in exchange asserted various claims to Palestine, including Jerusalem. Principally, these stakeholders were the Sherif of Mecca, based in the Hejaz, and the Zionist Organization, based in London.

In 1915, Britain entered into a secret exchange of correspondence with the Sherif known as the Hussein-McMahon correspondence and two years later an understanding was reached with the Zionist Organization in the form of the Balfour Declaration.²⁵ Both agreements contained conflicting claims and sowed the seeds for future conflict, but only the first agreement addressed the question of the Holy Places.²⁶

Some scholars have expressed the opinion that the Hussein-McMahon correspondence was unclear and that it is only of limited historical value today.²⁷ I would, however, question this view for two reasons. First, the Hussein-McMahon correspondence specifically addressed the status of the Holy Places, and the Sykes-Picot agreement, which was negotiated in the light of the Hussein-McMahon correspondence, specifically mentioned that consultations would take place with the Sherif of Mecca over the political fate of Palestine.²⁸ Third, the sovereignty of Jerusalem is still an open question today and consequently one must by necessity revisit any document which may shed some light on its status.

For as we shall see, Israel's legal claim to Jerusalem is based on the argument that its title is superior to any other claimants as a result of the sovereignty vacuum in Palestine that emerged upon the termination of the British mandate of Palestine in May 1948. This view is questionable however because Britain, the Permanent Mandates Commission of the League of Nations, and the United Nations had already expressed their views on the status of Jerusalem in the various partition plans that were proposed during and after the mandate. Moreover, Britain had even expressed a view on the status of the Holy Places before the Balfour Declaration was read out in Parliament.

For instance in 1915, Sir Henry McMahon, the British agent in Cairo, informed the Sherif of Mecca that he had been 'empowered' in the name of his government to give an assurance that it would 'guarantee the Holy Places against all external aggression and will recognise their inviolability'.²⁹

One might have argued that by 'Holy Places' Britain only meant the Christian Holy Places. But this would only strengthen the Arab claim to Palestine as nearly all the major Christian Holy Places are located in Jerusalem and in the rest of Palestine. Presumably, therefore, it was in the Muslim Holy Places that Hussein, as the custodian of Mecca and Medina, would

²³ Khalidi, *Palestinian Identity*, *ibid*, pp. 35-36.

²⁴ Yehoshua Porath, "The Political Awakening of the Palestinian Arabs and their Leadership towards the end of the Ottoman Period" in Moshe Ma'oz (ed.), *Studies on Palestine during the Ottoman Period* (Jerusalem: The Hebrew University Magnes Press, 1975), p. 357.

²⁵ The Balfour Declaration is reproduced in John Norton Moore (ed.) *The Arab-Israeli Conflict, Volume III: Documents* (New Jersey: Princeton University Press, 1977), p. 885.

²⁶ See Victor Kattan, *From Coexistence to Conquest: International Law and the Origins of the Arab-Israeli Conflict 1891-1949* (New York, London: Palgrave, Pluto Press, 2009), pp. 98-116.

²⁷ See e.g. Timothy J. Parris, *Britain, the Hashemites and Arab Rule 1920-1925: The Sherifian Solution* (London: Frank Cass, 2003) p. 31.

²⁸ See The Sykes-Picot Agreement, 16 May 1916 in Norton Moore (ed.) *The Arab-Israeli Conflict*, *supra* n. 25 at pp. 25-28

²⁹ Translation of a letter from Sir H. McMahon, His Majesty's High Commissioner at Cairo, to the Sherif of Mecca, 24 October 1915, Command Paper 5957 (1939), in John Norton Moore (ed.), *The Arab-Israeli Conflict. Volume III: Documents* (New Jersey: Princeton University Press, 1974), pp. 5-21.

have wanted from Britain a guarantee against external aggression. One could then argue that perhaps Britain restricted its view of the Muslim Holy Places to only those in the Arabian Peninsula and perhaps in Mesopotamia. However, this would not make sense either, since Britain specifically recognised that the Haram-ash-Sherif was a Muslim Holy Place:

The Moslem world must be satisfied with regard to their permanent possession of the Haram-esh-Sherif (Mosque of Omar, which occupied the site of the old Jewish Temple), and I do think it important that their exclusive rights to this should be inserted in the Peace Conference. It is in an altogether different category from the rest of the Mohammedan shrines and mosques in Palestine and it is the only one to which really vital importance is attached by Indian Moslems.³⁰

This view is further supported by British practice when it began administering the mandate. The Supreme Muslim Council supervised the restorations of the Dome of the Rock and the Al-Aqsa Mosque in agreement with Britain when it was the mandatory power in the 1920s in a project that was directed from Istanbul.³¹ The Zionist Organization even recognized the Muslim claim to Jerusalem when it concluded the Feisal-Weizmann correspondence in 1919. In that correspondence Weizmann agreed that 'the Mohammedan Holy Places shall be under Mohammedan control'.³² In that agreement, Weizmann was specifically referring to the Mohammedan Holy Places in Palestine.

I think it is significant and perhaps a little odd that no mention was then made of any Jewish claim. The Balfour Declaration says nothing about Jerusalem, and the mandate did not recognise a specific Jewish claim. In fact, the British negotiators at Paris had intended to insert an extra clause in the mandate which would have accorded specific protection to the Christian and Muslim Holy Shrines in Jerusalem in the event that the city fell under exclusive Jewish control.³³ It seems that no agreement was specifically concluded regarding the Jewish Holy Places until Israel passed the Protection of the Holy Places Law after it captured the City in 1967.³⁴

As regards the Muslim Holy Places in Jerusalem all the principal actors and stakeholders—Britain, France, the Arabs, and the Zionist Organization—accepted that they ought to remain in Muslim control. Now of course one can legitimately ask who represented the Muslims between 1915 and 1919, and there are differences of opinions on this, but I do not think it is necessary to enter into that debate in order to resolve the status of Jerusalem today, in light of the doctrine of self-determination. As regards the Christian Holy Places they were still subject to the status quo pronounced at Berlin.

3.2 Jerusalem and the British Mandate (1923-1948)

³⁰ 'The Holy Places of Palestine', Minute by W. Ormsby-Gore, 25 February 1919, Peace Conference (British Delegation) 1919, FO 608/98.

³¹ See Beatrice St Laurent and Andras Riedlmayer, 'Restorations of Jerusalem and the Dome of the Rock and Their Political Significance, 1538-1928', 10 *Muqarnas, Essays on Honor of Oleg Grabar* (1993), pp. 82-83.

³² See Art. VI of the Feisal-Weizmann Agreement, 3 Jan. 1919 available on the website of Israel's Foreign Ministry at <http://www.mfa.gov.il/MFA/Peace+Process/Reference+Documents/The+Weizmann-Feisal+Agreement+3-Jan-1919.htm>

³³ 'The Holy Places of Palestine', supra n. 30.

³⁴ On the Holy Places Law see Berkovitz, 'The Holy Places in Jerusalem: Legal Aspects', supra n. 13, pp. 6-14.

