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Charalambos K. Papastathis

A NEW STATUS FOR JERUSALEM? AN EASTERN ORTHODOX VIEWPOINT

*Charalambos K. Papastathis**

I.

The religious aspect of the status of Jerusalem is linked directly to the status of the Holy Land, although these two questions appear to be, prima facie, distinct. This paper examines both issues from an Eastern Orthodox viewpoint.

United Nations General Assembly Resolutions 181 (II), 194 (III), and 303 (IV) established the de jure status of Jerusalem.[1] These resolutions stipulated that the city of Jerusalem and its vicinity would constitute a *corpus separatum* under a special international regime, to be administered by the United Nations. When Israeli troops entered the City in 1967, however, they established a de facto situation. This de facto situation was later reinforced by Israel's unilateral July 30, 1980 proclamation, declaring Jerusalem as capital of the State of Israel.[2] The international

* Professor of Ecclesiastical Law at the Faculty of Law of the Aristotle University of Thessaloniki. B.A., 1963; Ph.D., 1978. Reader (1981); Full Professor (1988). Post-graduate courses in the Vatican, Sofia, Bucharest, and Prague. Vice-President of the Hellenic Association for Slavic Studies. Secretary General of the Macedonia-Thrace Union of Fulbrighters; member of the European Consortium for Church-State Research, the International Association of Canon Law, the Society of the Law of Oriental Churches, the Jean Bodin Society for the Comparative History of Institutions; fellow of the International Academy for Freedom of Religion and Belief. Secretary General of Cults at the Ministry of Education and Cults (1987-88). The author has published the following books: The Legislative Work of the Cryillo-Methodian Mission in Great Moravia (1978); On the Administrative Organization of the Church of Cyprus (1981); The Charters of the Orthodox Communities of the Ottoman Empire (1984); The Nomocanon of George Trapezountios (1985); The Status of the Monks of Mount Athos (1988); A Handbook of Ecclesiastical Law (2d ed. 1994), and more than 90 articles and reports in various reviews and symposia.

1. G.A. Res. 181 (II), U.N. GAOR, U.N. Doc. A/64 (1947), G.A. Res. 194 (III), U.N. GAOR (1948), G.A. Res. 303, U.N. GAOR (1949); *see also* RUTH LAPIDOTH & MOSHE HIRSCH, THE JERUSALEM QUESTION AND ITS RESOLUTION: SELECTED DOCUMENTS 6-10, 30-32, 85-86 (1994).

2. *See* John Quigley, *Old Jerusalem: Whose to Govern?*, 20 DEN. J. INT'L L. & POL'Y 145, 150-53 (1991); John Keegan, *The Six-Day Miracle*, DAILY TELEGRAPH, June 6, 1992, at 1 (discussing the 1967 Six-Day War and depicting Jerusalem as an Israeli occupied territory prior to the War); *see also* LAPIDOTH & HIRSCH, *supra* note 1, at 322-23 (citing the July 30, 1980 proclamation).

community has not yet officially recognized the de facto situation; thus, de jure, the *corpus separatum* lives on. Further, the de facto/de jure distinction is precisely why the heads of foreign diplomatic delegations are in Tel Aviv, not in Jerusalem. The *corpus separatum,* the international status of Jerusalem, is not acceptable to either Arabs or Israelis.

The Palestinians consider Jerusalem as part of the occupied (at present self-governed) territories, and intend to establish Jerusalem as the Palestinian capital. The September 13, 1993 Israeli-Palestinian Declaration of Principles mentions that discussion of the status of Jerusalem should start no later than May 1996.[3] Reality, however, dictates that the status of Jerusalem is a bilateral question to be resolved by the Israelis and the Palestinians.

II.

Conversely, territorial sovereignty does not govern the status of the Holy Places. Rather, certain religious groups exercise rights on the territory of the Holy Land. Christians, including the Eastern Orthodox, Roman Catholic, and Armenian Churches all look to Jerusalem. The exercise of these rights, known as the status quo, is independent of that of state sovereignty. The status quo comprises three elements: 1) a determined territory; 2) precise rights; and 3) certain persons to whom these rights belong.

