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SOVEREIGNTY IN JERUSALEM

*John Quigley**

I. INTRODUCTION

As the Palestine Liberation Organization (PLO) and the government of Israel approach negotiations about the status of Jerusalem,¹ various possible outcomes are being proposed in an effort to accommodate the aims of the two parties. Many of these proposals for Jerusalem have merit and may ultimately be reflected on the ground.² The difficulty in devising an appropriate status for Jerusalem is that two different peoples claim it as their capital. This Article seeks not to propose a particular outcome, but rather to examine the two claims.

Competing claims to territory are often difficult to unravel, but certain principles have developed in the international community. When Spain withdrew from its colony of Spanish Sahara in northern Africa, two neighboring states claimed sovereignty, and the population of the territory rejected both claims. The United Nations General Assembly, seeking to facilitate a peaceful resolution of this tripartite contest, turned to the International Court of Justice, asking it for an advisory opinion on the matter. In approaching the conflict, the court focused on acts of occupation and the principle of self-determination of peoples.³ Sovereignty being contested, the court asked which people, if any, was in occupation, and whether a competing claimant could be said to violate the right to sovereignty of that people.

The fate of Jerusalem, to be sure, is not likely to be the subject of a judicial tribunal's consideration. A resolution that is in accord with generally accepted principles, however, holds greater prospects of enduring

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1. Declaration of Principles on Interim Self-Government Arrangements, Sept. 13, 1993, Isr.-PLO, *reprinted in* 32 I.L.M. 1525 (entered into force Oct. 13, 1993) (agreement between Israel and Palestine Liberation Organization to commence, in 1996, negotiations on "[p]ermanent status" issues, including Jerusalem).

2. *See, e.g.,* Ruth Lapidoth, *Jerusalem and the Peace Process*, 28 ISRAEL L. REV. 402 (1994) (suggesting that notions of split or "functional" sovereignty may lead to an appropriate settlement).

3. Advisory Opinion No. 61, Western Sahara, 1975 I.C.J. 12, 31-33, 40-42, 68 (Oct. 16).

than one based on the expediency of the moment. While the strength of the two claims will not necessarily determine the outcome of the negotiations, it does provide an indication of what the parties may reasonably expect and which outcomes they may justifiably find unacceptable.

The two parties, their respective constituencies, and the international community are more likely to accept a resolution based on sound principle. The international community is a relevant actor because the United Nations, through its Security Council, has been accorded both the power and the obligation to deal with threats to the international peace.⁴ Thus, if a solution is achieved but is later threatened, the Security Council may have to step into the breach, and in so doing it may well consider legal entitlement.⁵

It is, indeed, one of the achievements of the twentieth century, albeit an achievement not uniformly realized in practice, that matters relating to sovereignty over territory should be resolved in accordance with the rights of the states and populations involved. A concept premised on the consent of the governed has replaced the nineteenth century concept that a state physically able to subjugate a foreign people was within its rights to do so. A concomitant principle that has emerged holds that territory is not to be taken by force, and if that occurs, the resulting situation is to be deemed unlawful and is to be reversed rather than recognized.⁶

II. ISRAEL'S CLAIM TO JERUSALEM

Israel claims sovereignty over the territory it has controlled since it declared statehood in 1948. That claim covers the western sector of Jerusalem.⁷ Israel also claims sovereignty over the eastern sector of Jerusalem, which it has held since 1967. Israel has not, however, stated the basis for its claims with respect to either sector of Jerusalem. In attempting to determine how Israel might rationalize its claim to Jerusalem, one might seek guidance in the basis for its claim to sovereignty in its other territory. However, Israel's primary basis for claiming sovereignty to territory is not relevant regarding Jerusalem.

4. U.N. CHARTER arts. 39-51.

5. See S.C. Res. 678, U.N. SCOR, 45th Sess., 2963d mtg. at 27, U.N. Doc. S/INF/46 (1990) (taking action against Iraq after Security Council decided that it was legally responsible for the hostilities in Kuwait).

6. See S.C. Res. 252, U.N. SCOR, 23d Sess., 1421st mtg. at 9-10, U.N. Doc. S/INF/23/Rev.1 (1968) (condemning Israeli measures affecting Jerusalem as tantamount to annexation); S.C. Res. 242, U.N. SCOR, 22d Sess., 1375th mtg. at 8-9, U.N. Doc. S/INF/22/Rev.2 (1967) (noting "the inadmissibility of the acquisition of territory by war" in calling on Israel to withdraw from territory it took in 1967).

7. See *infra* note 14 and accompanying text.

Israel claims sovereignty to its territory primarily on the basis of a United Nations proposal for a Jewish state in Palestine. In 1947, the United Nations General Assembly addressed the issue of sovereignty in Palestine after Great Britain indicated that it planned to withdraw as the administering power in Palestine, a role it had played since the early 1920s through a so-called "mandate" arrangement with the League of Nations.⁸

During World War I, leaders of Zionism, a movement among European Jews to found a Jewish state, lobbied Great Britain to sponsor such a state in Palestine. At the time, Britain played a central role in ousting the Ottoman Empire from Palestine. Britain said that it would promote a "Jewish national home" in Palestine, and this ill-defined notion was written into the League's mandate instrument.⁹ Following up on this commitment, Britain allowed substantial migration of Jews from Europe to Palestine, augmenting the Jewish sector of Palestine's population, which stood at under ten per cent as of World War I, to nearly one third by World War II.¹⁰ The British government understood that this migration was setting the stage for conflict, and so it sought solutions beginning in the 1930s, but to no avail. The reason for Britain's withdrawal in 1948 was its inability to devise a system of governance acceptable to both the Jewish and the Arab communities of Palestine.

