Jerusalem – Some Jurisprudential Aspects

Ruth Lapidoth
I. INTRODUCTION

The title of this paper raises a conceptual problem: does the conflict about Jerusalem indeed have legal or jurisprudential aspects? Conflicts are usually classified as either political, on the one hand, or legal, on the other. Whereas in a political conflict the parties disagree on what law to adopt, in a legal conflict the disagreement concerns the interpretation and application of existing law. Like most other aspects of the Arab-Israel conflict, the dispute about Jerusalem is primarily of a political nature.

Nevertheless, several reasons compel study of the legal dimension. First, though essentially of a political nature, the dispute also has some legal aspects. Second, the interested parties tend to define and justify their claims by relying on legal arguments. Finally, once a solution emerges, it will have to be formulated in legal terms and laid down in a legally binding document.

Legal considerations are relevant in three main spheres. First, the City is the subject of conflicting national claims of two peoples—Israelis and Palestinian Arabs. These claims raise the question of sovereignty over Jerusalem, and of the right of a State or another entity to determine the location of its own capital. Second, the problem of the Holy Places involves legal considerations, including the question of who should estab-
lish and who should supervise freedom of access and of worship. Moreover, some places are holy for two religions, thereby exacerbating tensions. Last but not least, the municipal administration of this very heterogeneous City requires some legal analysis.

In this paper a brief examination of some relevant landmarks in the recent history of the City will be followed by a short presentation of various opinions on the City's legal status. A discussion of recent developments in the concept of sovereignty will lead to some reflections on the future of the City. I wish to emphasize that in this article I do not intend to present the attitude of the government of Israel, nor to analyze the various claims to sovereignty over the City.

II. SOME RELEVANT LANDMARKS IN THE HISTORY OF JERUSALEM

In 1517, soon after the end of the Middle Ages, the City, together with the rest of Palestine, came under Ottoman rule for a period of four hundred years. Since 1830, the majority of the City's population has been Jewish—at first merely a relative majority but subsequently an absolute one.

The Holy Places in the City have often been a source for dispute. In the nineteenth century a bitter controversy arose when certain European countries extended their protection over various Christian denominations in Palestine and over the places that were holy to them. The Ottoman government promulgated a number of firmans, the most important one being that of 1852, in order to regulate the status of the various churches at the Holy Places. The 1852 firman concerned certain Holy Places and determined the powers and rights of the various denominations regarding those places. This arrangement became generally known as the status quo, and has been applied to the Church of the Holy Sepulchre and its


3. “Ferman [sic], in Turkish, denotes any order or edict of the Ottoman sultan. In a more limited sense it means a decree of the sultan headed by his cypher (tughra) and composed in a certain form . . . .” Encyclopedia of Islam, New edition, Vol. II (1965).
dependencies, the Convent of Deir al-Sultan, the Sanctuary of the Ascension (on the Mount of Olives), the Tomb of the Virgin Mary (near Gethsemane) in Jerusalem, the Church of the Nativity, the Milk Grotto, and the Shepherds’ Field near Bethlehem. The status quo obtained international recognition at the 1856 Conference of Paris (after the Crimean War), and by the 1878 Treaty of Berlin. The British mandatory authorities in Palestine extended the principles of the status quo also to the Western (or Wailing) Wall in Jerusalem and to Rachel’s Tomb (near Bethlehem).  

Neither the Balfour Declaration made by Britain in 1917, nor the Terms of the British Mandate for Palestine drafted by the Council of the League of Nations, referred to Jerusalem. The Terms of the Mandate, however, did address the Holy Places; the Mandatory power was requested to preserve existing rights in those places and to ensure free access and worship, subject to requirements of public order and decorum. A Commission which was to “study, define and determine” the various rights and claims in connection with the Holy Places was never established due to lack of agreement among the Powers about its composition. Shortly after the Mandate came into force, Britain adopted the Palestine (Holy Places) Order in Council of 1924 under which matters concerning the Holy Places were excluded from the jurisdiction of the courts and were entrusted to the British High Commissioner.

In 1947, after the Second World War, Britain requested the United Nations General Assembly to consider the Palestinian question, and on November 29, 1947, the General Assembly adopted its famous resolution on the future government of Palestine. Part III of that resolution dealt with Jerusalem. The General Assembly recommended the establishment of a “corpus separatum under a special international regime.” The United Nations’ Trusteeship Council and a Governor appointed by it would administer the corpus separatum. In the economic sphere, the General Assembly recommended the establishment of an economic union be-
City of Jerusalem: Boundaries proposed by the Ad-Committee on the Palestinian Question
tween Jerusalem and the Jewish and Arab States that were to be established in Palestine.