Written and unwritten legal sources determine these concrete rights. These rights may be divided into three categories: rights related to the foundation of religious institutions in the Holy Land; rights referring to the cult; and rights connected to the shrines. The specific contents of these rights, however, are determined in relation to historical conditions, to various religions and cults in the area, and to local state authority. All Orthodox people focus their interest in the Holy Land and, by extension in the regime of Jerusalem, through these rights.

In early antiquity, Palestine attracted the interest of the Greeks who founded several colonies on its coast. The term, Palestine, derives from

3. Declaration of Principles on Interim Self-Government Arrangements, Sept. 13, 1993, Isr.-PLO, *reprinted in* 32 I.L.M. 1525, 1529 (entered into force Oct. 13, 1993). The Declaration stipulates that, "[p]ermanent status negotiations will commence as soon as possible, but no later than the beginning of the third year of the interim period, between the Government of Israel and the Palestine people representatives." *Id.; see also* Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (signed by the Government of the State of Israel and the PLO on Sept. 28, 1995 in Washington, D.C.). This agreement provides that, "[p]ermanent status negotiations will commence as soon as possible, but no later than May 4, 1996, between the parties. It is understood that these negotiations shall cover remaining issues, including: Jerusalem . . . ."

the Philistines, a people reputedly of Cretan origin, who settled there. Alexander the Great conquered Palestine in 332 B.C., and after his death it came under the rule of the Greek dynasty of the Seleucids. Thus, Greek culture and language spread over the eastern Mediterranean coast and its extended hinterland. Greek rule lasted through the following three centuries, until the Roman conquest in 63 B.C. Nevertheless, Greek civilization outlived the conquest; moreover, from 312 A.D. to 634 A.D., Palestine was attributed to the new Roman Empire of the Greek nation, commonly known as Byzantium,[4] that governed Palestine.

In the year 451, with its seventh act, the Fourth Ecumenical Council of the one and only Christian Church promoted the then autocephalous Church of Jerusalem into a Patriarchate.[5] It was the fifth in chronological order and precedence, after the Churches: the Patriarchates of Rome, Constantinople, Alexandria, and Antioch. Since its foundation, the Patriarchate of Jerusalem, like its three counterparts in the East, has always followed the Greek typicon and language, both before and after the great schism of 1054. This same Patriarchate participated in the pentarchy of the patriarchates. Both doctrinally and administratively, it was the only canonical Church in Palestine, constituting the One, Holy, Catholic Church of the Universe. In spite of both the great schism of 1054 between Rome and the East, and the presence of other Churches in Jordan and Israel, the Orthodox Patriarchate of Jerusalem remained the canonical Church *par excellence*. Formal etiquette reflected its preeminence among Churches.

Before the schism, the Orthodox Patriarchate of Jerusalem, as the only canonical local Church, was the owner and protector of the shrines of the Holy Land. After the Crusades—which were launched not only against the Moslems, but also the Orthodox Christians—the majority of the most important shrines remained under the Patriarchate's jurisdiction. Its rights concerning the foundations, the cult, and the shrines are based on various sources. In chronological order, these include:

1) The *ahd-name*, or edict, of *Khalif Umar Ibn-al-Khatab* was granted to Sophronius, "Patriarch of the imperial nation," in 636. This edict recognized the ownership of the shrines, including the church of the Resurrection and the church and cave of the Nativity in Bethlehem. It provided that "our Subjects the Monks and Priests and their churches and monasteries, and everything under their ownership, and other shrines sit-

4. 16th and 17th century western scholars named the Roman Empire of the Greek nation Byzantium.