The United Nations General Assembly, by resolution, recommended to the Jewish and Arab communities that they split Palestine into two states, linked by an economic union.¹¹ In hostilities that followed the adoption of that resolution, a Jewish state was proclaimed, and in its founding declaration, the General Assembly resolution was cited as a legal basis for the sovereignty of the state of Israel.¹²

Under the General Assembly's proposal, Jerusalem was to form part of neither state. Concerned that neither side would readily relinquish its

8. 3 LEAGUE OF NATIONS O.J. 1007 (1922), *reprinted in Terms of League of Nations Mandates*, U.N. Doc. A/70 (1946), and in *Convention between the United States and Great Britain in Respect to Rights in Palestine*, Dec. 3, 1924, 44 Stat. 2184.

9. LEAGUE OF NATIONS O.J., *supra* note 8, at 1007.

10. SUPPLEMENT TO THE SURVEY OF PALESTINE 13 (reprint 1991) (1947) (estimating 99,000 Jews and 65,000 Arabs in Jerusalem as of Dec. 31, 1946).

11. G.A. Res. 181, U.N. GAOR, 1st Sess., at 131, 139, U.N. Doc. A/64 (1946) [hereinafter G.A. Res. 181].

12. Declaration of the Establishment of the State of Israel, 1 LAWS OF THE STATE OF ISRAEL 3, 4-5 (1948); *see also* JOHN QUIGLEY, *PALESTINE AND ISRAEL: A CHALLENGE TO JUSTICE* 47-53 (1990) (arguing two weaknesses in the Declaration's reliance on the General Assembly resolution: (1) that the resolution was framed not as a disposition of territory, but as a proposal to be implemented only if both parties could agree to it; (2) the General Assembly had no power to dispose of territory, so that regardless of how the resolution was framed, it did not represent a grant of territory).

claim to the City, the Assembly advocated an internationalized status for Jerusalem.¹³ Thus, the General Assembly resolution under which Israel claimed sovereignty over much of its territory provided no basis for a claim to Jerusalem.

In the absence of any official claimed basis for sovereignty in Jerusalem, others have formulated an argument that would support Israel's claim. According to this argument, Great Britain's withdrawal left Palestine with no sovereign, and open to occupation by others. Thus, territory that Israel occupied in Palestine fell under its sovereignty by virtue of occupation.¹⁴

Some have contested the "void of sovereignty" argument on the ground that no such void existed. The mandate arrangement involved a trust relationship, in which Great Britain filled a role analogous to what, in domestic law, would be called a trustee, while the community of citizens (all citizens of Palestine, whether Arab or Jew) was the beneficial title holder. Thus, upon Britain's departure, the previously divided title automatically became unitary in the hands of the community of citizens. Thus, there was no "void of sovereignty," rather the assertion of sovereignty by the (minority) Jewish community amounted to an infringement on the rights of the lawful putative sovereign.

III. THE PALESTINIAN CLAIM TO JERUSALEM

The Palestinian Arabs, claim to Jerusalem is founded on their longtime status as the majority population of Palestine. On that basis the Palestinians¹⁵ claim sovereignty over all of Palestine, including Jerusalem.¹⁶ The Palestinians claim descentance from the Canaanites, the earliest recorded inhabitants of Palestine. Although political control changed hands many times throughout history, this population, which the Arab

13. G.A. Res. 181, *supra* note 11, at pt. III.

14. ELIHU LAUTERPACHT, *JERUSALEM AND THE HOLY PLACES* 44-45 (1968); 1 D.P. O'CONNELL, *INTERNATIONAL LAW* 140 (1965); Yehuda Z. Blum, *The Missing Reversioner: Reflections on the Status of Judea and Samaria*, 3 *ISRAEL L. REV.* 279, 294 (1968); Stephen M. Schwebel, *What Weight to Conquest?*, 64 *AM. J. INT'L L.* 344, 346 (1970).

15. The term "Palestinians" in this Article refers to the Arabs of Palestine who reside in historic Palestine (currently Israel, the West Bank of the Jordan River, and the Gaza Strip). Prior to 1948, the term was used to indicate all inhabitants of Palestine, including Jews.

16. HENRY CATTAN, *PALESTINE AND INTERNATIONAL LAW* 65-68 (1973) (discussing generally the Palestinian claim to Palestine); *see also* Palestine National Council, Declaration of Independence, Nov. 15, 1988, U.N. GAOR, 43d Sess., Annex 3 at 13, U.N. Doc. A/43/827-S/20278 (1988) [hereinafter Palestine National Council] (declaring the creation of an independent Palestinian Arab state with Jerusalem as its capital).

conquest of the seventh century A.D. Arabized, remained into the twentieth century.

A potential weakness in the Palestinian claim is that since 1948 the Palestinians have not constituted the majority population in Palestine. During the hostilities of that year, so many of them were displaced that the population balance shifted in favor of the Jewish sector. The Palestinians assert, however, that this mass wartime departure was involuntary and does not affect their claim.¹⁷

Another potential weakness in the Palestinian claim is that Israel also has a claim based on occupation. Israel claims to be heir to the Hebrew Kingdom of ancient times in Palestine. The 1948 Declaration of the Establishment of the State of Israel referred, in addition to the United Nations General Assembly resolution, to "our natural and historic right" to the territory.¹⁸

IV. ISRAEL'S TAKING OF WEST JERUSALEM, 1948

To facilitate an assessment of the two claims to Jerusalem, this Article turns next to facts relevant to the occupation of Palestine and to how Israel came into control of Palestine, including Jerusalem, exploring in turn Israel's acquisition of West Jerusalem in 1948 and of East Jerusalem in 1967.