The General Assembly resolution received the consent of the national leadership of the Jewish Community of Palestine, but the Arabs categorically rejected it and immediately initiated attacks on Jewish towns and villages, including the Jewish neighborhoods in Jerusalem.

On May 14, 1948, when the British Mandate over Palestine was about to end, representatives of the Jewish Community in Palestine proclaimed the establishment of the State of Israel. The declaration does not mention Jerusalem, but it foresees that Israel "will safeguard the Holy Places of all religions." Immediately after the establishment of the State, the armies of five Arab States invaded Israel. The armies of Jordan (or Transjordan as it then was called) and Egypt operated in the Jerusalem region. The battle for Jerusalem was fierce, partly because, for a time, the Jewish areas were cut off from the coastal plain. The battle for the Old City ended with the surrender of the Jewish Quarter to the forces of the Jordanian Arab Legion.

Even before the fighting abated, Jordan and Israel reached a special agreement under the auspices of the United Nations regarding the Jewish enclave on Mount Scopus. The parties agreed to neutralize this area as well as the adjoining area of the Augusta Victoria hospital which was under Jordanian control, and to assign these areas to United Nations protection.

When the fighting ended, Jordanian forces were in control of the eastern parts of the City, whereas the western sector was under Israeli control. In November 1948, a truce came into force throughout the City, and at the beginning of 1949 Jordan and Israel signed an armistice agreement. This agreement gave rise to various practical as well as legal questions.

14. 1 Laws of the State of Israel, Authorized Translation 3 (5708-1948).
17. See Shabtai Rosenne, Israel's Armistice Agreements with the Arab States (1951).
Proclamations made by the Israeli Minister of Defence in 1948, and the Area of Jurisdiction and Powers Ordinance of 1948 applied Israeli law to West Jerusalem. That ordinance provided that the law in force in the State of Israel should also apply to any part of Palestine which the Minister of Defence would designate by Proclamation as under occupation of the Israel Defence Forces.

At the end of 1949, following the renewed debate on Jerusalem in the United Nations General Assembly, Israel's Prime Minister David Ben-Gurion announced in the Knesset (Israel's parliament) that Jerusalem was an "inseparable part of the State of Israel" and its "Eternal Capital." The Knesset approved this position.

In 1950, a conference of dignitaries from areas conquered by Jordan in 1948 convened in Jericho. The participants expressed their wish to be part of Jordan, and consequently the King of Jordan proclaimed the annexation of the West Bank (including Jerusalem) to his Kingdom.

During the years 1948-1952, there was a number of debates at the United Nations on the future of Jerusalem, and the Trusteeship Council prepared a draft statute for the City, but from 1952 until the Six-Day War in 1967, no significant debates occurred.

When the Six-Day War broke out, Jordan attacked West Jerusalem, despite Israel's promise that if Jordan refrained from attacking Israel, Israel would not attack Jordan. A few days later, Israel Defense Forces recovered the area taken by the Jordanian army ("Government House") and expelled the Jordanian army from East Jerusalem and the West Bank. Opinions have differed between Israeli (and most western) lawyers on the one hand, and Arab lawyers on the other, as to which party was the aggressor in the Six-Day War.

When the fighting ceased, Israel sought to include East Jerusalem under its jurisdiction. The Knesset passed the Law and Administration

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18. For English translation see JERUSALEM-SELECTED DOCUMENTS, supra note 1, at 27-29 (reproducing Proclamations number 1, 2 of the Israel Defense Forces in Jerusalem, August 2, 1948, and Order number 1 of the Military Commander in the Occupied Area of Jerusalem).

19. 1 LAWS OF THE STATE OF ISRAEL, Authorized Translation 64 (5708-1948).


21. Id.

22. 1 MARJORIE M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 1163-68 (1963), reprinted in JERUSALEM-SELECTED DOCUMENTS, supra note 1, at 145-47.


On 27 June 1967, following the Israeli conquest of east Jerusalem, the Israeli Parliament (the Knesset) guaranteed free access to the Holy Places to all religions. On 29 November 1967 this right was specifically extended to citizens of those Arab States which declared themselves still at war with Israel, or which refused to recognize Israel as a sovereign State.