In December 1917, the Ottoman Empire lost de facto sovereignty over Palestine when it lost control to General Allenby's army that marched into Jerusalem and assumed responsibility for law and order there until 1920 when it was replaced by a civilian administration.³⁵ Whilst Turkey, which had replaced the Ottoman Empire, did not cede sovereignty de jure until the Lausanne Peace Treaty was concluded in 1923,³⁶ the first paragraph of Article 22 of the League of Nations Covenant made it clear that one of the consequences of that war, was that the colonies and territories captured by the victors, 'ceased to be under the sovereignty of the states which formerly governed them'.³⁷

What happened to the question of sovereignty thereafter was contested with jurists expressing different opinions. Some scholars thought sovereignty vested in the League; others thought that communities of an A-class mandate approached very close to sovereignty; and yet others thought that sovereignty was in abeyance because it had no application to the mandates system.³⁸ Another view was that sovereignty was actually vested in the peoples of the A-class mandates.³⁹ It is not necessary to dwell at length on these points of controversy and disagreement, however, as it was generally recognised that upon the relinquishment of the mandate, sovereignty would automatically vest in the people of the territories concerned regardless of where it was located prior to the territory's independence.⁴⁰

The text of the British Mandate of Palestine contained few provisions on Jerusalem and said nothing about sovereignty, although it expressly safeguarded the 'Muslim sacred shrines'.⁴¹ Article 13 provided that all responsibility in connection with the Holy Places, including that of preserving existing rights and of securing free access to the Holy Places, religious buildings and sites and the free exercise of worship, was assumed by the Mandatory, which was responsible solely to the League of Nations. It further provided that 'nothing in this mandate shall be construed as conferring upon the Mandatory authority to interfere with the fabric or the management of purely Moslem sacred shrines, the immunities of which are guaranteed'. Article 14 envisaged that a special commission would be sent to Palestine by the mandatory power to

³⁵ Palestine was placed under British Military Occupation from the moment it was captured in December 1917 until July 1920, when a civilian administration was installed. See Lieut.-Col. Norman Bentwich, Chief Judicial Officer, Occupied Territories, Palestine, "The Legal Administration of Palestine under the British Military Occupation" 1 *British Yearbook of International Law* (1920-1921), pp. 139-148. Palestine was then a part of what was known as Occupied Enemy Territory Administration (OETA). See John J. McTague Jr. "The British Administration in Palestine 1917-1920" 7 *Journal of Palestine Studies* (1978), p. 57.

³⁶ See The Treaty of Peace with Turkey signed at Lausanne, 24 July, 1923. *Treaties of Peace 1919 - 1923, Vol. II*, (New York: Carnegie Endowment for International Peace, 1924), pp. 959 - 1022.

³⁷ See Article 22, Covenant of the League of Nations, 1 *League of Nations Official Journal* (1920) p. 9.

³⁸ See E. Lauterpacht (ed.), Hersh Lauterpacht, *International Law Being the Collected Papers of Hersch Lauterpacht, Vol. 3, The Law of Peace* (Cambridge: Cambridge University Press, 1977), pp. 64-69 (being of the opinion that sovereignty was vested in the League); the contrasting opinion of Quincy Wright, "Sovereignty of the Mandates", 17 *American Journal of International Law* (1923), pp. 691-703, writing at p. 696 that '[c]ommunities under "A" mandates doubtless approach very close to sovereignty'. See also the Separate Opinion expressed by Judge McNair in *International Status of South West Africa*, ICJ Reports 1950, p. 150 (in which he argued that sovereignty had not application to the mandates system because it was in abeyance).

³⁹ See Judge Ammoun's Separate Opinion in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (1970), Advisory Opinion, ICJ Reports (1971), at 69 who cites with approval the French edition of Stoyanovsky thesis, *La théorie générale des mandats internationaux*, (1925), at p. 83 and Paul Pic who both thought that sovereignty resided in the people of A-class mandates, and upheld the notion of virtual sovereignty residing in a people deprived of its exercise by domination or tutelage.

⁴⁰ See R.N. Chowdhuri, *International Mandates and Trusteeship Systems: A Comparative Study* (The Hague: Martinus Nijhoff, 1955), at p. 236.

⁴¹ For the English and French text of the British Mandate of Palestine see Terms of League of Nations Mandates, UN Doc. A/70 (October, 1946) pp. 2-7. See also, Annex 391, "British Mandate for Palestine", 3 *League of Nations Official Journal* (1922), pp. 1007 - 1012.

define and determine the rights and claims in connection with the Holy Places and the rights and claims relating to the different religious communities in Palestine.

The Commission envisaged by Article 14 was never appointed although the League did send a commission to Jerusalem after a riot broke out over the rights of worship and of access to the pavement in front of the Western Wall.⁴² On 14 January 1930, the proposal to send a Commission to Palestine was approved of by the League of Nations after it had heard the views of the Permanent Mandates Commission. The Commission was comprised of three persons, who happened to all be Christian, including the former Swedish Minister for Foreign Affairs, the Vice-President of the Court of Justice at Geneva, and a Member of the States-General of the Netherlands who was formerly Governor of Sumatra.

It is worth observing that this Commission is rarely mentioned in the numerous articles published on Jerusalem by international lawyers partial to an Israeli viewpoint.⁴³ Perhaps this was because after travelling to Jerusalem, examining the history of dispute, and listening to the complaints of both Jews and Muslims, the Commission reached the conclusion that: 'To the Moslems belong the sole ownership of, and the sole proprietary right to, the Western Wall, seeing that it forms an integral part of the Haram-esh-Sherif area, which is a Waqf property'.⁴⁴ The Commission did, however, acknowledge that the Jews should have free access to the Western Wall for the purposes of devotions at all times and that the Muslims should not impair access of the Jews to the Wall during the times of their devotional visits. The Commission was not asked to inquire into the sovereignty of Jerusalem, leaving the question open.

In 1936, the British Government appointed another Commission of Inquiry, this time, a Royal Commission that was to investigate the causes of the disturbances that had broken out in Palestine. The Commission recommended in the report it published a year later that Britain terminate its Mandate over Palestine and partition it between a Jewish state and an Arab state that was to be linked with Transjordan. However, Jerusalem, Bethlehem, Nazareth, and the Sea of Galilee would remain under British control in the form of a Mandate so as to ensure free access to the Holy Places that would accord 'with Christian sentiment in the world at large'.⁴⁵ This was the first concrete proposal to treat the status of Jerusalem and the other Holy Places differently to the remainder of those areas respectively allotted to the Zionists and the Palestinian Arabs.

Ten years later, in 1947, the UN General Assembly proposed a similar solution when they recommended dividing Palestine into Arab and Jewish states in economic union, with the City of Jerusalem established as a *corpus separatum* under a special international regime that was to be administered by the United Nations.⁴⁶ The Plan provided that the Trusteeship Council would be designated to discharge the responsibilities of the Administering Authority on behalf of the United Nations.⁴⁷ The City of Jerusalem was to be demilitarized and include in addition to the Jerusalem municipality, the surrounding villages and towns, Abu Dis, and Bethlehem.⁴⁸ The inhabitants of Jerusalem would be entitled to a special Jerusalem citizenship, and the city would

⁴² See Report of the Commission Appointed by His Majesty's Government in the United Kingdom of Great Britain and Northern Ireland, with the Approval of the Council of the League of Nations, to determine the Rights and Claims of Moslems and Jews in Connection with the Western or Wailing Wall at Jerusalem (London: H.M.S.O., December, 1930), hereinafter referred to as 'The Western Wall Report'. There is an extract of the report in 1 *Journal of Palestine Studies* (1971), p. 171.

⁴³ Not one of the jurists partial to an Israeli viewpoint cited in n. 15 mention this Commission.

⁴⁴ See Western Wall Report, supra note 42, pp. 57-58.

⁴⁵ Palestine Royal Commission Report, July 1937, Cmd. 5479, pp. 381-382 at p. 382 ("We think it would accord with Christian sentiment in the world at large if Nazareth and the Sea of Galilee (Lake Tiberias) were also covered by this Mandate.")

⁴⁶ GA Res. 181 (III), 29 Nov. 1947.