Until Jewish migration from Europe to Palestine began in the nineteenth century, Palestine's population was overwhelmingly Arab. The Jewish migration augmented a historical Jewish minority that in the early nineteenth century constituted two per cent of Palestine's population. Migrating Jews settled disproportionately in urban areas; by 1900 they made up half of Jerusalem's population, even though they still made up only ten percent of the population of Palestine as a whole.¹⁹

When Great Britain administered Palestine in the inter-war period, Jewish migration from Europe gave Jews a majority in Jerusalem, although Arabs continued to own most of the land.²⁰ In November 1947, after Great Britain announced its intent to withdraw from Palestine, the United Nations General Assembly made its recommendation to divide Palestine, with Jerusalem as a separate entity. Jerusalem was termed in the resolution a *corpus separatum*, to be administered by the United Na-

17. See CATTAN, *supra* note 16, at 101-07 (discussing the involuntary nature of the Palestinian expulsion).

18. Declaration of the Establishment of the State of Israel, 1 LAWS OF THE STATE OF ISRAEL 4 (1948).

19. A HISTORY OF THE JEWISH PEOPLE 916-17 (H.H. Ben-Sasson ed., 1976).

20. HENRY CATTAN, JERUSALEM 158 (1981) (providing a graphic depiction of Jerusalem's population).

tions Trusteeship Council.²¹ The division of Palestine as proposed in the resolution would have given 57% of its territory to the Jews, who made up less than one third of its population. The Arab community reacted negatively, in part because of the lack of proportion in the division, but primarily because the Arab community anticipated that the end of the mandate would bring independence to Palestine as a single unit, in which majority rule would govern.²² In Jerusalem, in the days following the adoption of the General Assembly resolution, the first signs of violence between the two communities appeared.

The Arab community protested the General Assembly resolution with commercial strikes and street demonstrations. In response, the Irgun, a Jewish military organization, began a military campaign. "For three days, from 11th to 13th December [1947]," wrote Irgun leader, and future prime minister of Israel, Menachem Begin, the Irgun "hammered at concentrations of rioters and their offensive bases." By "rioters" Begin meant the demonstrators. By "offensive bases," he meant Arab villages. Of this period Begin wrote, "[w]e attacked again and again in Jerusalem."²³

LEHI, another Jewish military organization, one of whose leaders was Itzhak Shamir, another future prime minister of Israel, joined the Irgun in raiding Arab villages. In the words of a British military officer, LEHI staged "bestial attacks on Arab villages, in which they showed not the slightest discrimination for women and children, whom they killed as opportunity offered."²⁴

In this same period, Arab irregulars, concerned that these Jewish military forces would take over Palestine, attacked Jewish convoys bringing supplies from the Mediterranean coast to Jewish settlements in the interior. The Haganah, a military organization affiliated with the Jewish Agency,²⁵ began armed attacks on Arab villages, justifying them as reprisals for the convoy raids.²⁶ In a report from Palestine, the United States Central Intelligence Agency called these Haganah raids "terrorist raids

21. G.A. Res. 181, *supra* note 11, at pt. III.

22. CATTAN, *supra* note 16, at 37.

23. MENACHEM BEGIN, *THE REVOLT* 337 (1951).

24. R.D. WILSON, *CORDON AND SEARCH: WITH 6TH AIRBORNE DIVISION IN PALESTINE* 156 (1949).

25. The Jewish Agency was the principal political organization representing the Zionist movement and promoting Jewish statehood in Palestine. The United Nations accredited the organization as representing the Jewish community of Palestine.

26. See NETANEL LORCH, *THE EDGE OF THE SWORD: ISRAEL'S WAR OF INDEPENDENCE, 1947-1949*, at 59 (1961); Sam P. Brewer, *Haganah Attacks a 2d Arab Village*, N.Y. TIMES, Dec. 21, 1947, at A1; Sam P. Brewer, *Irgun Shoots Down 2 British Soldiers; Arabs Get Warning*, N.Y. TIMES, Dec. 22, 1947, at A1.

against the Arabs similar in tactics to those of the Irgun."²⁷ In January 1948, the Haganah detonated a bomb killing 26 persons in an Arab neighborhood of a West Jerusalem hotel. The British government called the bombing a "dastardly and wholesale murder of innocent people."²⁸ During the same month, the Haganah launched rockets into Arab neighborhoods in Jerusalem, with the apparent aim of frightening Arab residents into fleeing.²⁹

Arabs did begin to evacuate Jerusalem, knowing that the Arab community had little military capacity to protect them. In a speech in February 1948, David Ben Gurion, the Jewish Agency leader and future first prime minister of Israel, celebrated the Arab exodus. Ben Gurion said, "[s]ince Jerusalem's destruction in the days of the Romans it hasn't been so Jewish as it is now. In many Arab districts [in West Jerusalem], one sees not one Arab. I do not assume that this will change."³⁰ That same month, a Jewish woman was shot in West Jerusalem. In response, the Haganah sent a van with a loudspeaker, ordering Arabs to abandon the neighborhood.³¹

In April 1948, the Irgun and LEHI captured the village of Deir Yassin on the western outskirts of Jerusalem and, after suppressing armed resistance, killed more than 200 civilians.³² The Irgun drove survivors through the streets of Jerusalem in trucks, in an apparent effort to frighten Jerusalem's Arabs into fleeing,³³ and later killed these survivors.³⁴ The Haganah operated loudspeaker vans in Jerusalem, announcing in Arabic, "unless you leave your homes, the fate of Deir Yassin will be your fate."³⁵

During the spring and summer of 1948, the three Jewish military forces took 80% of Palestine, expelling most of the Arabs from this area. By late 1948, three quarters of a million Arabs had left Palestine, and the

27. *Report by the Central Intelligence Agency: Possible Developments in Palestine*, Feb. 28, 1948, 5 *For. Rel. U.S. 1948* 666, 672 (1976).

28. Sam P. Brewer, *Britain Condemns Haganah 'Murders'*, N.Y. TIMES, Jan. 7, 1948, § 1, at 1.

29. BENNY MORRIS, *THE BIRTH OF THE PALESTINIAN REFUGEE PROBLEM, 1947-1949*, 50-52 (1987).

30. *Id.* at 52; see also TOM SEGEV, 1949: THE FIRST ISRAELIS 25 (1986) (discussing Ben Gurion's reaction to the Arab exodus).

