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Ambassador Maen Rashid Areikat

Chief PLO Representative to the U.S.

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The Status of Jerusalem under International Law

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Religious and Historical Significance

Since antiquity, successive empires and great powers have fought innumerable battles for control of the holy city due to its religious, cultural, historic and geopolitical significance at the nexus of three continents. In recent years the city has faced a wave of tragic developments, mostly due to Israeli insistence that Jerusalem in its entirety remain firmly in Israeli hands. In an attempt to create facts on the ground, Israel has forcibly demolished Palestinian homes and displaced their residents who, due to their absurd status as second-class citizens, have little recourse to defend themselves.

Jerusalem, Al-Quds (in Arabic), or Jebus (the city's original name) found its origins as a Canaanite city state around 2000 BCE. The first reference to conflict over the city in religious history is found in the Hebrew Book of Joshua which describes an unsuccessful campaign to annihilate the cities inhabitants (Joshua 15:63). Jebus remained outside of Israelite control until approximately 1000 BC when the tribe of Judah elevated King David who eventually consolidated the Israelite tribes marking an end to the Canaanite city states between the years 1010 and 970 BCE. In the north however, Israelites did not subscribe to strict Judaism as did the southern tribes and the Kingdom split in 930 BCE with the northern

Kingdom of Israel falling under Assyrian control in 730 BCE and the southern Kingdom of Judah falling to the Babylonians in 586 BCE. Essentially, Jerusalem was never a wholly Jewish city and was the capitol of an independent Israelite Kingdom for roughly 70 years, at most, during a period of history that took place almost 2700 years ago. Nevertheless, ideology plays a major role in Israel's unwillingness to share the city today with the Palestinians who in modern history have had a far longer and sustained presence there and have managed to live side by side with Jews and Christians.

Recent History

Palestine was a part of the Ottoman Empire for 400 years until the conclusion of the World War I. Palestine was then placed under a League of Nations Mandate in 1922 with the United Kingdom as mandatory power. Jerusalem was an integral part of the territory of Palestine during the period of the Mandate and was the seat of British administrative power.

The Mandate did not contain any specific provisions relating to Jerusalem, although Articles 13 and 14 of the Mandate did contain provisions on holy places. Under Article 13, the mandatory power assumed full responsibility for the holy places, including the preservation of, "existing rights", "securing free access" and "free exercise of worship", except with regard to the management of purely Muslim sacred areas whereby immunity of these areas was guaranteed. Article 14 of the mandate also provided for the establishment of a special commission "to study, 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 was never established due to difficulties in ensuring comprehensive religious representation and responsibility for the holy places remained connected to the mandate that continued the Ottoman *ferman* (ordinance) of Fatih Sultan Mehmet in 1457, governing relations among the various communities.

The increase in Jewish immigration to Palestine caused growing tensions between the two communities and Jerusalem became a flashpoint of conflict (in 1929 there was a serious outbreak of violence over access to the Wailing Wall). After the Palestinian uprising in 1936

that began in protest against increased Jewish immigration, the mandatory Power constituted the Palestinian Royal Commission. The Commission concluded that the Mandate was unworkable, that it be terminated, and proposed the partition of Palestine into an Arab State and a Jewish State. The Commission held the Holy places to be "a sacred trust of civilization" and proposed that a Jerusalem-Bethlehem enclave encompassing all the Holy places remain under British trusteeship under a new League of Nations Mandate. This first plan for partition was superseded by political and military events. After World War II the United Kingdom declared that it was unable to resolve the problem in Palestine and brought the problem to the United Nations, largely due to Jewish terrorism and insurgency such as the bombing of the King David Hotel (home of the British Governmental Offices) in 1946.

When the matter came before the United Nations in 1947, the General Assembly appointed a Special Committee on Palestine. The Committee unanimously recommended that the sacred character of the Holy places be guaranteed and that access to the Holy places be ensured "in accordance with existing rights". The Committee submitted two alternative plans for Palestine. The minority plan envisioned the establishment of a unified federal state in Palestine with Jerusalem as its capital with separate municipalities for the Jewish and Arab sectors. It also recommended the creation of a permanent international regime for the protection and supervision of the Holy places in Jerusalem and elsewhere. The majority plan recommended the partition of Palestine into an Arab State and a Jewish State and the territorial internationalisation of the Jerusalem area as an enclave in the Arab State. It was the latter plan that was approved by the General Assembly in Resolution 181.