⁴⁷ Part III, A, Plan of Partition with Economic Union, *ibid.*

⁴⁸ Part III, B, Plan of Partition with Economic Union, *ibid.*

have its own separate Courts and security arrangements.⁴⁹ In a draft constitution for the city that was submitted to the UN before the outbreak of armed conflict in 1948, it was proposed that a Governor of Jerusalem would become the chief executive authority in Jerusalem. Like a modern-day 'Pontius Pilate', the UN Governor would be vested with extensive and largely uncontrolled powers in the supervision of religious and charitable bodies. This included wide legislative and foreign affairs powers that would transform Jerusalem into a separate international entity with competencies in the fields of treaty-making, diplomatic protection, and diplomatic relations.⁵⁰

Although the UN Partition Plan was never enforced, the UN continued to come up with trusteeship proposals in later years to provide a solution to the difficulty that had arisen in Jerusalem.⁵¹ In 1950, the Trusteeship Council approved a special statute for the city.⁵² A *corpus separatum* for Jerusalem and Bethlehem would be administered by the Trusteeship Council of the United Nations. This model was far more modest in size and scope than the *corpus separatum* that had been proposed in the UN Partition Plan. Rather than appointing a strong UN Governor with wide executive authority this proposal envisaged a UN Commissioner appointed directly by the UN General Assembly to ensure 'protection of and free access to the Holy Places'. The proposal also differed from the UN Partition Plan in that pending a final settlement of the conflict it preserved the divided status quo in Jerusalem between Israel and Jordan. The proposal empowered the Commissioner to 'request the governments in the Jerusalem area to modify, defer or suspend ... laws, ordinances, regulations, and administrative acts' impairing 'the protection of and free access to the Holy Places' and to 'request governments to take...orders or regulations' necessary 'for the maintenance of public security and safety' in the area of the Holy Places.⁵³

Although nothing became of these proposals, this did not mean that the international community had acquiesced to Israeli and Jordanian sovereignty over Jerusalem.⁵⁴ Rather the UN's silence after 1950 was probably a reflection of the prevailing (and continued) climate, which made it impossible to bridge the differences between the two. In this respect Cassese notes that despite the failure of the Partition Plan, and the other proposals, Israel still accepted the UN as the entity with the competence to decide on the status of Jerusalem.⁵⁵ Indeed, prior to its occupation of the eastern half of the city in 1967, the official position of Israel was that the best proposal for Jerusalem was an international regime for the Holy Places only. Cassese also notes that Jordan implicitly assented to the UN's authority to determine the future status of the city in agreement with all the parties concerned.⁵⁶ Accordingly, if this is correct, then the status of Jerusalem must await the moment when an agreement is reached between the principal parties and the UN, that will resolve its status, along with the other core issues that remain unresolved.

3.3 Jerusalem under Jewish and Jordanian Control (1948-1967)

⁴⁹ Part III, C, Plan of Partition with Economic Union, *ibid.*

⁵⁰ See Carsten Stahn, *The Law and Practice of International Territorial Administration: Versailles to Iraq and Beyond* (Cambridge: Cambridge University Press, 2008), pp. 195-201.

⁵¹ See GA Res. 303 (IV), 9 December 1949.

⁵² Statute for Jerusalem Approved by the Trusteeship Council at the eighty-first, UN doc. T/592, 4 April 1950.

⁵³ See Stahn, *The Law and Practice of International Territorial Administration*, *supra* n. 50, p. 202.

⁵⁴ The granting of legal title could not be brought about by mere silence especially on such a complex and explosive matter. See Cassese, 'Legal Considerations on the International Status of Jerusalem', in Kattan (ed.), *The Palestine Question*, *supra* n. 15, p. 307.

⁵⁵ Cassese, 'Legal Considerations', *ibid.*, p. 301.

⁵⁶ Cassese, 'Legal Considerations', *ibid.*, pp. 301-304.

Once the British mandate was terminated on 15 May 1948, a dispute over the sovereignty of Jerusalem ensued. Israeli international lawyers and those who sought to advance the Israeli viewpoint on the status of Jerusalem sought to exploit this opportunity with a number of articles that were published in the late 1960s after Israel captured the city in the June 1967 war.⁵⁷ The central argument that underlined nearly every analysis of the status of Jerusalem from this perspective was that in 1948 there was a sovereignty vacuum, Israel fought a war of self-defence, it was victorious, and consequently it has a better title to Jerusalem than any other state.

The obvious problem with this argument is that it hinges on three misconceptions. First, that Israel acted defensively in 1948. Second, that the use of force in self-defence can confer sovereignty on the victor. Third, it assumes that the Palestinian people could not be bearers of sovereignty.

From what I can gather nearly all these authorities base their argumentation on a pamphlet that the British international lawyer Sir Elihu Lauterpacht published in 1968 entitled *Jerusalem and the Holy Places*.⁵⁸ Lauterpacht argued that when Britain terminated the mandate there was a sovereignty vacuum in Palestine which could only be filled by 'lawful action'.⁵⁹ Because, in his view, Israel accepted the UN Partition Plan and acted defensively, whereas the Arab states rejected the Partition Plan and acted aggressively, Israel acquired sovereignty. Lauterpacht based his argument on the Latin maxim *ex injuria ius non oritur*—no right can be born of an unlawful act.⁶⁰

In other words Israel's claim to Jerusalem was based on a combination of the UN Partition resolution (Lauterpacht evidently did not take into account the fact that the UN Partition Plan did not accord Israel sovereignty over Jerusalem) and lawful occupation which had not been challenged by any other sovereign, whereas Jordan's occupation of the Old City, not being based on a UN resolution or self-defence, 'entirely lacked legal justification'.⁶¹ Accordingly, whilst Jordan's title to East Jerusalem was defective, Israel's was not, and accordingly Israel acquired sovereignty over the portion of Jerusalem it occupied in 1948. The status of Jordan in Jerusalem according to Lauterpacht was merely that of 'prolonged *de facto* occupation'.⁶²

I should point out that this argument was crafted in order to justify Israel's presence in East Jerusalem after the 1967 War, where the same logic was applied. It was argued that Jordan's status in East Jerusalem was merely that of a belligerent occupant. Since title cannot be acquired by a state in belligerent occupation of territory, Jordan lacked sovereignty. As Lauterpacht explained: 'Once Jordan was physically removed from the Old City by legitimate measures—as the Israeli reactions to the Jordanian attack on 5th June, 1967, undoubtedly were—then the way was open for a lawful occupant to fill the still subsisting vacancy'.⁶³

Taking the analogy a step further Yehuda Blum, formerly the legal adviser of the Government of Israel to the UN, came up with the 'missing reversioner' thesis in which he argued that Israel lawfully acquired the city in 1967 in another war of self-defence because there was no other right holder to revert sovereignty to upon the conclusion of the conflict as Jordan's

⁵⁷ See e.g. Stephen M. Schwebel, 'What Weight to Conquest?' 64 *American Journal of International Law* (1970), pp. 344-347 at p. 346; Blum, *The Juridical Status of Jerusalem*, supra n. 15, pp. 9-12; Berkovitz, 'The Holy Places in Jerusalem: Legal Aspects', supra n. 13, p. 6; Lapidot, 'Jerusalem and the Peace Process', supra n. 15, p. 405; and Moshe Hirsch, 'The Legal Status of Jerusalem following the ICJ Advisory Opinion on the Separation barrier', 38 *Israel Law Review* (2005), pp. 299-300 (summing up the arguments).

⁵⁸ Lauterpacht, *Jerusalem and the Holy Places*, supra n. 15.

⁵⁹ Lauterpacht, *Jerusalem and the Holy Places*, ibid, pp. 41-42.

⁶⁰ Lauterpacht, *Jerusalem and the Holy Places*, ibid, p. 42.

⁶¹ Lauterpacht, *Jerusalem and the Holy Places*, ibid, p. 47.

⁶² Lauterpacht, *Jerusalem and the Holy Places*, ibid, p. 47.

⁶³ Lauterpacht, *Jerusalem and the Holy Places*, ibid, p. 48.

title was defective (and presumably the Palestinians could not be bearers of sovereignty).⁶⁴ Accordingly, the legal standing of Israel in Jerusalem and the West Bank 'is that of a state which is lawfully in control of territory in respect of which no other states can show better title' and that Jordan 'is not entitled to the reversionary rights of a legitimate sovereign'.⁶⁵ According to this view, Israel can keep hold of the territory.