31. MORRIS, *supra* note 29, at 52.

32. BEGIN, *supra* note 23, at 162-65 (describing the "Dir [sic] Yassin" massacre); Dana A. Schmidt, *200 Arabs Killed, Stronghold Taken*, N.Y. TIMES, Apr. 10, 1948, at A6.

33. HARRY LEVIN, *I SAW THE BATTLE OF JERUSALEM* 160 (1950).

34. MICHAEL PALUMBO, *THE PALESTINIAN CATASTROPHE: THE 1948 EXPULSION OF A PEOPLE FROM THEIR HOMELAND* 52 (1987); AVI SHLAIM, *COLLUSION ACROSS THE JORDAN* 164 (1988).

35. Erskine B. Childers, *The Wordless Wish: From Citizens to Refugees*, in *THE TRANSFORMATION OF PALESTINE: ESSAYS ON THE ORIGIN AND DEVELOPMENT OF THE ARAB-ISRAELI CONFLICT* 165, 186 (Ibrahim Abu-Lughod ed., 1971).

Arab population of Jerusalem, which at the start of the year stood at 65,000, was less than 4,000.³⁶

After the Jewish Agency declared Jewish statehood in May 1948, Jordan's army took up positions to keep the Jewish forces out of eastern Palestine. The Israeli and Jordanian forces did not seriously contest territory generally, but around Jerusalem they fought to a standstill, leading to the City's division. Jordan controlled the eastern sector, which included the ancient Walled City, while Israel controlled the western sector, where most of the City's Jews resided.

In 1950 Israel's parliament declared West Jerusalem to be Israel's capital,³⁷ and Jordan, following a request that emerged from a meeting of prominent Arabs,³⁸ incorporated the West Bank, including East Jerusalem. Jordan's parliament specified that it did so "without prejudicing the final settlement of Palestine's just case within the sphere of national aspirations, inter-Arab cooperation and international justice."³⁹

V. ISRAEL'S TAKING OF EAST JERUSALEM, 1967

In 1967, Israel captured the eastern sector of Jerusalem when it overran all of eastern Palestine (the West Bank of the Jordan River). This military action resulted from military action between Israel and Egypt. Serious tension between Israel and Syria, in turn, precipitated that military action.⁴⁰

Responding to that situation, Egypt asked the United Nations to remove a United Nations peacekeeping force from certain sectors of the Israel-Egypt frontier. Egypt explained that its motive in making this request was to allow it to move against Israel "the moment it [Israel] might carry out any aggressive action against any Arab country," a reference to

36. Ian Lustick, *The Quiescent Palestinians: The System of Control over Arabs in Israel*, in *THE SOCIOLOGY OF THE PALESTINIANS* 64, 66 (Khalil Nakhleh & Elia Zureik eds., 1980).

37. Emergency Regulations (Land Requisition-Accommodation of State Institutions in Jerusalem), 4 *LAWS OF THE STATE OF ISRAEL* 106 (1950); see also *Jerusalem Named Capital of Israel*, *N.Y. TIMES*, Jan. 24, 1950, at A1.

38. MARJORIE M. WHITEMAN, 2 *DIGEST OF INTERNATIONAL LAW* 1163-64 (1963).

39. Albion Ross, *Amman Parliament Vote Unites Arab Palestine and Transjordan*, *N.Y. TIMES*, Apr. 25, 1950, § 1, at 1, 14.

40. Charles W. Yost, *The Arab-Israeli War: How it Began*, 46 *FOREIGN AFF.* 304, 308 (1968) (noting Israeli Prime Minister Levi Eshkol's threat to invade Syria); see Amos Shapira, *The Six-Day War and the Right of Self-Defence*, 6 *ISRAEL L. REV.* 65, 66 (1971) (quoting the *Wk. News Bull*); see also Letter from George J. Tomeh, Permanent Representative of Syria, to the President of the Security Council (May 15, 1967) reprinted in U.N. SCOR, U.N. Doc. S/7885 (1967) (complaining of Israel's threats).

the possibility that Egypt might attack Israel if Israel attacked Syria.⁴¹ Egypt moved troops up to its frontier with Israel but made no military move against Israel. On June 4, Israel's cabinet authorized its army to invade Egypt.⁴² Israel launched that invasion the next day.⁴³

Both Egypt and Israel claimed that the other struck first.⁴⁴ Egypt said that the first move was an Israeli aerial bombing of Egyptian military aircraft on the ground at their home bases in Egypt. Israel said that the first move was an Egyptian shelling of three southern Israeli villages and an approach by Egyptian jet aircraft towards Israel.⁴⁵ The Egyptian version turned out to be accurate. Egypt had not shelled Israel, and Egypt's planes never left their bases, but were destroyed there by Israel's aerial bombardment.⁴⁶

A month later, Israel's prime minister admitted that Israel struck first but claimed it acted in "legitimate defence," expecting an imminent Egyptian attack.⁴⁷ However, other Israeli leaders who were present at the June 4 cabinet meeting contradicted the prime minister, saying that it was understood at the meeting that Egypt was not about to attack.⁴⁸ No evidence came to light to suggest that Egypt was about to attack.

Jordan, which had recently entered into a defense treaty with Egypt, shelled West Jerusalem in response to Israel's attack on Egypt. Israel

41. INDAR JIT RIKHYE, *THE SINAI BLUNDER: WITHDRAWAL OF THE UNITED NATIONS EMERGENCY FORCE LEADING TO THE SIX-DAY WAR OF JUNE 1967*, at 16 (1980) (quoting letter from Farik Awal to the Commander of the United Nations Emergency Force); see also *Report of the Secretary-General on the Withdrawal of the United Nations Emergency Force*, U.N. GAOR, 5th. emerg. spec. sess., para. 21, U.N. Doc. A/6730/Add.2 (1967) (indicating that the Secretary-General offered to move the peacekeepers from the Egyptian to the Israeli side of the frontier, but that Israel declined).