Resolution 181 terminated the Mandate. It proposed the establishment of Arab and Jewish states in the territory of Palestine and delimited the boundaries of the two states. Jerusalem was not included within the boundaries of the two states. Instead a special regime was proposed for Jerusalem. The Resolution provided:

The City of Jerusalem shall be established as a corpus separatum under a special international regime and shall be administered by the United Nations. The Trusteeship Council shall be designated to discharge the responsibilities of the Administering Authority on behalf of the United Nations.

The boundaries of the city were defined as including “the present municipality of Jerusalem plus the surrounding villages and towns, the most eastern of which shall be Abu Dis; the most southern, Bethlehem; the most western, Ein Karim (including also the built-up area of Motsa); and the most northern Shu’fat”. The Assembly requested the Council to elaborate a statute for the city providing for the appointment of a Governor and administrative staff, a Legislature, an independent judiciary, citizenship, and a regime governing the Holy places and religious buildings and sites.

The Partition Plan and the international regime for Jerusalem never materialised and hostilities broke out in 1948-49. Israel resolved to occupy West Jerusalem by force and Jordan took control of East Jerusalem, incorporating it in 1950. The Israel-Jordan General Armistice Agreement of 3 April 1949 effectively formalised the de facto division of the city.

Despite the hostilities, the United Nations did not give up the objective of internationalisation of the Jerusalem area. UN General Assembly Resolution 194 established a three-member Conciliation Commission for Palestine. The Commission resolved *inter alia* that “the Jerusalem area, including the present municipality of Jerusalem plus the surrounding villages and towns...should be accorded special and separate treatment from the rest of Palestine and should be placed under effective United Nations control”. In its periodic reports to the General Assembly, the Commission reported that the Arab delegations were, in general, prepared to accept the principle of an international regime for Jerusalem subject to United Nations guarantees regarding its stability and permanence. Israel was unable to accept this, although it accepted without reservation an international regime for, or international control of, the Holy places.

In the meantime, Israel took a number of measures designed to extend Israeli jurisdiction over West Jerusalem. In September 1948 the Supreme Court was established in Jerusalem and in February 1949 the Knesset met in the city and established a number of Ministries and public services. Jerusalem was proclaimed as the capital of Israel in 1950.

In 1967 Israel occupied East Jerusalem by force and has since, adopted a number of unilateral and illegal measures to extend Israeli control over occupied East Jerusalem

including the enactment of a law in 1967 applying Israeli law, jurisdiction and administration to East Jerusalem. Israel enacted a 'basic law', which declared the united city to be the capital of Israel and the seat of the major institutions of state in 1980. This action (like the 1967 de facto illegal annexation of East Jerusalem) was firmly condemned by the Security Council and General Assembly and declared null and void.

United Nations Security Council Resolution 252 of 1968 and later Resolution 478 of 1980 censured in the strongest terms the enactment of the Israeli legislation and the illegal annexation of occupied East Jerusalem and affirmed that it "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 1967, including Jerusalem". Moreover, the Security Council decided "not to recognise 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 called upon all member states to accept its decision and withdraw diplomatic missions from the city if they had established them. Resolutions 252 and 478 subsequently, reaffirmed with similar wording, continue to embody the position of the United Nations and the overwhelming majority of states on the status of Jerusalem.

The Current Status of Jerusalem

Consideration of the legal status of Jerusalem cannot be divorced from consideration of the status of Palestine as a whole. Sovereignty over Palestine prior to the mandate and including Jerusalem was vested in the Ottomans. The Mandate did not transfer sovereignty to the Mandatory Power, nor was sovereignty transferred to the League of Nations. During the time of the Mandate sovereignty was in effect in abeyance. That situation remained static until the establishment of the State of Israel and its admission to the United Nations in 1949.