Similarly, Judge Stephen Schwebel, formerly of the International Court of Justice, and a student of Sir Elihu's father, used the same logic to advance his alternative argument of 'defensive conquest' i.e. that a state acting in lawful exercise of its right of self-defence may seize and occupy foreign territory as long as such seizure and occupation are necessary to its self-defence.⁶⁶ Where the prior holder of territory had seized the territory unlawfully, the state which subsequently takes that territory in the lawful exercise of self-defence has, against that prior holder, better title.⁶⁷ In other words, because in Schwebel's view, Israel captured Jerusalem in two defensive wars, the first being in 1948, when it captured West Jerusalem, and the second in 1967, when it captured East Jerusalem, Israel acquired lawful title over the whole of the city.⁶⁸

It seems clear to me that on any reasonable interpretation of the law not one of these views can possibly be right. Even assuming for argument's sake the highly questionable premise that Israel acted in lawful self-defence in 1948 and then again in 1967, this would not confer on Israel sovereignty over either East or West Jerusalem. It should be recalled that Israel had never had sovereignty or even authority over Jerusalem, even de facto, prior to 1948 to which sovereignty could 'revert' to.⁶⁹ The better view therefore is that neither Israel nor Jordan's presence in Jerusalem between 1948 and 1967 conferred on them sovereignty. In 1950 Lord Henderson, the Undersecretary of State for Foreign Affairs, told the British Parliament that pending a final determination of the status of Jerusalem, his government was unable to recognize Jordanian or Israeli sovereignty over Jerusalem. The British Government made it clear that in its view Israel and Jordan only exercised de facto *authority* in Jerusalem, but not sovereignty.⁷⁰

In a confidential document drafted by the British Foreign Office in 1955, the view was expressed that sovereignty in Jerusalem was in abeyance.⁷¹ Whilst Jordan 'could do more than merely maintain the status quo', it 'was not entitled to go so far as to enact new basic legislation of substance'. The Foreign Office advised that Jordan 'should not take such action as would prejudice the possibility of arrangements being made for Jerusalem by the United Nations or, indeed, by some other definitive solution being reached'.⁷² The same principle was applied to Israel's attempts to incorporate West Jerusalem:

Another consideration is that Israel's administration of the new city is on a par with Jordan's of the old and that she has gone as far, if not further than, Jordan in asserting sovereignty over it. Representations to the one side might therefore involve similar representations to the other.

⁶⁴ See Yehuda Z. Blum, "The Missing Reversioner: Reflections on the Status of Judea and Samaria", 3 *Israel Law Review* (1968), pp. 279-301 at p. 294. He also expressed the similar opinions in Yehuda Z. Blum, *Secure Boundaries and Middle East Peace: In the Light of International Law and Practice* (Jerusalem: Institute for Legislative Research and Comparative Law, 1971), pp. 87-91.

⁶⁵ Blum, "The Missing Reversioner", *ibid.*, p. 294.

⁶⁶ Schwebel, 'What Weight to Conquest?', *supra* n. 57, p. 345.

⁶⁷ Schwebel, 'What Weight to Conquest?', *ibid.*, p. 346.

⁶⁸ Schwebel, 'What Weight to Conquest?', *ibid.*, pp. 346-347.

⁶⁹ Cassese, 'Legal Considerations on the International Status of Jerusalem', in Kattan (ed.), *The Palestine Question*, *supra* n. 15, p. 307.

⁷⁰ HL Deb 27 April 1950, Vol. 166, cols 1211-1213.

⁷¹ 'Jordan authority in Jerusalem', Foreign Office Minute by Mr. Lawrence, 6 June 1955, FO 371/115663.

⁷² 'Jordan authority in Jerusalem', *ibid.*

If Israel's administration in Jerusalem arouses less general concern it is only because the major Christian shrines are in the old city rather than the new.⁷³

In 1971, the British Foreign Office asked Eileen Denza, its legal adviser, to prepare a minute commenting on the legal aspects of the arguments raised in Lauterpacht's *Jerusalem and the Holy Places*.⁷⁴ I came across minute, which was recently declassified, whilst undertaking some research on Jerusalem in the National Archives a few years ago. What I found striking about Denza's minute, which was described by the person who had requested it, as 'very helpful', was how she so stridently dismissed some of the conclusions that Lauterpacht had reached so conclusively. For instance, she questioned his view that Jordan 'was entirely lacking in any legal justification' when its army entered Palestine in 1948. Likewise she questioned his view that the Israeli measures taken in East and West Jerusalem were 'lawful and valid'. In her view this was 'a highly dubious piece of special pleading'. Denza pointed out that the UN Partition Resolution did not provide for Israeli sovereignty over Jerusalem, rather it sought to establish a corpus separatum. She then explained:

It is true that acquiescence over a long period of time (perhaps even twenty years) might have perfected her title to West Jerusalem. But I do not think that the absence of Assembly Resolutions for a period of years indicates such acquiescence on the part of the United Nations or its members. We have never acquiesced in Israeli claims to full sovereignty – and have constantly shown this in every way open to us – in particular by refusing to accept Israel's right to make the territory of the corpus separatum her capital and administrative centre.

I do not think that the analysis which makes Israel an entirely innocent self-defender in 1948 and the other Arab States aggressors is entirely correct and I do not think that a distinction in any event can be drawn between Israel's title and Jordan's on the basis of their conduct in 1948. I think that Jordan acquired title to the areas of Palestine allocated to the Arab states under the [UN Partition] Resolution and occupied by her in the same manner as Israel.

I do not think there was a legal vacuum ... at the end of the Mandate. I think that all the powers of sovereignty under the Mandate became temporarily vested in the General Assembly. But the analysis of where sovereignty then lay is to some extent unprofitable exercise. The main point is that Resolutions of the General Assembly acting in effect as the successor to the powers under the Mandate of both the League of Nations and the Mandatory Power have a special force. It is probably true that the Resolution did not in themselves cede territory, but they had a legal force beyond the moral and persuasive force which is all that General Assembly Resolutions have in the ordinary sense.

The Old City

I would disagree entirely with Mr. Lauterpacht's account of the status of East Jerusalem prior to 1967. In my view Jordan's position in East Jerusalem was entirely parallel with Israel's in West Jerusalem. The Armistice Agreement did not say that the parties to it could not assert sovereign rights in regard to Jerusalem. It merely provided that the terms of the Agreement itself would not prejudice the terms of an ultimate settlement of the Palestine question. So far as it operated to prevent the establishment of title by prescription it operated against Israel as much as Jordan...

The British approach does not depend on believing that Israel has annexed Jerusalem. HMG are perfectly well aware that Israel has in virtually all respects of which we are aware

⁷³ 'Jordan authority in Jerusalem', *ibid.*

⁷⁴ 'Jerusalem and the Holy Places', Foreign Office Minute, by Mrs. E. Denza, 13 October 1971, FCO 17/1605.

treated East Jerusalem as her own territory, but has stopped shortly of the juridical step of annexation. Mr. Lauterpacht flatters himself on page 52 when he says that he has met the British point on its merits. All he has done is to allege falsely that it is based on an incorrect assumption. Mr. Lauterpacht ignores the customary international law, of which he must be perfectly well aware, which lays down in detail the duties of an occupying power in the administration of occupied territory. It is not possible to circumvent these rules by describing Israel's actions as reunification or integration rather than annexation.⁷⁵

It should be observed that in 1971 when Denza drafted this minute, Israel had not formally annexed East Jerusalem. It would take another nine years until it did so. If Denza is correct that the sovereignty of Jerusalem was temporarily vested in the UN, then the critical question is what happened to the sovereignty of Jerusalem after the UN plans to internationalize the city failed. In my view this was never resolved and therefore the sovereignty issue was and is suspended until the future of the city is resolved. I would therefore question Denza's view that Jordan had title to East Jerusalem. It certainly had a claim, but this claim was not recognized. Neither was Israel's claim to sovereignty over West Jerusalem recognized between 1948 and 1967.