5. *See* VII S.S. MANSI, SACRORUM CONCILIORUM NOVA ET AMPLISSIMA COLLECTIO 179.

uated within or outside Jerusalem shall be assured and the Patriarch shall be their head."[6] Moreover, all Christian pilgrims, regardless of their country of origin and denomination, would be subject to the jurisdiction of the Patriarchate.[7]

2) The *Hatt-i-Serif* of Sultan Mehmed II, the Conqueror of Constantinople, was issued in 1458 to the Patriarch of Jerusalem Athanassios, and confirmed the Edict of 636 of Khalif Umar Ibn-al-Khatab.[8]

3) The *firman* of Sultan Selim was issued in 1517 to the Patriarch of Jerusalem Dorotheos, and provided that he should "have jurisdiction over . . . the shrines and inherit the deceased Metropolitans, Bishops and Monks."[9]

4) An edict of Sultan Suleiman the Magnificent, issued to the Patriarch Germanos in 1538, recognized the Patriarch's jurisdiction over the shrines.[10]

5) The 1634 order of Sultan Murad IV, instructed that the keys to the shrines should be handed over to the "Patriarch of the Romaioi (Romans)[11] and to the Monks in Jerusalem and to their authority."[12]

6) The *Hatt-i-Serif* of Sultan Murad IV, in 1731, provided that "the said places . . . and the keys to the two doors now in the hands of the Monk and Patriarch of the Brotherhood of the Romans and of those who will succeed him as Patriarchs . . . have already (been) recognized as theirs and they shall possess them."[13]

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6. *See* NIC. MOSCHOPOULOS, LA QUESTION DE PALESTINE ET LE PATRIARCAT DE JÉRUSALEM. SES DROITS, SES PRIVILÈGES 19-21 (1948); *Ἐπίσημα ἔγγραφα περὶ τοῦ προσκυνηματικοῦ καὶ διοικητικοῦ καθεστῶτος τῆς Ἐκκλησίας Ἱεροσολύμων* [Official Documents About the Shrine-Worshipping and Administrative State of the Church of Jerusalem], Jerusalem 25-27 (Fraternity of the Holy Sepulchre, 1944); *Refutation of the Allegations put forward by Sir Anton Bertram against the Patriarchate of Jerusalem*, Jerusalem (Patriarchate of Jerusalem) 51-52 (1937) [herinafter *Refutation*].

7. *See* MOSCHOPOULOS, *supra* note 6, at 20; *Ἐπίσημα ἔγγραφα supra* note 6, at 26.

8. *See Ἐπίσημα ἔγγραφα*, *supra* note 6, at 27-29.

9. *See* archimandrite KALLISTOS MILIARAS, *Οἱ Ἅγιοι Τόποι ἐν Παλαιστίνῃ καὶ τὰ ἐπ' αὐτῶν δίκαια τοῦ ἑλληνικοῦ ἔθνους* [The Holy Land in Palestine and the Rights of the Greek Nation on Them], vol. II, Jerusalem (Fraternity of the Holy Sepulchre) 3-5 (1933).

10. *See* MILIARAS, *supra* note 9, at 12-15. At the time of patriarch Germanos, the sultan recognized a host of other rights in favor of the Patriarchate, including the right to repair the bell-tower of the church of the Resurrection (in 1345) and even the church itself (in 1546). *See id.* at 15.

11. In the Arab and Turkish languages, Rum, Romaeoi (meaning Romans) refers to the Orthodox Christians whose mother tongue is Greek. *See* MOSCHOPOULOS, *supra* note 6, at 63-68.

12. MILIARAS, *supra* note 9, at 71-72.

13. *See Refutation*, *supra* note 6, at 53.

7) The 1757 order of Sultan Osman III, repeated the text of the above grant concerning disputes which arose between the Greeks and Latins.[14]

8) In 1809, Sultan Mahmoud II issued a *firman* that granted to the Orthodox Greeks the right to rebuild the church of the Resurrection, which had burnt down the previous year.[15]

9) In 1852, the Ottoman government, in its effort to diffuse the Greek-Latin dispute over the shrines, issued a *firman*, addressed to Hafiz Ahmed pasha.[16] This *firman* confirmed the status quo as it existed *ab antiquo* with respect to the Orthodox Greeks.

After the Crimean War, according to the Paris Peace Treaty of 1856, Ottoman Turkey, Russia, and France jointly undertook to rebuild the church of the Resurrection without any claim of possession. In 1869, the Patriarch Cyrill acquired authority over the church and the right to clean its coupola.

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14. MILIARAS, *supra* note 9, at 296-303.