Recognition of Israel implied the possession and sovereignty over some, but not all territory, in former mandated Palestine. In particular it did not imply recognition of the 1949 Armistice boundary lines or sovereignty over West Jerusalem. In this context, the

significance of the PLO's acceptance of UN Security Council Resolution 242 is of importance since it implicitly amounted to acceptance of Israeli sovereignty over these territories, with the exception of Jerusalem as it was set as one of the issues for permanent status negotiations in the Declaration of Principles concluded between the PLO and Israel in 1993. Accordingly, sovereignty over that part of the former mandated territory of Palestine occupied by Israel in 1948-49, with the exception of West Jerusalem has passed to the State of Israel. The sovereignty of the rest of Palestine, namely, East and West Jerusalem, the West Bank, and Gaza, remains unresolved.

Since Palestine's provisional independence was recognised in the League of Nations Mandate and the right to self-determination of the Palestinian people has been recognised by the international community, Palestine is legally entitled to sovereignty in the aforementioned territories of East and West Jerusalem, Gaza and the West Bank.

Israel's occupation of West Jerusalem in 1948 has not been recognised. The reasons for this are several. First, to do so would be inconsistent with the concept of Jerusalem as a *corpus separatum*; second, it would prejudice the outcome of future negotiations on the status of Jerusalem between the two interested parties (Israel and Palestine); third, as Israel does not recognize the division between West Jerusalem and East Jerusalem, it would run counter to binding UN security council resolutions that declared the Israeli annexation of East Jerusalem to Israel null and void. Most states regard Israel as exercising only *de facto* authority over West Jerusalem and there are no embassies based there. Although the 1949 Israel-Jordan General Armistice Agreement endorsed the *de facto* division of the City, it did not affect its legal status. In particular, Article II of the agreement expressly states that the agreement itself shall not confer any political or military advantage, that it should not prejudice the rights, claims or positions of either party and that it was dictated exclusively by military considerations.

East Jerusalem was generally recognised under the *de facto* administration of Jordan from 1948-1967. Israel's occupation of East Jerusalem in the 1967 conflict did not confer any title (under international law vis-à-vis belligerent occupation). Because of the inadmissibility of acquisition of territory by force, Israel is required to withdraw from all the territories it

occupied in the 1967 conflict as laid down in Security Council Resolution 242. Accordingly, it is universally accepted that East Jerusalem is part of the occupied territory and that Israel's status in it is only that of an occupying power. This position has been affirmed numerous times by the UN Security Council; the UN General Assembly; the ICRC; the conference of the High Contracting Parties of the Fourth Geneva Convention; and the International Court of Justice in the *Wall* advisory opinion.

Palestinian Rights to Jerusalem

The Palestinian position is that the Israel's unilateral annexation of East Jerusalem and subsequent measures and policies aiming at creating facts on the ground are illegal. Israel must withdraw from Occupied East Jerusalem to the 1967 lines. East Jerusalem should be the capital of the State of Palestine in line with Palestine's right to self-determination on all the lands occupied in 1967. The Declaration of Independence adopted by the Palestine National Council in 1988 declared "the establishment of the State of Palestine in the land of Palestine with its capital at Jerusalem", ceding West Jerusalem and 78% of historic Palestine and constituting an assertion of Palestinian sovereignty over East Jerusalem.

The Palestinian position has received overwhelming support from the Arab and Non-Aligned countries. The Sixth Conference of Heads of State or Government of Non-Aligned countries affirmed a number of basic principles for a comprehensive solution of the Arab-Israeli conflict, including that "the City of Jerusalem is an integral part of occupied Palestine. It must be evacuated in its entirety and restored unconditionally to Arab sovereignty". The Third Islamic Summit conference of "the Palestine and Al-Quds al-Sharif session" held in Mecca in January 1981, stressed "the determination of the Palestinian people to maintain their eternal right to the Holy City of Al-Quds as the capital of their homeland Palestine, and the insistence of Muslim Governments and peoples alike on their eternal right to the Holy City of Al-Quds, in view of the permanent political, religious, cultural and historical importance of Al-Quds to all Muslims", and affirmed "the commitment of Islamic States to liberate Al-Quds to become the capital of the independent Palestinian State, and to reject any situation which might infringe on the Arab right to full sovereignty over Al-Quds". In their declaration adopted at Fez, Morocco, in September 1982, the heads of State or

Government of the League of Arab States also called for the establishment of an independent Palestinian State with Al-Quds as its capital.