42. Asher Wallfish, *Meir Reveals Text of War Decision*, JERUSALEM POST, June 5, 1972, at 1.

43. See RITCHIE OVENDALE, *THE ORIGINS OF THE ARAB-ISRAELI WARS* 180 (1984).

44. U.N. SCOR, 22d Sess., 1347th mtg. at 3, U.N. Doc. S/PV.1347 (1967).

45. U.N. SCOR, 22d Sess., 1348th mtg. at 15, U.N. Doc. S/PV.1348 (1967) (quoting Eban's statement that "Egyptian forces engaged us by air and land, bombarding the [Israeli] villages of Kissufim, Nahal-Oz and Ein Hasheloshah," and "approaching Egyptian aircraft appeared on our radar screens").

46. OVENDALE, *supra* note 43, at 180.

47. *Admission on Attack*, THE TIMES (London), July 8, 1967, at 3 (quoting statement of Prime Minister Levi Eshkol).

48. *Le général Rabin ne pense pas que Nasser voulait la guerre*, LE MONDE, Feb. 29, 1968, at 1, 4 (quoting Chief of Staff Itzhak Rabin that the troops Egypt brought up to the frontier "would not have been enough to unleash an offensive against Israel. He knew it and we knew it.") (translated from the French original by the author); *Excerpts from Begin Speech at National Defense College*, N.Y. TIMES, Aug. 21, 1982, at A6 (quoting Prime Minister Menachem Begin stating that Egypt's troop movements did "not prove that Nasser was really about to attack us. We must be honest with ourselves. We decided to attack him.").

urged Jordan to stay out of the fighting,⁴⁹ but when it did not, Israeli troops pushed eastward through East Jerusalem to the Jordan River, occupying the entire West Bank of the Jordan River. The United Nations Security Council, citing the prohibition against acquiring territory by military force, asked Israel to withdraw.⁵⁰

VI. EAST JERUSALEM UNDER ISRAEL'S CONTROL

As territory taken during hostilities, the West Bank is under a regime that in international law is termed belligerent occupation.⁵¹ Belligerent occupation yields no sovereignty. This result follows regardless of whether the belligerent power's use of force was aggression or lawful defense. Thus, even if one were to consider Israel to have acted defensively in its use of force against Egypt, and hence against Jordan, it would not acquire sovereign rights in East Jerusalem.

Belligerent occupation is subject to a body of law that has developed in the international community through the experience of warfare. A premise of the law of belligerent occupation is that the occupied territory is to be altered as little as possible, pending a resolution of the military conflict that precipitated the occupation, in the expectation that the belligerent occupant will ultimately withdraw.⁵² One aspect of this obligation is that the belligerent occupant must continue in force the law applicable there at the commencement of the occupation, enacting only such regulations as are necessary for its own protection.⁵³

49. This warning is open to two conflicting interpretations: (1) that Israel had no intent to take the West Bank; or (2) that Israel wanted to defeat Egypt before taking on Jordan. Evidence for the latter is provided by the fact that after defeating both Egypt and Jordan, Israel invaded Syria and occupied the Golan Heights.

50. S.C. Res. 242, U.N. SCOR, 22d Sess., 1375th mtg. at 8, U.N. Doc. S/INF/22/Rev.2 (1967). Simultaneously, the Council called for peace agreements between Israel and its Arab neighbors, apparently making the two actions dependent on each other. The linkage does not derogate from the point made in the text, which is that the Council did not view Israel as having any right to the territory it seized during the 1967 hostilities.

51. S.C. Res. 465, U.N. Doc S/INF/36 (1981). Resolution 465 does not use the term "belligerent occupant," but uses the term "occupied" and states that the Geneva Convention relative to the Protection of Civilian Persons in Time of War, which is a convention on belligerent occupation, provides the applicable law. The term "belligerent" appears in article 4 of the Geneva Convention and is commonly used to describe the status of territory to which the Geneva Convention applies. Geneva Convention Relative to the Treatment of Civilian Persons in Time of War, Aug. 12, 1949, art. 4, 6 U.S.T. 3516, 75 U.N.T.S. 287 (1950) [hereinafter Geneva Convention]; see also JOHN DUGARD, *RECOGNITION AND THE UNITED NATIONS* 111-15 (1987); Antonio Cassese, *Legal Considerations on the International Status of Jerusalem*, in 3 *THE PALESTINE YEARBOOK OF INTERNATIONAL LAW* 31 (1986).

52. See MORRIS GREENSPAN, *THE MODERN LAW OF LAND WARFARE* 223-24 (1959).

53. Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, Annex: Regulations Respecting the Laws and Customs of War on Land, art. 43; 1 BEVANS,

In the bulk of the West Bank, Israel enforced Jordanian law, but for East Jerusalem, Israel's parliament, the Knesset, applied Israeli law to the exclusion of Jordanian law. The Knesset did so by legislating that "[t]he law, jurisdiction and administration of the State [of Israel] shall extend to any area of Eretz Israel⁵⁴ designated by the Government by order."⁵⁵

By another law, the Knesset authorized the Minister of the Interior to extend the boundaries of any municipality to include the area that government order designated,⁵⁶ and the Minister expanded the borders of East Jerusalem to include a substantial sector of the West Bank.⁵⁷ The government then merged East Jerusalem with West Jerusalem to form a single administrative entity.⁵⁸

Israel was careful to specify that these enactments did not amount to a claim of sovereignty over East Jerusalem. It told the United Nations: "The measures adopted relate to the integration of Jerusalem in the administrative and municipal spheres, and furnish a legal basis for the protection of the Holy Places of Jerusalem."⁵⁹ The United Nations, however, condemned Israel for these laws and decrees, finding them to effect an annexation of East Jerusalem in all but name.⁶⁰

TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA 1776-1949, at 631 (1968). Geneva Convention, *supra* note 51, art. 64.