15. *Id.* at 342-43. The construction was completed the following year. *Id.*

16. GABRIEL E. NORADOUNGHIAN, RECUEIL D' ACTES INTERNATIONAUX DE L' EMPIRE OTTOMAN, 407-10 (1900); MOSCHOPOULOS, *supra* note 6, at 41-44. Noradounghian has excerpted the official French translation of the *firman*:

> Les Latins n'ont pas raison de prétendre à la possession exclusive, ni de cette coupole [du Saint-Sépulcre], ni de la petite coupole [sur l'endroit appelé le Tombeau de Jésus], ni de la Hadjir Moughtésil, ni du Golgotha, ni des voûtes de Sainte-Marie, ni de la grande église de Bethléem, ni de la Sainte-Crèche; il faut laisser tous ces endroits dans leur état actuel. . . .
>
> Les Latins, se basant sur quelques Firmans dont ils sont en possession, ont élevé la prétention que le Tombeau de la Bienheureuse Marie leur appartient exclusivement, mais ils n'ont pas raison en cela non plus
>
> . . . [J]e ne trouve pas à propos que les sujets de mon Empire qui professent la religion grecque soient privés de la faculté de pratiquer leur religion dans l'intérieur de l'oratoire sus-mentionné. Ainsi, on n'empêchera pas aux Grecs d'exercer leur culte dans l'intérieur du Coubel-el-Mess-ad (la Coupole de l'Ascension).

NORADOUNGHIAN, *supra* at 408-09. In English, the above passage reads:

> [T]he Latins are not correct in claiming exclusive possession either of this church [of the Holy Sepulchre], or of the little church [over the place said to be the Tomb of Jesus], or of the Hadjir Moughtesil, or of Golgotha, or of Holy Mary's vaults, or of the great church of Bethlehem, or of the Holy Creche; all these places must be left in their present state. . . .
>
> The Latins, relying on Firmans in their possession, have claimed that the Tomb of the Blessed Mary belongs exclusively to them, but they are not correct about this either. . . .
>
> . . . [I] do not think it appropriate that the subjects of my Empire who practice the Greek religion be denied the right to practice their religion inside the above-mentioned chapel. Thus, the Greeks will not be prevented from worshiping inside the Coubel-el-Mess-ad (the Church of the Ascension) . . . (translated by the *Catholic University Law Review*).

10) Jurisdiction over the shrines again was established in 1875, when the Ottoman Empire promulgated the Statute of the Patriarchate of Jerusalem.[17]

11) In 1939, when Palestine was under British Mandate, King George VI confirmed the election of the new Patriarch, proclaiming that "We . . . confirm [the Patriarch] in the exercise of the said rights, powers, jurisdictions, privileges and immunities, which are by law appurtenant to the said office, or are by ancient custom or practice held and enjoyed in conjuction therewith."[18]

In 1958, the Kingdom of Jordan issued Law No. 27. This law governed the organization, representation, and management of the property of the "Rum" Orthodox Patriarchate of Jerusalem.[19] Law No. 27 asserted jurisdiction in Jordan, Israel, and in those areas subject to Israeli rule after the War of 1967. Several years later, on June 27, 1967, Israel established a law to protect and ensure free access to the Holy Land.[20] Subsequently, on April 23, 1990, Foreign Minister Moshe Arens made a statement regarding the safeguarding of the legal rights and privileges of the Patriarchates.[21]

III.

The status of the Orthodox Patriarchates of Jerusalem is, *ab antiquo,* both valid and authoritative. It satisfies the aspirations of Orthodox Christians and commands the respect of Jordan and Israel. Of course, unpleasant incidents have occurred. For example, in 1992, individuals damaged some objects in the interior of the church of the Resurrection; on another occasion, followers of a Judaic denomination squatted in a

17. The relevant text, in the official French translation, is as follows: "Le Patriarche de Jérusalem est, séparément ou en commun avec d'autres rites, le gardien de toutes les reliques de son ressort, dans l'église (Kumame) de Jérusalem; il est également le chef des églises, monastères, métropolitains, évêques, clercs et prêtres relevant du siège patriarcal et á la direction des écoles et des hôpitaux qui en dépendent. . ." (art. 1 et seq.). G. YOUNG, CORPS DE DROIT OTTOMAN 36-37 (1905). In English, the above passage reads, "The Patriarch of Jerusalem is, individually or together with other rites, the caretaker of all the relics in his jurisdiction, in the [Kumane] Church of Jerusalem; he is also head of the churches, monasteries, metropolitans, bishops, clerics and priests answerable to the patriarchal see and has control of the schools and the hospitals within its jurisdiction." (translated by the *Catholic University Law Review).*