It should be pointed out that although sovereignty over Jerusalem is currently in abeyance, nevertheless, the Palestinian claim remains legally valid. Accordingly, no determinations regarding the future status of Jerusalem can be taken without the acceptance of the Palestinian people.

A Legal Israeli Claim to Jerusalem?

The religious and historical claims of Judaism to Jerusalem are irrelevant considering the question of legal title to the City. In so far as it is possible to ascertain any legal arguments by Israel, or to justify their claim to sovereignty, they appear to be the following;

Israel is entitled to enjoy sovereignty over the territory it took militarily in 1948 because UN General Assembly Resolution 181 proposed that there should be two states in Palestine, an Arab and a Jewish state, and the international community accepted Israel's title by virtue of Israel's recognition and entry into the United Nations.

Resolution 181 contemplated an Israeli state of smaller dimensions than the territory Israel captured in 1948, and recognition and UN membership does not imply recognition of Israel's borders, specifically borders that encompass Jerusalem. In any event, Resolution 181 did not contemplate Jerusalem forming part of Israel and therefore Israel's claim to sovereignty over Jerusalem on the basis of Resolution 181 (or otherwise) has not been recognised.

Israel has also claimed sovereignty over Jerusalem on the basis of self-determination. However, the right of self-determination can only be exercised by a people in relation to a "unit of self-determination" recognised as such by the international community. It cannot apply to those territories, whose people are Palestinians, occupied illegally by Israel since 1967. The population of the settlements cannot count for this purpose since the settlements are illegal under international law and cannot be used after the fact for this purpose. Israel has therefore worked to displace the civilian population by force – once again, in violation of

international law. Additionally and regarding Jewish immigration, the “unit of self-determination” would not include Jerusalem since Jerusalem was never included as part of Israel in Resolution 181 and Israeli sovereignty over Jerusalem has never been recognised.

A further argument in support of Israeli claims presents the idea that Israel is entitled to sovereignty over territories occupied in 1948 and 1967 since Israel acted in self-defence and the territories it acquired as a result were not under the sovereignty of any other state. Since the adoption of the United Nations Charter, it is a well-established principle of international law that the use of force, even if it is in exercise of right to self-defence, cannot of itself form the basis for the acquisition of title over territory. Nor is the fact that the territories in question were not under the sovereignty of any other state relevant. Israel would only be able to acquire title if the territories were *res nullius* (which they clearly were not). Specifically, with regards to East Jerusalem, Israel’s claim to title is further flawed by the fact that belligerent occupation cannot confer title and that the principle of inadmissibility of acquisition of land by force applies to the occupied Palestine territory, including Jerusalem. This position has been asserted numerous times in the rejection of the international community, the UN organs and international organisation to recongize Jerusalem as the capital of Israel and in the repeated condemnation of Israeli polices and measures in the occupied Palestinian territory, including East Jerusalem.

Claims to the Eastern and Western parts of Jerusalem

There is a legal difference between West Jerusalem and East Jerusalem which also includes the Old City as it is located east to the armistice lines of 1949. Israel has been generally regarded since 1948 as being in *de facto* occupation of West Jerusalem but not as a belligerent occupier. This can be inferred from the position of the international community and the UN that did not argue the applicability of the laws relevant to belligerent occupation, including the Fourth Geneva Convention, to West Jerusalem. However, Israel’s *de facto* administration of West Jerusalem cannot confer title unless the international community, through the UN, and the Palestinians (as the other holders of the most valid claim to sovereignty over West Jerusalem), were to recognise or acquiesce in the claim to sovereignty. As regards East Jerusalem, Israel is regarded as a belligerent occupier and the

Fourth Geneva Convention and the other rules of International Humanitarian Law apply to that part of the city, including the Old City, which is included among the territories from which Israel must withdraw in accordance with Resolution 242. Israeli powers in these areas are those, and only those, conferred on belligerent occupiers under general international law and international humanitarian law.