In the Israel-Palestinian negotiations that began at Madrid on 30 October 1991, Israel declared that the future status of Jerusalem was not negotiable, and that the city would remain the 'undivided' capital of Israel.

This policy was re-iterated by the Rabin government after it came to power in June 1992.

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Ordinance (Amendment No. 11) Law, 1967, which authorizes the Government to apply the law, jurisdiction, and administration of Israel to areas formerly part of Mandatory Palestine.25 Similarly, the Municipalities Ordinance was amended to authorize the extension of the municipal boundaries where Israel’s jurisdiction had been applied in accordance with the above amendment.26 The government of Israel issued an appropriate order to apply Israeli law to the eastern sector of Jerusalem, which also was included within the jurisdiction of the Jerusalem municipality.27 Israeli law, however, has granted East Jerusalemites certain facilities by establishing special arrangements by virtue of the Legal and Administrative Matters (Regulation) Law [Consolidated Version] of 1970.28 The most conspicuous examples of the differences between the law as applied to Israel and to East Jerusalem are the system of education, and rules on foreign currency. Schools in the eastern neighborhoods have taught the Jordanian curriculum, and the Jordanian dinar constitutes legal tender along with the Israeli shekel.

A special arrangement also applies to matters of nationality. Residents of East Jerusalem have not automatically acquired Israeli nationality, but may do so by application. So far however, only a small number of residents of the eastern sector of the City have applied for Israeli citizenship, although apparently the numbers have recently risen considerably.

Israel has increased the municipal boundaries of Jerusalem to extend from Atarot in the north to Rachel’s Tomb in the south, and from Ein Kerem in the west to the eastern slopes of Mount Scopus.

Various United Nations bodies have sharply criticized the measures taken by Israel in Jerusalem.29 Did these acts constitute annexation of the eastern parts of Jerusalem? In July 1967, the then Minister of Foreign Affairs, Abba Eban, informed the United Nations Secretary-General in writing that these acts did not constitute annexation, but only administrative and municipal integration.30 Israel’s Supreme Court, however, has held in a number of deci-

26. Id.; see also ARAB-ISRAEL CONFLICT DOCUMENTS, supra note 5, at 130.
sions that, under Israeli law, the eastern sectors of Jerusalem had become a part of the State of Israel.\textsuperscript{31}

Immediately after the fighting in Jerusalem ended in June 1967, Prime Minister Levi Eshkol convened the spiritual leaders of various communities and reassured them of Israel's intention to protect all Holy Places and to permit free worship.\textsuperscript{32} A few days later the Knesset passed the Protection of the Holy Places Law of 1967, which ensures protection of the Holy Places against desecration as well as freedom of access thereto.\textsuperscript{33}

Security Council Resolutions 242 and 338 of November 22, 1967 and October 22, 1973\textsuperscript{34} respectively did not mention Jerusalem, nor did Jerusalem feature in the 1978 Camp David Accords between Israel and Egypt\textsuperscript{35} due to fundamental differences between the parties on the issue. Each of the participants in the Camp David Conference however, stated its position in a letter sent to the other via the President of the United States.\textsuperscript{36} Israel's Prime Minister Menachem Begin stated that, in accordance with legislation from 1967, "Jerusalem is one city, indivisible, the Capital of the State of Israel."\textsuperscript{37} Egypt's President, Anwar el-Sadat, on the other hand, stated that "Arab Jerusalem is an integral part of the West Bank, . . . [and] should be under Arab sovereignty."\textsuperscript{38} At the same time President Sadat determined that "[e]ssential functions in the City should be undivided, and a joint municipal council composed of an equal number of Arab and Israeli members can supervise the carrying out of