18. MOSCHOPOULOS, *supra* note 6, at 83-84.

19. *Official Gazette of the Kingdom of Jordan*, 1958, 556-64. The author uses the Greek translation published in the collection of Varnavas Tzortzatos, *Οἱ βασικοὶ θεσμοὶ διοικήσεως τῶν Ὀρθοδόξων Πατριαρχείων* [The Basic Administrative Institutions of the Orthodox Patriarchates], (Athens, Institute for Balkan Studies, 1972) 151-63.

20. LAPIDOTH & HIRCH, *supra* note 1, at 166-69.

21. Ann Peters, *Islamic Group Joins Christians Against Jewish Settlement*, UPI, Apr. 24, 1990, *available in* LEXIS, Nexis Library, UPI file.

guest house of the Patriarchate. Such isolated trivialities, however, do not disrupt or even endanger the status quo. Conversely, there are other events that trouble the Orthodox. The source of their fears is the Holy See's position concerning the status of Jerusalem.

At the end of World War II, the Vatican opposed the creation of a Jewish state in Palestine. The Vatican was determined to protect Roman Catholic interests in the Holy Land.[22] Catholic scholars emphasize that the Vatican's aversion to a "Jewish Home" did not mean that it favored Arab domination in the Holy Land. Rather, the Vatican feared that either Arab or Jewish domination would prejudice Catholic interests. According to the Holy See, its interests would be better protected through a solution where "neither Jews nor Arabs, but a Third Power, should have control in the Holy Land."[23]

Twenty-three years later, in June 1967, Vatican official spokesmen, Monsignor Vallainc, stated that the only solution for the protection of Jerusalem and surrounding sites was administration by an international regime. This internationalization meant a separate territory, a *corpus separatum*.[24] Since the end of 1967, the Vatican's demand for a special, internationally guaranteed status did not extend to a demand for internationalization of the City. An allocution in December 1967 by His Holiness Pope Paul VI confirms this assessment.[25]

Ever since, the problem has been how to secure the sacred and universal character of Jerusalem by establishing a special status, internationally guaranteed, irrespective of which state would exercise sovereignty over the Holy City. Such a framework is acceptable to most of the major interested religions as a basis for further negotiations.

On December 30, 1993, the "Fundamental Agreement between the Holy See and the State of Israel" [Fundamental Agreement] was signed.[26] Under article four, the Holy See recognized the status quo by acknowledging the obligation to respect the regime governing the presence of three Christian denominations: Orthodox, Roman Catholic, and Armenian.[27] Article twelve of the Fundamental Agreement, however, stipulates that the Holy See and Israel will continue to negotiate for a

22. SILVIO FERRARI & FRANCESCO MARGIOTTA BROGLIO, *The Vatican, the European Community and the Status of Jerusalem*, *in* I STUDI IN MEMORIA DI MARIO CONDORELLI 574 (1988).

23. As John Victor Perowne, British plenipotentiary minister to the Holy See, observed in 1949. *Id.* at 574.

24. *Id.* at 577-78.

25. *Id.* at 579 (discussing Acta Apostolica Sedis 25-26 (1968)).

26. Fundamental Agreement Between the Holy See and the State of Israel, Dec. 30, 1993, *reprinted in* 33 I.L.M. 153 [hereinafter *Fundamental Agreement*].

27. *Id.* at 155.

solution to those questions agreed upon in the agenda of July 15, 1992.[28] This agreement between the Vatican and Israel caused justifiable anxiety among Orthodox Christians and non-Roman Catholics in general.