Apart from the legal distinction as a belligerent occupation, there is no distinction as to the status of the territory of the Eastern and Western parts of Jerusalem. No power currently has sovereignty over Jerusalem which remains in abeyance, pending agreement on the legal regime that will apply to Jerusalem or its two sides.

US Position 1946-1967

In 1946, Britain and the United States, recognizing Great Britain's intention to abandon the mandate, established the "Anglo-American Committee of Inquiry." In April 1946, the committee submitted recommendations that Palestine not be dominated by either Arabs or Jews. It stated that Palestine would not become a Jewish or Arab State, acknowledging, "that the form of government ultimately to be established, shall, under international guarantees, fully protect and preserve the interests in the Holy Land of Christendom and of the Moslem and Jewish faiths." The United States maintained this position for the next two years.

On March 25th 1948, President Harry Truman, spoke before the United Nations supporting the proposal that they establish a temporary UN trusteeship for Palestine due to Great Britain's announcement that it would be abandoning the mandate on May 15th of that year. This plan was rejected on March 19th 1948 by Rabbi Silver speaking on behalf of the Jewish Agency who proclaimed that Jews in Palestine would declare independence the day after the mandate concluded. President Truman and his Secretary of State George Marshall remained committed to the idea of delaying recognition of Israel until hostilities ceased. However, under the sustained pressure of his White House Counsel and closest advisor, Clark Clifford (who threatened to campaign against him), Truman reluctantly recognized Israel on May 14th, 1948 in a memo, reading, "This Government has been informed that a

Jewish State has been established in Palestine, and recognition has been requested by the (provisional) government thereof. The United States recognizes the provisional government as the de facto authority of the new (State of Israel).

It is worthy to note that Clark Clifford was asked to add the words "provisional" in the first instance of its appearance above and replace "Jewish State" with "State of Israel," in the last line of the memo. On October 24th 1948, Truman reaffirmed the US position through the release of a statement, reaffirming his government's intent to, "continue to support, within the framework of the United Nations, the internationalization of Jerusalem and the protection of the holy places in Palestine. . . .". Despite the fact that this statement also noted that de jure recognition of Israel, would be offered by the United States, once a government was elected, the refusal to recognize Jerusalem as its capital, being clearly mentioned, is significant.

On January 4th 1950, the United States imposed a boycott on U.S. officials doing business in Jerusalem. On the December 20, 1950, the United States and the UN Trusteeship Council asked Israel to remove its government offices in Jerusalem. The total boycott remained in effect until November 12th, 1954.

The successive administration of Dwight D. Eisenhower, echoed Truman's position in an Aide-Memoir dated July 9, 1952, and concerning the proposed move of the Israeli Foreign Ministry from Tel Aviv to Jerusalem stated, "The Government of the United States has adhered and continues to adhere to the policy that there should be a special international regime for Jerusalem which will not only provide protection for the holy places but which will be acceptable to Israel and Jordan as well as the world community. . . ."The Government of the United States also wishes to convey that in view of its attitude on the Jerusalem question, it has no present intention of transferring the Ambassador of the United States and his staff to Jerusalem." This remained the United States' official policy until the 1967 war.

US Position 1967 –1980

No official action was taken regarding Jerusalem's status until the military occupation of East Jerusalem and its illegal "annexation" in June, 1967. The United States gradually shifted its direct support for Jerusalem's internationalization to a position that reflected its willingness for the parties to determine the city's fate themselves while shifting their position from the desire to see the city "internationalized" to the desire to see it "undivided". On June 19th, 1967, President Lyndon Johnson noted in a White House statement that there, "must be adequate recognition of the special interest of three great religions in the holy places of Jerusalem.' On this principle he assumes that before any unilateral action is taken on the status of Jerusalem there will be appropriate consultation with religious leaders and others who are deeply concerned. . . .".