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31. \textit{See infra} note 69 and accompanying text (discussing the United States' attitude to the Camp David accord).
36. \textit{Jerusalem-Selected Documents, supra} note 1, at 299-300 (listing letters of Anwar Sadat, Menachem Begin, and Jimmy Carter stating their respective positions on the status of Jerusalem). The contents of the letter by President Carter will be discussed below.
37. \textit{Id.} at 300.
38. \textit{Id.} at 299.
\end{flushright}
these functions." He added that "in this way, the City shall be undivided." In 1980, the Knesset adopted a new law concerning Jerusalem - the Basic Law: Jerusalem Capital of Israel. This law states that "Jerusalem, complete and united, is the capital of Israel," that it is "the seat of the President of the State, the Knesset, the Government, and the Supreme Court." It states further that the Holy Places shall be protected, and that the Government has to provide for the development and prosperity of Jerusalem. In fact, the contents of the law does not include any innovation. The significance of the designation of this statute as a Basic Law is uncertain, particularly because none of its provisions have been entrenched. Nevertheless, its adoption aroused resentment in the international community. The Security Council condemned it as "a violation of international law," and called upon member States with embassies situated in Jerusalem to withdraw them from the City. Thirteen embassies left the City following that resolution. In 1982, however, the Embassy of Costa Rica returned to West Jerusalem, followed by that of El Salvador.

In his 1982 peace initiative, United States President Ronald Reagan declared inter alia that the status of Jerusalem should be determined through negotiations, that the Palestinian inhabitants of the eastern part of the City should be permitted to participate in the elections for autonomous institutions, and that the City should remain undivided.

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39. Id.
40. Id.
41. 34 LAWS OF THE STATE OF ISRAEL, Authorized Translation 209 (5740-1979/80), reprinted in JERUSALEM-SELECTED DOCUMENTS, supra note 1, at 322.
42. Id.
43. Id.

On November 9, 1995, the Supreme Court of Israel delivered a judgment addressing in detail the status of basic laws. Civil Appeal 6821/93, United Mizrahi Bank Ltd. et al. v. Cooperative Village Migdal et al. (Not yet published. An English summary has been published in two parts, in the Jerusalem Post of January 1 and January 8, 1996.). As a consequence of the reasoning of the Court, the Basic Law: Jerusalem, Capital of Israel, in all probability, may be amended only by a subsequent basic law.

In 1988, King Hussein of Jordan, who had declared in 1950 that he annexed the West Bank including Jerusalem, announced that he intended to dismantle the legal and administrative links between the West Bank and Jordan. In the same year, the Palestine National Council of the Palestine Liberation Organization [PLO] proclaimed the establishment of the State of Palestine with Jerusalem as its capital. This proclamation was recognized by many states. A mere proclamation, however, even if followed by large scale recognition, is not sufficient for the establishment of a State, unless the four prerequisites for the existence of a State are present: territory, population, effective government, and the ability to conduct international relations.

III. OPINIONS ON THE LEGAL STATUS OF JERUSALEM

Many statesmen as well as experts in international law have expressed their opinion on the status of Jerusalem. In the framework of the present article, only the most representative ones are presented, and we will limit ourselves to stating those opinions, without analyzing the pros and cons.

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47. Arab-Israel Conflict Documents, supra note 5, at 339-43.
48. Id. at 344-56.
50. As the western parts of the City have not changed significantly since 1949, we can analyze opinions on their status without a temporal division. The eastern sectors changed hands, however, in 1967, and therefore it may be useful to divide the discussion accordingly. For a concise overview of the various opinions, see Ruth Lapidoth & Moshe Hirsch, Jerusalem-Political and Legal Aspects 11-15 (1994) (in Hebrew); Moshe Hirsch et al., Whither Jerusalem? Proposals and Positions Concerning the Future of Jerusalem 15-24 (1995). This article only reproduces opinions on the lex lata. For a summary of the various proposals de lege ferenda, see id. at 25-144; Naomi Chazan, Negotiating the Non-Negotiable: Jerusalem in the Framework of an Israeli-Palestinian Settlement in Emerging Issues (International Security Studies Program, American Academy of Arts and Sciences, Cambridge, MA, Occasional Paper No. 7 1991); Gershon Baskin, Jerusalem of Peace - Sovereignty and Territory in Jerusalem's Future (1994); Dore Gold, Jerusalem-Final Status Issues: Israeli-Palestinians, Study No. 7 (Tel Aviv, The Jaffee Center for Strategic Studies, Tel Aviv University, 1995); proposal prepared by the Arab Studies Society in 1995 (a summary in Hebrew was published in the Jerusalem weekly Kol Ha-eeer of October 20, 1995).
There are four basic opinions on West Jerusalem. According to the first, Israel lawfully acquired sovereignty in 1948. When Britain left the area, a vacuum of sovereignty ensued which could be validly filled only by lawful action. Since Israel acquired control of west Jerusalem in 1948 by a lawful act of self-defence, she was entitled to fill that vacuum and thus became the lawful sovereign.51