Recently, the Holy See maintained that the Fundamental Agreement renewed the status quo. Despite this welcome assurance, the Fundamental Agreement contains a provision, of unknown terms, which sanctions secret diplomatic proceedings between the Vatican and Israel, not of course to the prejudice of the conferring parties.[29]

Furthermore, press reports claim that the Israeli-Palestinian Agreements provide that responsibility for the Muslim shrines of Jerusalem is to be entrusted to Saudi Arabia and Christian shrines to the Vatican. The secrecy that cloaks the terms agreed upon by the Holy See, Israel, and Palestine is ominous. The Conference on Christianism and Judaism, held in Jerusalem in February 1994, is a plain indication of their respective intentions. As an eminent metropolitan of the Church of Greece has pointed out in the press:

> Neither the Orthodox nor the Armenian Patriarchs of Jerusalem were invited to take part to the Conference. This very sad omission does not obstruct our understanding of several good-will gestures of the Roman Catholic Church towards the Jewish people which were intended to 'wash out mistakes of the past,' as Rabbi Rozen put it.[30]

Moreover, in various relevant texts and statements there are numerous references to the three monotheistic religions-Jewish, Christian, and Muslim, that regard Jerusalem as a Holy City. Nonetheless, the term "Christian" is never defined. Does this favor all denominations or only the most powerful one?

Clergymen and monks have publicized these fears through the media in the Orthodox countries. Unfortunately, there has been no denial or explanation by competent officials. The Message of the heads of the Orthodox Churches given at the celebration of the Revelation in the church of Patmos on September 9, 1995 expressed this concern. The Message emphasizes that the Orthodox Church does not meddle in politics, but cannot remain indifferent to political decisions that affect its existence. The Message concludes:

> We consider that such a case is the matter of the future of the Holy Land, of the holy shrines and the Community living

28. This paper does not address these questions.

29. *See generally Fundamental Agreement, supra* note 26.

30. Christodoulos, Metropolitan of Demetrias, "Τὸ Βατικανὸ καὶ οἱ Ἅγιοι Τόποι" [The Vatican and the Holy Land], To Vima, July 17, 1994 (quoting Christdoloulos, Metropolitan of Demetrias).

> therein, which [is a matter that] concerns the whole of Orthodoxy and more specifically the Patriarchate in Jerusalem. Therefore, any discussion regarding changes of the Holy Land's status quo, which was established through the ages by means of international decisions and treaties, cannot and should not be made without the knowledge of and in the absence of the Orthodox Patriarchate of Jerusalem, which has been based there for centuries.[31]

Furthermore, the psychological factor is instrumental in relations between the Orthodox East and Frankish West and has emerged in various forms over the centuries. For example, the Orthodox Arabs and the Greeks recall that the Crusaders of the Fourth Crusade, while guests in Constantinople, captured the capital of the Christian Roman Empire, and divided its territories and treasures among themselves.

If the presence and jurisdiction of the various cults, or of some, were to be enhanced de jure in Jerusalem, it might lead to severe conflict. A relatively small number of Christian Arabs inhabit the wider area of Jerusalem, living among Jews and Muslim Arabs. Numerically, the non-Arab Christian population is almost non-existent. Consequently, the "people" element of establishing a new regime is missing. Thus, on the one hand, Christians of all denominations wish to impose a new situation from the top. On the other hand, fundamentalism has experienced a significant revival in recent years, although this has not spread to Israel and Jordan.

There is no reason to stir up such emotions and beliefs, particularly because Arabs and Israelis alike consider Christians of Europe as total strangers to the area of Palestine. Any attempt to alter the status of Jerusalem would constitute interference in Arab-Israeli domestic affairs and, for that reason, would be provocative. We would face violent reactions that might extend beyond the Holy Land. Therefore, there is no reason to create a new cause of local and international conflict in an already agitated world. The lessons of Bosnia are instructive. The haste of some European state and religious powers to dismantle Yugoslavia has brought us to the brink of international conflict. Typically, the three parties at war in Bosnia belong to the same nation and speak the same language, but they follow different religions. Doubtless, the status quo in Jerusalem has its flaws. Nevertheless, it also has one great merit: it works. Let it then become the starting point of cooperation between Christian Churches, not the beginning of trouble for all parties concerned.

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31. *See* Ὀρθόδοξος Κήρυξ [Orthodox Herald], Sept.-Oct. 1995, at 6 n.84-85.