When Israel placed East Jerusalem under its administrative domain on June 28, 1967, the Department of State issued on the same day a statement reading, "The hasty administrative action taken today cannot be regarded as determining the future of the holy places or the status of Jerusalem in relation to them...The United States has never recognized such unilateral actions by any of the states in the area as governing the international status of Jerusalem...The policy of the United States will be governed by the President's statement of June 19 and the White House statement this morning." In addition, the U.S. Permanent Representative to the United Nations addressed the General Assembly on July 14th 1967 stating, "With regard to the specific measures taken by the Government of Israel on 28 June, I wish to make it clear that the United States does not accept or recognize these measures as altering the status of Jerusalem. My Government does not recognize that the administrative measures taken by the Government of Israel on 28 June can be regarded as the last word on the matter, and we regret that they were taken. We insist that the measures taken cannot be considered as other than interim and provisional, and not as prejudging the final and permanent status of Jerusalem. . . .". In short, the United States officially continued to regard Israel's claim to West Jerusalem as illegal while considering East Jerusalem as occupied territory subject to the stipulations of the Geneva Conventions.

In the years that ensued, the American Israel Public Affairs Committee (AIPAC) tirelessly lobbied congress to reverse the official US position entirely but has yet to be successful. This has resulted in a rift between the Executive Branch and the United States Congress that has remained in place over the last 30 years. The United States Congress has passed a series of non actionable resolutions with the exception of the Helms Amendment of October, 1988 that became part of Public Law (PL) 100-459 which allowed Israel and the United States to sign the Land Lease and Purchase Agreement in 1989 allowing for the U.S. to lease 7.7 acres of land in West Jerusalem at \$1 per year for 99 years. Almost immediately, reports surfaced that the land in West Jerusalem was located in what was known as the Allenby Barracks and Palestinian circles have continued to question the legality of the proposed site for the embassy on the grounds that it was Palestinian refugee property confiscated by Israeli authorities and also allegedly an Islamic *waqf*. This has been authenticated after 10 years of hard work by Palestinian constituents and likely remains a large preventative factor in establishing an embassy in Jerusalem. Nonetheless non-actionable resolutions passed by the US Congress also culminated in the related, Jerusalem Embassy Act of 1995 passed by both the U.S. House and Senate. However, opposition from President's Clinton, Bush and Obama remain in effect as they view the act as "congressional infringement on the Executive Branch's constitutional authority over foreign policy," and have thus enforced their presidential waiver on national security interests. Nonetheless, there has been tacit approval by these Presidents of the eventual relocation of the US Embassy from Tel Aviv to Jerusalem, pending the resolution of the conflict and the status of Jerusalem by the parties themselves. This remains the official American position to date and despite the efforts of the U.S. Congress, the United States has not recognized "East" or "West" Jerusalem as Israel's capital.

Conclusions

Palestinians do not need to claim ties to ancient history, religion or even culture to demonstrate a legitimate claim to the city. This paper has shown that Palestinian sovereignty over East (and arguably West) Jerusalem is enshrined in international law. Despite fluctuation in the positions of various interested parties, save the Palestinians forcibly dispossessed of their historic homeland, the status of Jerusalem remains central to

resolution of the conflict and Israeli control of the entire city remains illegal. Yet the truth of the matter is that Jerusalem is not Berlin or Belfast, its deep historic and religious affiliations remain a sticking point for Israelis, Palestinians and those who see Jerusalem (and the greater Palestinian-Israeli Conflict) as a microcosm for the challenges facing the Islamic "East" and the Judeo-Christian "West". Despite Israel's best efforts to cleanse Jerusalem of Palestinian inhabitants, Israel is obligated under international law to protect those citizens.

It has been shown that Israel has repeatedly violated the 4th Geneva Convention of 1945 as well as scores of United Nations Resolutions and international conventions. The only legal option for Israel is to absorb Palestinians as Israeli citizens and offer them the same rights and privileges enjoyed by the rest of Israeli society or return, at the very least, to the 1949 Armistice lines. Israel sees this as a demographic impossibility precisely because they refused to acknowledge the Anglo-American Committee's recommendation of the dissolution of partition as well as subsequent views by the United States that informed Israel of the impracticality of partition, specifically with regard to Jerusalem. Instead, Israel has opted to adopt a policy of ethnic cleansing that remains a flagrant violation of human rights and freedoms and only serves to underscore their territorial ambitions, and unwillingness to entertain the notion of a just and lasting peace of two, secular and democratic states living side by side in peace and security.