Under a second opinion, sovereignty over Jerusalem is suspended until a comprehensive settlement is agreed upon.52

According to the third theory, the Palestinian Arab people have had and still have “legal sovereignty” over the whole of Palestine including Jerusalem since the mandatory period.53

Proponents of the fourth opinion maintain that the status of Jerusalem is still subject to the United Nations General Assembly resolution of 1947 which recommended the establishment of a corpus separatum under a special international regime and administered by the United Nations.54

Most foreign nations have not adopted a clear-cut policy on the status of West Jerusalem.55 Although their approaches differ, certain similarities emerge with regard to basic questions. Foreign States were not prepared to recognize the legality of Jordanian or Israeli rule over zones of the City under their respective control. One manifestation of this attitude was that foreign consuls stationed in the City refused to apply to Jordan or Israel for the grant of an exequatur, i.e. permission to carry out their functions in the City. The refusal to recognize Israeli rule over the western sector was apparent for example in the 1952 case of Heirs of


52. HRH CROWN PRINCE HASSAN BIN TALAL, A STUDY ON JERUSALEM 24-27 (1979); see also G.I.A.D. Draper, The Status of Jerusalem as a Question of International Law, in THE LEGAL ASPECTS OF THE PALESTINE PROBLEM WITH SPECIAL REGARD TO THE QUESTION OF JERUSALEM 154-63 (Hans Koechler ed., 1981).


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Shababo v. Roger Heilen, the Consulate General of Belgium and the Consul General of Belgium in Jerusalem. In that case, a driver of the Belgian Consulate had been involved in a road accident that caused the death of Mr. Shababo. Family members of the deceased sued the driver, the Consulate, and the Consul General, claiming damages. The incident was the subject of several judgments of the Jerusalem District Court. In the first hearing, the driver and his principals challenged the jurisdiction of the Israeli courts over the accident since it had taken place in Jerusalem. The court dismissed that argument.

Despite this non-recognition of Israeli sovereignty, most states have nevertheless accepted the de facto applicability of Israeli law and none has so far demanded that the laws of occupation including the 1949 Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War be applied.

There were also four main opinions on the status of East Jerusalem during the period 1949-1967 (the time it was under Jordanian rule). According to the first opinion, during that time the area was under a vacuum of sovereignty: Britain had abandoned sovereignty, but Jordan could not fill this gap because it had occupied East Jerusalem by an illegal act of aggression.

Under another theory, similar to the parallel one concerning west Jerusalem, the Palestinian Arab people has had, and continues to have, title to "legal sovereignty" over the whole of Palestine, including East and West Jerusalem.

A third opinion recognized Jordanian sovereignty over East Jerusalem, derived from the exercise of the right of self-determination by the inhabitants, in view of their wishes expressed by the resolution adopted by


57. See, e.g., JERUSALEM-SELECTED DOCUMENTS, supra note 1, at 147-48 (Statement by the Minister of State of the United Kingdom in the House of Commons, April 27, 1950); Id. at 447-49 (letters of Janet G. Mullins, United States Assistant Secretary of State for Legislative Affairs, to Lee H. Hamilton, Chairman of the Subcommittee on Europe and the Middle East, United States House of Representatives, June 29, Sept. 6, 1989) (discussing the lease of property in Jerusalem for a United States diplomatic mission).

58. Id. at 449.

59. For references see supra note 51.

60. For references, see supra note 53; see also Michael Van Dusen, Jerusalem, the Occupied Territories and the Refugees, in MAJOR MIDDLE EASTERN PROBLEMS IN INTERNATIONAL LAW 51 (Majid Khadduri ed., 1972); John Quigley, Old Jerusalem: Who's to Govern, 20 DENY. J. INT'L L. & POL. 145, 164-66 (1991).
the notables in Jericho in 1950.\footnote{Yoram Dinstein, \textit{Autonomy}, in \textsc{Models of Autonomy} 291, 300 (Yoram Dinstein ed., 1981). For references on the Jericho meeting, see \textit{supra} note 22. It is not known whether Dinstein has changed his opinion on the question of sovereignty due to Jordan's disengagement from the West Bank. See \textit{supra} note 47 and accompanying text.} Finally, proponents of the fourth opinion claim that the \textit{corpus separatum} solution still applies to both East and West Jerusalem.\footnote{For references see \textit{supra} note 54.}