I think it is clear that after 1948 conquest was no longer a legitimate mode of acquiring sovereignty.⁷⁶ The right of self-defence under the UN Charter does not negate the prohibition of annexation implicit in Article 2 (4) of the same Charter.⁷⁷ Nor would it be consistent with the right of self-defence in international law which to be exercised lawfully must comply with the principles of necessity and proportionately.⁷⁸ Moreover, it could be added that, if one flipped the arguments advanced by Lauterpacht, Blum, and Schwebel on their heads and argued that—as many historians have argued in recent years—it was Israel, rather than the Arab states, who acted aggressively in the 1948 war, then they accordingly could have validated their presence in Palestine by invoking the same Latin maxim as Lauterpacht, the notion of 'defensive conquest', or even the argument of the 'missing reverser'.⁷⁹ Finally, the argument that in the light of Jordan's flawed title, Israel has the best legal claim to Jerusalem is fallacious because it completely ignores the Palestinian claim to Jerusalem based on their right of self-determination.⁸⁰

3.4 Jerusalem under Israeli Rule (1967-)

In 1967, Israel captured East Jerusalem from Jordan. On 7 June 1967, the Israeli military high command issued a Proclamation stipulating that its army would observe there the provisions of the Geneva Convention on the Protection of Civilian Persons in Time of War of 1949.⁸¹ However, after that war ended the Israeli political establishment ordered the army to revoke this proclamation. Kretzmer explains that the likely reason was because they viewed their status in the

⁷⁵ Ibid.

⁷⁶ See Ian Brownlie, *International Law and the Use of Force by States* (Oxford: At the Clarendon Press, 1963), p. 217.

⁷⁷ See Robert Yewdall Jennings, *The Acquisition of Territory in International Law* (Manchester: Manchester University Press, 1963), pp. 55-56. See also, the exchange of notes between Derek Bowett and G. Hart, "International Law Relating to Occupied Territory: A rejoinder", 87 *Law Quarterly Review* (1971), pp. 473 – 475.

⁷⁸ See Iain Scobbie, Sarah Hibbin, *The Israel-Palestine Conflict in International Law: Territorial Issues* (US Middle East Project and Sir Joseph Hotung Programme for Law, Human Rights, and Peace Building in the Middle East, School of Oriental and African Studies, University of London, 2009), pp. 93-100.

⁷⁹ See Kattan, *From Coexistence*, supra n. 26, pp. 169-208.

⁸⁰ See Eisner, 'Jerusalem: An Analysis of Legal Claims and Political Realities', supra n. 15, p. 248-9.

⁸¹ See ICJ Wall advisory opinion, supra n. 11, pp. 1035-6, para. 93.

territories as that of a 'liberator' rather than an 'occupier'.⁸² However, the view that the Geneva Convention does not apply to East Jerusalem and the rest of the occupied territories has never been accepted by the international community.⁸³ Regardless of Israel's domestic law, for the purposes of international law, Israel's status in East Jerusalem is that of a belligerent occupant where the provisions of the Geneva Convention on the Protection of Civilian Persons applies.⁸⁴

Accordingly, it follows that Israel has no sovereignty in East Jerusalem or over the remainder of the occupied territories. A consequence of this is that Israel cannot legislate for the city as if it were the sovereign. Nor may it colonize the city with its own citizens. Article 49 (6) of Geneva Convention IV prohibits the establishment of civilian settlements in occupied territory, thus civilian settlements constructed in and around East Jerusalem, and the West Bank, are unlawful.⁸⁵ As Theodor Meron, Israel's legal adviser, explained in an opinion he was asked to prepare in 1967 for his government that was seen by the Prime Minister and the President: 'The prohibition [enshrined in Article 49 (6) of the Geneva Convention IV] is categorical and not conditional upon the motives for the transfer or its objectives. Its purpose is to prevent settlement in occupied territory of citizens of the occupying state'.⁸⁶ Thus, he concluded: 'civilian settlement in the administered territories contravenes explicit provisions of the Fourth Geneva Convention'.

The Security Council in resolution 242⁸⁷ called on Israel to withdraw from the territory, a position it reiterated in resolution 338 after the October War of 1973.⁸⁸ However within months of the June 1967 war the Knesset passed legislation authorizing the Government to apply the law, jurisdiction, and administration of Israel to any area which was formerly part of mandatory Palestine.⁸⁹ Although the Foreign Minister of Israel denied that his Government was annexing the City, the Israeli Supreme Court took a different view, and ruled that East Jerusalem had effectively been incorporated into the state of Israel.⁹⁰ In 1968, the Security Council passed a resolution in which it expressed its view that 'all legislative and administrative measures and actions taken by Israel, including expropriation of land and properties thereon, which tend to change the legal status of Jerusalem are invalid and cannot change that status'.⁹¹ Several other similarly worded resolutions followed.⁹²

In 1980 a member of the opposition in Israel presented to the Knesset a private member's bill on the subject of Jerusalem. Lapidoth explains that the law entitled 'Jerusalem Capital of Israel' that was approved of by the Knesset 'did not contain any innovations'.⁹³ Nevertheless, the

⁸² David Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (Albany: The State University of New York Press, 2002), pp. 32-33.

⁸³ See Declaration of the Conference of the High Contracting Parties to the Fourth Geneva Convention and the Statement by the ICRC, Dec. 5, 2001, available at:

<http://www.icrc.org/eng/resources/documents/misc/57jrgw.htm>

⁸⁴ ICJ Wall advisory opinion, supra n. 11, pp. 173-177, paras. 90-101.

⁸⁵ ICJ Wall advisory opinion, ibid, p. 184, para. 120.

⁸⁶ 'Memorandum on Settlement in the Administered Territories', Ministry of Foreign Affairs, 18 September 1967 translated and reprinted in the Appendix to Scobbie, *The Israel-Palestine Conflict: Territorial Issues*, supra n. 78, pp. 116-122. This opinion is also available to view on the website of the Sir Joseph Hotung Project in Law, Human Rights, and Peace Building at the School of Oriental and African Studies at this link: <http://www.soas.ac.uk/lawpeacemideast/resources/file48485.pdf>

⁸⁷ SC Res 242, 22 November 1967.

⁸⁸ SC Res. 338, 22 October 1973.

⁸⁹ Lapidoth, 'Jerusalem and the Peace Process', supra n.15, pp. 407-8.

⁹⁰ Lapidoth, 'Jerusalem and the Peace Process', ibid, p. 409.

⁹¹ SC Res. 252, 21 May 1968.

⁹² See SC Res. 267, 3 July 1969; SC Res. 271, 15 September 1969; SC Res. 298, 25 September 1971; SC Res 465, 1 March 1980, SC Res 476, 30 June 1980.

⁹³ Ruth Lapidoth, 'Jerusalem: The Legal and Political Background', 3 *Justice* (The International Association of Jewish lawyers and Jurists, 1994), p. 11.

Basic Law attracted the opprobrium of the United Nations whose principal political organ responded with a harshly worded resolution:

The Security Council,

Recalling its resolution 476 (1980),

Reaffirming again that the acquisition of territory by force is inadmissible,

Deeply concerned over the enactment of a 'basic law' in the Israeli Knesset proclaiming a change in the character and status of the Holy City of Jerusalem, with its implications for peace and security,

Noting that Israel has not complied with resolution 476 (1980),

Reaffirming its determination to examine practical ways and means, in accordance with the relevant provisions of the Charter of the United Nations, to secure the full implementation of its resolution 476 (1980), in the event of non-compliance by Israel,

1. Censures in the strongest terms the enactment by Israel of the 'basic law' on Jerusalem and the refusal to comply with relevant Security Council resolutions;
2. Affirms that the enactment of the 'basic law' by Israel constitutes a violation of international law and does not affect the continued application of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, in the Palestinian and other Arab territories occupied since June 1967, including Jerusalem;
3. Determines that all legislative and administrative measures and actions taken by Israel, the occupying Power, which have altered or purport to alter the character and status of the Holy City of Jerusalem, and in particular the recent 'basic law' on Jerusalem, are null and void and must be rescinded forthwith;
4. Affirms also that this action constitutes a serious obstruction to achieving a comprehensive, just and lasting peace in the Middle East;
5. Decides not to recognize the 'basic law' and such other actions by Israel that, as a result of this law, seek to alter the character and status of Jerusalem and calls upon:
 - (a) All Member States to accept this decision;
 - (b) Those States that have established diplomatic missions at Jerusalem to withdraw such missions from the Holy City.
6. Requests the Secretary-General to report to the Security Council on the implementation of the present resolution before 15 November 1980;
7. Decides to remain seized of this serious situation.⁹⁴

Unlike many of the resolutions on the Israel-Palestine conflict, this resolution was drafted as a legally binding resolution. Paragraph 5 (a) of this resolution clearly states that this resolution

⁹⁴ SC Res. 478, 20 August 1980.

was drafted as a decision and was therefore determinative.⁹⁵ In its 1971 advisory opinion in *Namibia*, the International Court of Justice said that member states should comply with decisions adopted under Article 25 of the UN Charter, which should include even those members who voted against the adoption of the particular resolution and those members of the UN who were not members of the Security Council.⁹⁶ No state voted against the adoption of Resolution 478 on Jerusalem, which was approved by 14-0, with the US abstaining.