54. The term "Eretz Israel" (Land of Israel) means the territory of mandate Palestine, which includes the West Bank.

55. Law and Administration Ordinance Law, (Amendment No. 11) Law, 21 LAWS OF THE STATE OF ISRAEL 75 (1967). Implementing this law, the government ordered that Israeli law should apply. *Kovetz HaTakanot* (Official Gazette), No. 2064, June 28, 1967, at 2690, *reprinted in* Sabri Jiryis, *Israeli Laws as Regards Jerusalem*, in IV THE LEGAL ASPECTS OF THE PALESTINE PROBLEM WITH SPECIAL REGARD TO THE QUESTION OF JERUSALEM 181, 182 (Hans Köchler ed., 1981).

56. Municipalities Ordinance (Amendment No. 6) Law, 21 LAWS OF THE STATE OF ISRAEL 75 (1967).

57. *Kovetz HaTakanot* (Official Gazette), No. 2063, June 28, 1967, at 2670.

58. *Municipalities Ordinance (Declaration on the Enlargement of Jerusalem's City Limits)*, *Kovetz Ha-Takanot* (Official Gazette), No. 2065, June 28, 1967, at 2694, *reprinted in Order Unites Holy City*, JERUSALEM POST, June 29, 1967, at 1.

59. Report of the Secretary-General, U.N. GAOR, 5th Emerg. Spec. Sess., at 3, U.N. Doc. A/6753 at 3 (1967), *reprinted in* 6 I.L.M. 846 (letter of Abba Eban, Foreign Minister, to U.N. Secretary-General).

60. S.C. Res. 267, U.N. SCOR, 24th Sess., 1485th mtg. at 33, U.N. Doc. S/INF/24/Rev.1 (1969) (expressing concern and condemnation of Israel's action); S.C. Res. 252, U.N. SCOR, 23d Sess., 1421st mtg. at 19, U.N. Doc. S/INF/23/Rev.1 (1968) (declaring invalid those actions changing the status of Jerusalem); G.A. Res. 2253, U.N. GAOR, 5th Emerg. Spec. Sess., at 234, U.N. Doc. A/6798 (1967) (declaring Israel's actions invalid); *see also* Report of the Secretary-General, *supra* note 59 (quoting Israeli Foreign Minister, Abba Eban, as stating in letter to the Secretary-General that the term, "annexation" was "out of place").

In 1980, however, the Knesset passed a law stating that "Jerusalem, complete and united" was "the capital of Israel."⁶¹ This enactment by implication claimed sovereignty over both sectors of Jerusalem.⁶² The United Nations found this law, like the 1967 measures, to be unlawful, as an attempted annexation of territory under belligerent occupation.⁶³

All this time Jordan still claimed sovereignty in the West Bank, including East Jerusalem. In 1988, however, after the Palestine National Council declared a Palestine state, Jordan renounced its claim.⁶⁴ The Palestine National Council proclaimed "the establishment of the State of Palestine in the land of Palestine with its capital at Jerusalem,"⁶⁵ the state to encompass the Gaza Strip and the West Bank.⁶⁶

Israel, however, continued to claim East Jerusalem. In 1990, after a shooting incident in East Jerusalem in which Israeli police killed seventeen Palestinians, the United Nations Security Council, acting on the premise that East Jerusalem was under belligerent occupation, asked the United Nations Secretary-General to propose appropriate measures in response.⁶⁷ The Secretary-General proposed sending investigators, but Israel objected, saying, "Jerusalem is not, in any part, 'occupied territory'; it is the sovereign capital of the State of Israel. Therefore, there is no room for any involvement on the part of the United Nations in any matter relating to Jerusalem."⁶⁸ In a follow-up resolution, the Security Council expressed "alarm" at Israel's view that East Jerusalem was not occupied territory.⁶⁹

61. Basic Law: Jerusalem, Capital of Israel, 34 LAWS OF THE STATE OF ISRAEL 209 (1980).

62. See *Temple Mount Faithful Association v. Attorney General*, High Court 4185/90, 47(5) Piskei Din 221 (1993) (ruling, on basis of 1980 Act, that East Jerusalem is under Israel's sovereignty); Asher F. Landau, *Israel's Rights on Temple Mount Undisputed*, JERUSALEM POST, Nov. 15, 1993, at 7 (summarizing Temple Mount case).

63. S.C. Res. 478, U.N. SCOR, 35th Sess., 2245th mtg. at 14, U.N. Doc. S/INF/36 (1980); G.A. Res. 35/169E, U.N. GAOR, 35th Sess., Supp. No. 48, at 208-09, U.N. Doc. A/35/48 (1981).

64. John Kifner, *Internal Tensions: King Warns Palestinians Residing in Jordan to Maintain Stability*, N.Y. TIMES, Aug. 1, 1988, at A1 (King Hussein announcing, "We respect the wish of the P.L.O. . . . [for] an independent Palestinian state").

65. Palestine National Council, Declaration of Independence, *supra* note 16, at 15.

66. Letter from Deputy Permanent Observer of the Palestine Liberation Organization to the Secretary General, in U.N. GAOR, 43d Sess., Annex 2, Agenda Item 37 at 7, U.N. Doc. A/43/827, S/20278 (1988).

67. S.C. Res. 672, U.N. SCOR, 46th Sess., U.N. Doc. S/INF/46 (1991).

68. *Report Submitted to the Security Council by the Secretary-General in Accordance with Resolution 672*, U.N. SCOR ¶ 3, U.N. Doc. S/21919 (1990).