How were these opinions influenced by the changes that occurred in 1967? Under the first opinion, the vacuum of sovereignty existed until Israel occupied east Jerusalem by a lawful act of self-defence and thus was entitled to fill the gap.\footnote{For references see \textit{supra} note 51.} Under a slightly different interpretation Israel has the strongest relative title to the area in the absence of a lawful "sovereign reversioner" due to Jordan's lack of valid sovereignty.\footnote{Yehuda Z. Blum, \textit{The Juridical Status of Jerusalem} (1974); Yehuda Z. Blum, \textit{The Missing Reversioner: Reflections on the Status of Judea and Samaria}, 3 \textsc{Israel L. Rev.} 279 (1968).}

The Six-Day War did not have any effect upon the opinion under which the Palestinian Arab people have "legal sovereignty" over the whole of Palestine irrespective of the factual situation.\footnote{For references see \textit{supra} note 53.}

The expert who recognized Jordanian sovereignty in East Jerusalem expressed the opinion that this sovereignty survived the war, but that Israel is a lawful occupant of those areas since she occupied them in a war of self-defence.\footnote{For references see \textit{supra} note 61.} The \textit{corpus separatum} theory was not affected by the war.\footnote{For references see \textit{supra} note 66.}

In practical terms, the international community did not recognize the sovereignty of either Jordan or Israel. Moreover, since 1967 the United Nations Organization including the Security Council has repeatedly stated that East Jerusalem is occupied territory subject to the Fourth 1949 Geneva Convention.\footnote{E.g. Security Council Resolution 465, of March 1, 1980, \textsc{SCOR}, 35th year, 1980, Resolutions, at 5; Security Council Resolution 478, of August 20, 1980, \textit{id.}, at 14, both reprinted in \textsc{Jerusalem-Selected Documents}, at 311, 351.}

The attitude of the United States was expressed \textit{inter alia} in the context of the Camp David accords in a letter sent by President Carter to both Egypt and Israel.\footnote{Letter from Jimmy Carter, President of the United States to Anwar Sadat, President of Egypt and to Menachem Begin, Prime Minister of Israel (Sept. 22, 1978), in \textsc{Jerusalem-Selected Documents}, \textit{supra} note 1, at 300.} The President wrote that the position of the United States remained as stated by Ambassador Arthur Goldberg at the United
Nations General Assembly in 1967, and subsequently by Ambassador Charles Yost in the Security Council in 1969. There is, however, a difference between the speeches of the two Ambassadors. While they both emphasized that the actions of Israel in the City were merely provisional and that the problem of Jerusalem's future should be settled by negotiations, Ambassador Yost added that East Jerusalem was occupied territory to which the Fourth 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War applied. This position, however, did not prevent the United States from requesting Israel to extradite a person who lived in the eastern sector of the City.

The attitude of the European Community can be inferred from a 1980 declaration on the Middle East which included a paragraph on Jerusalem:

The Nine [member states] recognize the special importance of the role played by the question of Jerusalem for all the parties concerned. The Nine stress that they will not accept any unilateral initiative designed to change the status of Jerusalem and that any agreement on the City's status should guarantee freedom of access for everyone to the Holy Places.

The Israeli courts, on the other hand, have held that the eastern sectors of Jerusalem had become part of the State of Israel. One of the earlier cases on this question is Ruidi and Maches v. Military Court of Hebron. This case involved an antiquities dealer from Hebron who transferred antiquities from Hebron to East Jerusalem, without first obtaining an export license as required by the Jordanian antiquities law which applied on the West Bank. The dealer, charged with exporting without a license, responded that East Jerusalem was not foreign territory in relation to the West Bank. The Supreme Court, however, rejected this argument since it considered that the eastern sectors of Jerusalem had become part of Israel.

Perhaps the most comprehensive discussion of the status of Jerusalem under Israel law as well as under Jewish law is included in Justice

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73. 24(2) Piskei-Din 419 (1970). For a summary in English, see JERUSALEM-SELECTED DOCUMENTS, supra note 1, at 502-06.
Menachem Elon's judgment in the more recent case of The Temple Mount Faithful Association et al. v. Attorney General et al., decided in 1993. In this case, the petitioners requested the High Court of Justice to order the Attorney-General and various other Israeli authorities to prosecute the Muslim Waqf for having undertaken on the Temple Mount certain works without the necessary permit. The High Court decided not to interfere in the discretion of the relevant authorities. In reaching its conclusion, the Court emphasized that the Temple Mount is part of the territory of the State of Israel and that the sovereignty of the State extends over unified Jerusalem in general and over the Temple Mount in particular. Hence, all laws of Israel apply to the Temple Mount, including those laws guaranteeing freedom of worship, right of access to, and protection against desecration, of the Holy Places.