Resolution 478 was concerned with the implications that Israel's annexation of the city had for 'international peace and security'. This recalls the language in Articles 39 and 41 of the UN Charter in which the Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, in which it may call upon the Members of the United Nations to apply specific measures. The measure envisaged in this particular instance was that those states which had established diplomatic missions in Jerusalem were to withdraw such missions from the Holy City. After the passage of this resolution, 'within a short period of time, all 13 countries, which had diplomatic missions in Jerusalem, moved them to Tel Aviv'.⁹⁷

Although Berkovitz explains that El Salvador and Costa Rica returned their embassies to West Jerusalem in April 1984, the Israeli press reported that they had moved them back to Tel Aviv in 2006.⁹⁸ Currently no state maintains an embassy in West Jerusalem, including the US.⁹⁹ This is despite congressional pressure and a law that was passed calling on the government to do so.¹⁰⁰ Clearly there is a general conviction that despite Israel's best efforts to incorporate the whole of Jerusalem into Israel over a prolonged period of time, no one recognises Israeli sovereignty in the city. At most they recognise that Israel exercises de facto authority, but not sovereignty, at least for the purposes of international law and diplomatic relations.

As regards the Muslim Holy Places it is noteworthy that Israel does not allow its flag to be flown over the buildings of the al-Haram-al Sharif compound although there are plenty of inflammatory Israeli flags around the compound in the Jewish Quarter and in the ideological Israeli settlements in the Muslim Quarter. This is probably an indicator that the noble sanctuary has a special reverence for Muslims and that it would be most unwise to inflame them. According to Klein there is an Israeli flag inside the Israeli police station on the site, and the Palestinians hoist their flag during demonstrations that occasionally break out in the compound.

⁹⁵ Article 25 of the UN Charter provides that: 'The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter'.

⁹⁶ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276*, 21 June, ICJ Reports 1971, pp. 52-54, paras. 113-117. For commentary on this aspect of the Namibia opinion see Rosalyn Higgins, 'The Advisory Opinion on Namibia: Which UN Resolutions are Binding under Article 25 of the Charter?' 21 *International and Comparative Law Quarterly* (1972), pp. 281-282. See further, the view of the European Court of First Instance in Case T—253/02 *Chafiq Ayadi v. Council Of the European Union*, 12 July 2006, para. 156.

⁹⁷ Berkovitz, 'The Holy Places in Jerusalem: Legal Aspects', supra n. 13, p. 5.

⁹⁸ 'El Salvador to move embassy from Jerusalem', *Ynet News*, 25 August 2006 (also noting that Costa Rica had already announced that it was relocating its embassy the previous week. This story is available at <http://www.ynetnews.com/articles/0,7340,L-3295745,00.html>)

⁹⁹ The website Israel Science and Technology Homepage (<http://www.science.co.il/embassies.asp>) only lists the 'International Christian Embassy' as being located in Jerusalem. The Bolivian Embassy is listed as being in Mevaseret Zion which is a suburb of Jerusalem. However, other websites list the Bolivian Embassy as being in Herzeliya, a posh suburb of Tel Aviv. In 2009, *Ynet News* reported that Bolivia had severed diplomatic ties with Israel after its offensive in Gaza. All the other embassies listed on this website are located in Tel Aviv, Herzeliya, or Ramat Gan. Consulate-Generals do not have the same status as an Embassy.

¹⁰⁰ See Geoffrey R. Watson, 'The Jerusalem Embassy Act of 1995', 45 *Catholic University Law Review* (1995), p. 837.

Officially, security and public order are Israel's responsibility, but in practice he notes that the Waqf plays a role in this, with its employees policing, protecting, and supervising the site.¹⁰¹

As regards the Christian Holy Places, the status quo still applies. The Fundamental Agreement between the Holy See and the State of Israel assures this, with Israel affirming 'its continuing commitment to maintain and respect the 'Status quo' in the Christian Holy Places to which it applies and to the respective rights of the Christian communities thereunder'.¹⁰² Accordingly, it may be concluded that the status quo applies to Christian shrines in the Old City, with Israel recognising Muslim rights over the Muslim Holy Places. As Israel's Foreign Minister told the UN General Assembly in a debate on Jerusalem in 1969: 'Israel does not claim exclusive or unilateral jurisdiction in the Holy Places of Christianity and Islam in Jerusalem and is willing to discuss this principle with those traditionally concerned'.¹⁰³

One scholar has argued that Security Council resolution 242 implicitly recognised Israel's claim to sovereignty over West Jerusalem because it only called for a withdrawal from territories occupied in the June 1967 war.¹⁰⁴ However, this view fails to mention that the same resolution reaffirmed 'the inadmissibility of the acquisition of territory by war'. In the debate on Resolution 242 it was made clear that Israel should 'do nothing to prejudice the status of Jerusalem'.¹⁰⁵ In fact the very first resolution to be passed in the General Assembly, within a month of the outbreak of the war, concerned the status of Jerusalem in which it called on Israel 'to desist forthwith from taking any action which would alter the status of Jerusalem'.¹⁰⁶ Several other similarly worded resolutions followed.¹⁰⁷ And of course the Assembly had a specific interest in that city as it had proposed the Partition Plan and plans for the internationalization of the city.¹⁰⁸

Moreover, as the International Court of Justice noted, Israel agreed in the 1949 armistice agreement with Jordan to provide 'free access to the Holy Places'. Israel subsequently agreed in Article 9, paragraph 1, of the 1994 Peace Treaty with Jordan, 'to provide freedom of access to places of religious and historical significance'. Although most of the Holy Places are located in East Jerusalem, the Court observed that some of these shrines are located in West Jerusalem.¹⁰⁹ Thus both the armistice agreement and the 1994 treaty apply to the whole of Jerusalem; that is to West Jerusalem as well as East Jerusalem, and also to the Holy Places in Bethlehem. The reason why the international community does not want the status of Jerusalem to be prejudiced and for it to be treated differently from the remainder of the territories, is because of the Holy Places.

It may therefore be concluded that Israel's de facto annexation of east Jerusalem is, in the words of the Security Council, both 'null and void' under international law, and that East Jerusalem is occupied territory. As such Israel is subject to obligations under the Fourth Geneva Convention. No state recognises the applicability of Israeli law and jurisdiction to East Jerusalem, except where that application is compatible with the Fourth Geneva Convention. The situation is

¹⁰¹ Menachem Klein, *Jerusalem: The Contested City* (London: Hurst & Company, 2001), p. 60.

¹⁰² See Article 4 (1) Fundamental Agreement between the Holy See and the State of Israel, 30 December 1993, 33 *International Legal Materials* (1994), p. 153 at p. 155. For an analysis inquiring into the legal status of the agreement see Geoffrey R. Watson, 'Progress for Pilgrims? An Analysis of the Holy See-Israel Fundamental Agreement', 47 *Catholic University Law Review* (1997), p. 497.

¹⁰³ See Blum, *The Juridical Status of Jerusalem*, supra n. 15, p. 31 quoting Eban General Assembly, *Official Records*, 24th session, 1757th Plenary Meeting, p. 20.