69. S.C. Res. 673, U.N. SCOR, 46th Sess., 2949 mtg. at Res. & Dec. 7, U.N. Doc. S/INF/46 (1991); see also Joel Brinkley, *Labor Party Rejects Likud Terms for Palestinian Talks*, N.Y. TIMES, Mar. 7, 1990, at A3 (objecting to Israel's plans to build housing in East

Beginning in 1967, in East Jerusalem, the Israeli government confiscated land and constructed residential housing for Jews. This phenomenon continued even after Israel and the PLO agreed, in their 1993 Declaration of Principles, to resolve the status of Jerusalem in the context of their so-called permanent status negotiations, to commence in 1996.⁷⁰ In 1995, after Israel announced a plan to expropriate additional land in East Jerusalem to build housing for Jews, only a United States veto stopped the Security Council from condemning the proposed action.⁷¹ An Israeli civil rights organization charged that Israel's policy was to create "a demographic and geographic reality that will preempt every future effort to question Israeli sovereignty in East [sic] Jerusalem."⁷²

During the Security Council debate, the United Kingdom delegate said that Israel should "refrain from taking actions which seek to change the status quo on this most sensitive of all issues before the conclusion of the final-status negotiations."⁷³

VII. SOVEREIGNTY IN JERUSALEM

States recognizing Israel have not recognized Israeli sovereignty over either the western or eastern sector of Jerusalem, despite nearly half a century of Israeli control in West Jerusalem, and nearly thirty years in East Jerusalem.⁷⁴ Regarding West Jerusalem, states maintaining diplomatic relations with Israel have avoided locating their embassies there, placing them instead in Tel Aviv, precisely because they consider the sta-

Jerusalem for newly arriving immigrants from the Soviet Union, the U.S. Department of State reaffirmed that East Jerusalem was part of the West Bank, not of Israel).

70. Declaration of Principles on Interim Self-Government Arrangements, *supra* note 1, art. 5 § 2.

71. U.N. SCOR, 50th Sess., 3538th mtg. at 6, U.N. Doc. S/PV.3538 (1995); *see also*, Barbara Crossette, *U.S. Vetoes Condemnation In U.N. of Israeli Land Seizure*, N.Y. TIMES, May 18, 1995, at A10.

72. B'tselem, *A Policy of Discrimination: Land Expropriation, Planning and Building in East Jerusalem* 1 (typescript edition, 1995); *see also* *Suspension of Land Expropriations: Rabin Holds News Conference on Land Expropriation Decision* (Israel Defense Force Radio, Tel Aviv, May 22, 1995) (transcript in BBC Summary of World Broadcasts, May 24, 1995, available in LEXIS, Nexis Library, World Library, Curnws File) (announcing that Israel would "suspend" expropriations but avoiding a commitment not to resume).

73. U.N. SCOR, 50th Sess., 3538th mtg. at 7, U.N. Doc. S/PV/3538 (1995) (quoting Sir David Hannay, U.K.); *see also id.* at 3 (Mr. Lavrov, Russian Federation); *id.* at 4 (Mr. Wisnumurti, Indonesia); *id.* at 5 (Mr. Fulci, Italy); *id.* at 8 (Mr. M rim e, France) (all asserting that the 1995 land seizures were intended to preempt the Palestinian claim of sovereignty in East Jerusalem).

74. *See* Harry N. Howard, *The Development of United States Policy in the Near East, South Asia, and Africa During 1953: Part II*, 30 DEP'T ST. BULL., March 1954, at 328-29 (quoting U.S. Secretary of State John F. Dulles); Shlomo Slonim, *The United States and the Status of Jerusalem 1947-1984*, 19 ISRAEL L. REV. 179, 195-97, 202 (1984).

tus of Jerusalem to be undetermined. As for East Jerusalem, objection to Israel's control is exhibited through collective criticism of Israel at the United Nations.

To assert its legitimacy in Palestine, Israel relies primarily on the 1947 General Assembly resolution, but this resolution yields no argument for sovereignty in Jerusalem,⁷⁵ since the resolution proposed internationalization. The "void of sovereignty" argument proffered to support Israeli sovereignty in Jerusalem is based on a premise that the territory is *res nullius*, i.e., without a sovereign.⁷⁶ That premise was not true, however. There was no void of sovereignty in Palestine because, during the mandate period, the community of citizens of Palestine held sovereignty subject to Great Britain's administration.⁷⁷ A community under a League mandate was deemed to be a subject of international law with a legal interest in the territory that was separate from that of the mandatory power.⁷⁸ In Palestine under the mandate, the inhabitants carried Palestine citizenship.⁷⁹ When Britain withdrew, the community of citizens was entitled to exercise its latent sovereignty. The majority of that community of citizens was represented by a United Nations recognized political organization, the Arab Higher Committee, which asserted a right to establish a government for Palestine.

Separate from rights stemming from the mandate arrangement, the community of citizens of Palestine enjoyed a right to sovereignty by virtue of the self-determination principle.⁸⁰ The analysis the International Court of Justice used in the Western Sahara case would lead to a conclusion that the community of citizens of Palestine, predominantly Arab, but with a Jewish minority, had a right to sovereignty based on its connection to the territory, and on the principle of self-determination.⁸¹ Under that

75. G.A. Res. 181 (II), U.N. GAOR, 2d sess., 1947, at 131-51; John Quigley *Old Jerusalem: Whose to Govern?*, 20 DEN. J. INT'L L. & POL'Y 155, 155-56 (1991).

76. Lapidot, *supra* note 2, at 412-14; JULIUS STONE, *ISRAEL & PALESTINE: ASSAULT ON THE LAW OF NATIONS* 116-18 (1981); *supra* note 14 and textual discussion (discussing theory that when Britain pulled out territory occupied by Israel was under its sovereignty by virtue of occupation).

77. LEAGUE OF NATIONS O.J. *supra* note 8, at 1007.

78. See James B. Scott, *The Two Institutes of International Law*, 26 AM. J. INT'L L. 87, 91 (1932) (quoting part of a 1931 resolution of the Institute of International Law).