¹⁰⁴ See Eisner, 'Jerusalem: An Analysis of Legal Claims and Political Realities', supra n. *, pp. 252-252.

¹⁰⁵ See the statement by Mr Berard (France) quoting a statement by Mr. George Brown of the UK in 1382nd meeting, 22 November 1967, UN doc. S/PV.1382, para. 112.

¹⁰⁶ GA Res. 2253 (ES-V), 4 July 1967.

¹⁰⁷ See e.g. GA Res. 2254 (ES-V), 14 July 1967.

¹⁰⁸ As Berkovitz observed 'Since [1981], on an annual basis, the General Assembly has condemned Israel for its efforts to change the status, character and cultural, historical and religious traditions of Jerusalem'. See Berkovitz, 'The Holy Places in Jerusalem: Legal Aspects', supra n. 13, p. 5.

¹⁰⁹ See ICJ Wall advisory opinion, supra n. 11, p. 189, para. 129.

analogous as regards West Jerusalem, except that the Geneva Convention does not apply there. The international community recognises Israel's de facto annexation of West Jerusalem but they do not recognise it de jure, which is why most countries have located their embassies in Tel Aviv.

This analysis applies regardless of the 1993 Declaration of Principles in which Israel agreed to the inclusion of Jerusalem on the agenda of the permanent status negotiations. At the start of the Oslo negotiations, Shimon Peres, who was then Israel's Minister of Foreign Affairs, sent the following letter to Johan Jorgen Holst, then Foreign Minister of Norway:

I wish to confirm that the Palestinian institutions of East Jerusalem and the interests and well-being of the Palestinians of East Jerusalem are of great importance and will be preserved.

Therefore, all the Palestinian institutions of East Jerusalem, including the economic, social, educational, cultural, and the holy Christian and Moslem places, are performing an essential task for the Palestinian population.

Needless to say, we will not hamper their activity; on the contrary, the fulfilment of this important mission is to be encouraged.¹¹⁰

This letter was kept secret at the time. It only came to light after it was published in *The Jerusalem Post*. As a result, Lapidoth argues, somewhat disingenuously, that the letter could not be legally binding because it was not made in public and because if the intention had been that it would be binding, then it should have been incorporated into the Oslo Accords.¹¹¹

I find this argument unconvincing. First, it is clear that binding legal obligations can be contained in agreements that are not made public, whether this takes the form of a letter, a conversation, agreed minutes, a unilateral declaration, or any other form.¹¹²

Second Lapidoth's view that this letter was not binding because it was intended to benefit a third party is clearly erroneous. She writes that 'as was to be expected, Norway passed on the letter to Yassir Arafat'.¹¹³ Evidently, the letter was *specifically* concluded to benefit a third party, with the Foreign Minister of Norway merely acting as an intermediary, rendering inoperable the rule *pacta tertiis nec prosunt* (that treaties cannot bind third parties.)¹¹⁴ It is clear that the object and purpose of the letter was to safeguard the interests of the Palestinian community in Jerusalem.

¹¹⁰ Reprinted in *The Jerusalem Post*, 7 June 1994.

¹¹¹ Lapidoth, 'Jerusalem and the Peace Process', supra n. 15, pp. 428-429.

¹¹² The Permanent Court of International Justice stated in its advisory opinion on the *Customs Régime between Austria and Germany* concerning the legal status of a Protocol concluded in 1922: 'From the standpoint of the obligatory character of international engagements, it is well known that such engagements may be taken in the form of treaties, conventions, declarations, agreements, protocols, or exchanges of notes. See *Customs Régime between Germany and Austria*, PCIJ, Series A/B, No. 41, Advisory Opinion, 5 September, 1931, p. 37 at p. 47. On a conversation being binding between two foreign ministers see *Legal Status of Eastern Greenland*, PCIJ, Series A/B., No. 53, 5 April 1933, (1933), p. 22 at pp. 21-75. See also, *Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Preliminary Objections, Judgment of 26 May 1961, ICJ Reports 1961, p. 17 at p. 31. ('Where ... as is generally the case in international law, which places the principal emphasis on the intention of the parties, the law prescribes no particular form, parties are free to choose what form they please provided their intention clearly results from it'. See further, the *Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility*, Judgment, ICJ Reports 1994, p. 112 at p. 122, para. 29. (Where the ICJ held that an unregistered agreement would be binding between the parties to it even if it was not registered with the UN or with the League of Arab states.) On agreed minutes constituting an international agreement, see pp. 120-121 at para. 25 of the same case (Qatar v Bahrain): 'The [minutes] enumerate commitments to which the Parties have consented. They thus create rights and obligations in international law for the Parties. They constitute an international agreement'.

¹¹³ Lapidoth, 'Jerusalem and the Peace Process', supra n. 15, p. 429.

¹¹⁴ See Christine Chinkin, *Third Parties in International Law* (Oxford: Clarendon Press 1993), p. 25, pp. 27-28 (for examples of exceptions to the general rule such as *Free Zones of Upper Savoy and District of Gex (France v. Switzerland)*, 1932 PCIJ ser. A/B, No. 46, 96 in which cautious approval was given to the view that states could create rights in favour of other states as an exercise of their sovereignty).

The Vienna Convention on the Law of Treaties does envisage that a right can arise for a third state from a provision of a treaty if the parties to the treaty intend the provision to accord that right to a third state.¹¹⁵ Because the Oslo negotiations was predicated on the assumption that the PLO had international personality to conclude treaties the controversy as to its status was moot.¹¹⁶

Third, it is hardly 'impossible', as Lapidoth alleges, 'to ascertain the contents of what was promised'.¹¹⁷ The words 'I wish to confirm' and 'we will not hamper' are hardly ambiguous, but clear and determinative. Israel will preserve the existence of Palestinian institutions and will not hamper their activity, which includes the economic, social, educational, and cultural Palestinian institutions, as well as the Holy Christian and Moslem places.

Fourth, regardless of the legal status of this document, Israel is required to preserve public order and the laws in the country, in any event, which includes ensuring respect for private property, religious convictions and practice by the Hague Regulations,¹¹⁸ which the Supreme Court of Israel had admitted is binding and enforceable under its domestic legislation.¹¹⁹

Fifth, the Christian Holy Places are subject to the status quo agreement, and Israel has said on more than one occasion that it would respect existing rights, including those regarding the rights of Muslims to access the Muslim Holy Places. Israel's Declaration of Independence expressly states that 'it will safeguard the Holy Places of all religions'. As Ben-Gurion noted in a speech before the Knesset:

In our Declaration of the renewed State of Israel on 14th May, 1948, we declared and undertook before the bar of history and before the world that 'the State of Israel will ensure freedom of religion, conscience, language, education and culture; will guard the holy places of all religions and will be faithful to the principles of the United Nations Charter'. In accordance therewith, our delegation at the U.N. has stated that the State of Israel undertakes to respect all existing rights regarding the holy places and religious sites in Jerusalem, ensures freedom of worship and freedom of movement for clergy, and also agrees to effective U.N. supervision over the holy places and over existing rights, to be settled between the U.N. and the State of Israel.¹²⁰

The International Court of Justice concluded that Israel was obliged to ensure freedom of access to the Holy Places that came under its control in 1967, whilst expressly referring to paragraph 129 of its advisory opinion in which it noted that this included access to the two Holy Places in West Jerusalem that fell under Israeli control in 1948 such as the Room of the Last Supper and the Tomb of David.¹²¹

Finally, as regards the Palestinian institutions of East Jerusalem, such as Orient House, which is still closed at the time of writing, the Quartet's 2003 Performance-Based Roadmap

¹¹⁵ See Article 36, Vienna Convention on the Law of Treaties 1969, 1155 *United Nations Treaty Series*, p. 331.

¹¹⁶ A former legal adviser to the Government of Israel and chief negotiator argued that the Oslo Accords were binding even though they were concluded between a state and a non-state actor. See Joel Singer, review of Geoffrey Watson's *The Oslo Accords: International Law and the Israeli-Palestinian Peace Agreements* in IX *The Middle East Quarterly* (2002), available online at <http://www.meforum.org/1459/the-oslo-accords>

¹¹⁷ Lapidoth, 'Jerusalem and the Peace Process', supra n. 15, p. 430.

¹¹⁸ See Arts. 43 and 46 of Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907.

¹¹⁹ See Kretzmer, *The Occupation of Justice*, supra n. 82, pp. 34-40, and the cases cited there.

¹²⁰ See the Statement by the Prime Minister concerning Jerusalem and the Holy Places, 5 December 1949 in Ruth Lapidoth and Moshe Hirsch (eds.) *The Jerusalem Question and Its Resolution: Selected Documents* (Dordrecht: Martinus Nijhoff Publishers, 1994), p. 81.

¹²¹ See ICJ Wall advisory opinion, supra n. 11, p. 197, para. 149.

Towards a Permanent Two-State Solution to the Israel-Palestine Conflict, which was endorsed by the UN Security Council, called on Israel to reopen them as part of Phase 1.¹²²

4. CONCLUSIONS: THE FUTURE OF THE CITY?

The doctrine of sovereignty has received a blistering attack from scholars in recent years. For instance, writing a few years ago, Professor Amr Shalakany of the American University of Cairo, and formerly a legal advisor to the PLO's Negotiation Support Unit in Ramallah, expressed his opinion that: 'Municipal issues such as garbage collection are more likely to affect the distribution of wealth and power between [Jerusalem's] residents than any public law debate on questions of sovereignty may in the future'.¹²³ Whilst this may have been the case during the height of the peace process, today it seems clear that the problems facing the city's Arab residents will not dissipate until the status of the city is resolved. It is likely that Israel will continue to adversely tinker with the population's demographics and construct settlements for Jews in Jerusalem until an agreement is reached or a settlement is imposed by an outside actor.

In this regard the fate of Jerusalem is interwoven with the other threads of contention between Israel and the Palestinians, the most pressing at present being the quest to obtain international recognition of Palestinian statehood. It is, however, difficult to see how a unilateral assertion of Palestinian statehood will change the underlying difficulties in Jerusalem with the exception that it will enable the Palestinians to more forcefully assert sovereignty over the city, particularly its eastern half where most of the Arab population resides. Accordingly, in the event that a Palestinian state comes into being the acute problems in Jerusalem, such as the tunnelling by Israeli archaeologists under the al-Haram al-Sharif, the restrictions imposed on Palestinians seeking access to their Holy Places for the purposes of devotion, the destruction of historic buildings such as the Shepherds Hotel, the construction of a ring of settlements around Jerusalem whose purpose is to increase the Arab-Jewish population ratio in the Old City in favour of the latter, and to cut Jerusalem off from the remainder of the West Bank, are likely to continue.

In light of the forgoing it seems that the future status of the city is unlikely to be resolved without the input of a third actor. Accordingly, it might not be inopportune to suggest that an international body be vested with temporary authority and responsibility for the administration of Jerusalem with a view to resolving the city's status. Bethlehem might also be included in such an arrangement, so that both cities are treated as a single territorial unit, as they were in the UN Partition Plan.¹²⁴ Uniting Bethlehem and Jerusalem would allow for freer access between the Holy Places and would buttress the Arab-Jewish population ratio in favour of the former, although the population of Jerusalem would still predominantly be Jewish. It is probably no coincidence that the wall Israel began constructing in 2002, which has been universally condemned and which the International Court of Justice called on Israel to dismantle, cuts between Jerusalem and Bethlehem, dividing the two cities. Placing responsibility for the administration of Jerusalem in the hands of a third party might subside the effects of the conflict until the parties agree to resolve the city's status although it does seem that Israel would oppose any arrangement that is not geographically limited to a specific area of the city.¹²⁵

¹²² The UN Security Council endorsed the Road Map and called on the parties to fulfill the obligations contained within it in resolution 1515, adopted on 19 November 2003.

¹²³ Shalakany, 'Privatizing Jerusalem or an Investigation into the City's Future Legal Stakes', *supra* n. 5, p. 433.

¹²⁴ Assuming that there is support for this amongst the populations of both cities. Prior to 18967 there were strong ties between Jerusalem and Bethlehem which were linked geographically, economically, and socially.

¹²⁵ Israel's view of the *corpus separatum* envisaged by the UN Partition Plan, as expressed on its Foreign Ministry's website, is that it was 'nothing more than one of many inappropriate historical attempts made to

If this proposal is viewed as unrealistic or unworkable in light of Israeli obstructionism it could be tested at the smaller scale. An international body, acting in concert with Israeli and Palestinian officials, could be vested with temporary authority over the administration and security of the Old City or parts thereof with a view to resolving its status. According to the official EU description of the peace talks at Taba in 2001, 'an informal suggestion was raised that for an agreed period such as three years, Haram al-Sharif/Temple Mount would be under international sovereignty of the P5 plus Morocco (or other Islamic presence), whereby the Palestinians would be the "Guardian/Custodians" during this period. At the end of this period, the parties would either agree to a new solution or an extension of the existing arrangement'.¹²⁶ Apparently, 'neither party accepted or rejected the suggestion'. The idea of an international presence might be further developed to include other areas in the Old City such as the Christian Quarter, and perhaps other flashpoints such as the City of David. It seems clear that the problem of Jerusalem and indeed broader Israeli-Palestinian relations cannot be resolved without a more assertive input from the international community. It was the failure of the UN to impose partition in 1947, a settlement after the 1967 conflict, and a solution since then, that has led to the impasse.

While such a scenario effectively postpones the question of sovereignty it could refocus attention towards the daily needs of the resident population and in the least respond to their frustrations regarding access to the Old City. Perhaps the EU's Administration in the Bosnian City of Mostar, negotiated during the peace talks that lead to the Dayton agreement, could serve as an example.¹²⁷ Mostar was politically and militarily divided during the conflict in the Balkans. Bosnian Croats had control of the western section of the city and Bosnian Muslims the east, a demographic parallel to Jerusalem, although of course Israel has exercised effective control over the whole city since 1967. This has allowed Israel to entrench its position in the Old City, and in other parts of East Jerusalem, through the construction of settlements whose scale resembles that of whole neighbourhoods.

These differences notwithstanding, the lessons learned at Mostar and from other experiments in international administration, could serve as a guide for establishing a new proposal for resolving Jerusalem. The UN's previous proposals for Jerusalem could be taken into account and updated in the light of the current situation. Whether the Quartet, and especially the US, are up to this task is questionable however. Given that Palestinians have not perceived them as fair arbiters, it may be time to invite other international actors to the fore. In this regard the participation of states like Brazil, India, South Africa, China, or Turkey may prove a positive step forward. International diplomats, negotiators, and lawyers, would also do well to incorporate the work of experts from spatial disciplines, such as geography, urban planning, and architecture, who have sought to understand the dynamics of divided cities.¹²⁸

examine possible solutions to the status of the city'. In its view, 'there is no basis in international law for the position supporting a status of 'corpus separatum' for the city of Jerusalem'. The Status of Jerusalem, 14 March 1999, available on the website of Israel's Ministry of Foreign Affairs at http://www.mfa.gov.il/MFA/MFAArchive/1990_1999/1999/3/The+Status+of+Jerusalem.htm

¹²⁶ See 'EU description of the outcome of permanent status talks at Taba', which was written by Miguel Moratinos, the EU Special Representative to the Middle East Process, published in *Ha'aretz*, 14 Feb 2002.

¹²⁷ See Stahn, *The Law and Practice of International Territorial Administration*, supra n. 50, pp. 301-308.

¹²⁸ See e.g. Oren Yiftachel and Haim Yacobi, 'Planning a bi-national capital: should Jerusalem remain united?' 33 *Geoforum* (2002), pp. 137-145. See further, Sherrill Stroschein (ed.), *Governance in Ethnically Mixed Cities* (Association for the Study of Nationalities) (London: Routledge, 2007).