79. LEAGUE OF NATIONS O.J., *supra* note 8, at 1008; Palestine Citizenship Order in Council, July 24, 1925, *Statutory Rules & Orders*, no. 777, at 474 (1925); Norman Bentwich, *Nationality in Mandated Territories Detached from Turkey*, THE BRITISH YEAR BOOK OF INTERNATIONAL LAW 97, 102 (1926); *The International Status of Palestine*, 90 JOURNAL DU DROIT INTERNATIONAL 964, 966 (1963).

80. Quigley, *supra* note 75 at 155-57.

81. Western Sahara, (advisory opinion), 1975 I.C.J. 3, 31-33, 40-68; *supra* note 18 and accompanying text (Israel claimed historic right to territory).

analysis, an Israeli claim based on the Hebrew Kingdom of ancient times would not prevail, because the more substantial contact with the territory was that of the predominantly Arab community of citizens. By forcibly taking Jerusalem in 1948 and 1967, Israel prevented the community of citizens of Palestine from exercising its sovereignty.

The Jewish community, to be sure, constituted the majority population of Jerusalem at the end of World War II. But it was the community of citizens of the territory of Palestine that had a right to exercise sovereignty, regardless of which group predominated in a particular locality.

The claim to sovereignty of the community of citizens as it existed in 1948 is not undermined by the fact that the population mix changed radically in that year.⁸² A right to sovereignty is not lost because of wartime displacement. The United Nations has long taken the view that the Palestinians displaced in 1948 are entitled to return.⁸³ It has taken this view whenever faced with a situation of displacement by civil warfare; routinely calling for the repatriation of refugees.⁸⁴ Those displaced Palestinians and their progeny are entitled to return, a matter that Israel and the PLO have agreed to address in the "permanent status" negotiations, along with the question of the status of Jerusalem.⁸⁵ They are part of the population bearing sovereign rights.

The above analysis applies to both sectors of Jerusalem. Regarding the eastern sector, it was indicated above that Israel acted aggressively, but

82. Lustick, *supra* note 36, at 66.

83. G.A. Res. 194, U.N. GAOR, 186th plen. mtg. at para. 11, U.N. Doc. A/810 (1948), reprinted in 2 UNITED NATIONS RESOLUTIONS 85 (1973).

84. See S.C. Res. 779, U.N. Doc. S/RES/779 (1992), reprinted in 1992 U.N.Y.B. 343 (regarding Croatia, "all displaced persons have the right to return in peace to their former homes"); S.C. Res. 787, U.N. Doc. S/RES/787 (1992), reprinted in 1992 U.N.Y.B. 375 (regarding Bosnia, the Council "insists that all displaced persons be enabled to return in peace to their former homes"); S.C. Res. 876, U.N. Doc. S/RES/876 (1993), reprinted in 1993 U.N.Y.B. 510 (regarding Abkhazia, affirms "right of refugees and displaced persons to return to their homes"); S.C. Res. 1009, 3563d mtg, U.N. Doc. S/RES/1009 (1995) (demanded that Croatia "in conformity with internationally recognized standards . . . respect fully the rights of the local Serb population including their rights to remain, leave or return in safety . . . [and] create conditions conducive to the return of those persons who have left their homes"); S.C. Res. 1019, 3591st mtg., U.N. Doc. S/RES/1019 (1995) (demanded that Croatia "respect fully the rights of the local Serb population including their right to remain or return in safety" and called on Croatia "to lift any time-limits placed upon the return of refugees to Croatia to reclaim their property"); *Security Council Fails to Reconfirm Resolutions Regulating Transport of Goods Between Federal Republic of Yugoslavia and Bosnia and Herzegovina* (Federal News Service, Dec. 5, 1994), available in LEXIS, Nexis Library, Curnws File (quotes Security Council statement of that date in which Council "reaffirm[ed] the right of all refugees and displaced persons affected by the conflict to return to their homes in secure conditions in accordance with international law").

85. Declaration of Principles on Interim Self-Government Arrangements, *supra* note 1, art. V §§ 2, 3.

that fact is not determinative regarding sovereignty.⁸⁶ Israel would equally have deprived the rightful sovereign of the territory of East Jerusalem had it acted defensively.⁸⁷ The United Nations Charter recognized a right to use force in self-defense, but only for the limited purpose of repelling aggression.⁸⁸ A state that occupies territory while acting in its defense does not thereby gain sovereignty.

VIII. CONCLUSION

The international community should promote for Jerusalem a solution consistent with the legitimate claims of the contending parties. From the standpoint of territorial right, as this notion is understood in international law, Palestine has a valid claim to Jerusalem. That does not mean that it could not agree to a solution whereby the City would be internationalized, or whereby it would be divided or controlled jointly. Jerusalem is one issue among several to be resolved between Palestine and Israel, and the parties are free to make concessions on one issue in order to gain an advantage on another.

The danger in the current situation is that while legal entitlement favors the PLO, *de facto* control rests with Israel, and Israel enjoys a preponderance of military and political power relative to the PLO. Moreover, even since 1991, when the negotiation process began, and since 1993, when Israel agreed to resolve the issue of Jerusalem, Israel has continued to take land in Jerusalem and insert more of its own citizens in an apparent effort to create a situation that will not be reversed.

A solution for Jerusalem that ignores legal entitlement runs the risk of sowing the seeds of new conflict, rather than bringing long-term peace. To be sure, a solution for Jerusalem in accord with principle will anger many Jews, particularly those of the political right. In the long term, however, a solution that follows principle holds greater prospect of providing a lasting peace. The international community has a role to ensure an equitable solution. If an inequitable solution is reached, the decades of hostility in the region will not end.

86. OVENDALE, *supra* note 43, at 180.

87. U.N. CHARTER, art. 51.

88. *Id.*