Jerusalem's turbulent legal history, and the conflicting opinions on its status, may explain the hard bargaining over the City in the peace process.

IV. JERUSALEM AND THE RECENT STAGES OF THE PEACE PROCESS

The peace process started long ago, but this paper reviews only the more recent stages. In 1993, the PLO and Israel conducted secret negotiations in Oslo. As a result, certain letters were exchanged and a Declaration of Principles was initialled in Oslo and later signed in Washington D.C. on September 13, 1993. This text constituted a turning point in the attitude of the two parties on the question of Jerusalem. The parties agreed that Jerusalem would not be included in the interim self-government arrangements—a concession by the Palestinians. Israel, on the other hand, conceded that Jerusalem would be one of the subjects to be dealt with in the framework of the negotiations on the “permanent status” to start in 1996. In addition, it was agreed that “Palestinians of...
Jerusalem who live there will have the right to participate in the election process for the Interim Self-Government Authority for the West Bank and Gaza.\textsuperscript{78}

These provisions raise a few legal issues. First and foremost, what is “Jerusalem”? Probably the parties had East Jerusalem in mind, since it seems that the dispute today concerns only that part. The Palestinians, however, may also have certain claims with regard to West Jerusalem, including, for example the rights of refugees who left those areas. In addition, if the parties agree to change the status of East Jerusalem, the question of freedom of access between the two parts could also arise.

A more burning question concerns the confines of Jerusalem: does the provision in the Declaration of Principles envision the City in the limits that existed under the British Mandate? Or within the lines recommended in 1947 by the United Nations General Assembly?\textsuperscript{79} Or those established by Israel and Jordan in the wake of the 1949 Armistice Agreement?\textsuperscript{80} Or those adopted by Israel after the unification of the City in 1967?\textsuperscript{81} This question has no great bearing on the problem of the Holy Places since most of them are situated in the Old City, which, under any definition, falls within “Jerusalem.” But the matter is crucial with regard to the new Jewish neighborhoods established after 1967, most of which only fall within the town limits established in 1967. Will these neighborhoods be considered as part of the West Bank or of Jerusalem? When concluding the above Declaration of Principles, Israel presumably intended that its terms carry the meaning accorded them under Israel’s internal legislation and, therefore, the term “Jerusalem” relates to the area included in the municipal jurisdiction of the City under Israeli law, as described in the historical introduction.\textsuperscript{82}

It is unknown how the PLO intended to define the contours of Jerusalem when it signed the Declaration of Principles. A strong presumption exists, however, in favor of the borders that have been practically in place.

\textsuperscript{78} Id. Annex I, para 1.
\textsuperscript{79} The proposed boundaries appear on a map, Annex B to the United Nations Resolution 181 (II), reprinted in \textit{Arab-Israel Conflict-Documents}, supra note 5, at 53.
\textsuperscript{80} General Armistice Agreement, April 3, 1949, Jordan-Isr., art. V, 42 U.N.T.S. 304, reprinted in \textit{Arab-Israel Conflict-Documents}, supra note 5, at 88-89 (establishing boundaries); see also map in \textit{Gilbert}, supra note 1, at 101, and in \textit{Bahat}, supra note 1, at 77.
\textsuperscript{81} \textit{Martin Gilbert}, \textit{The Arab-Israeli Conflict: Its History in Maps} 123 (5th ed. 1992); \textit{Bahat}, supra note 1, at 81. In 1993, Israel slightly changed those borders; see also \textit{Martin Gilbert}, \textit{Jerusalem Past and Future} 18 (1994). These changes primarily relate to the western boundary of the City.
\textsuperscript{82} See supra notes 25-28 and accompanying text.
for the last twenty-nine years, in particular since the PLO did not express a different opinion upon signing the Declaration.

If the parties agree, however, negotiations on Jerusalem could also encompass a larger area. This enlargement could serve two purposes. First, the inclusion of part of the metropolitan area of Jerusalem would be helpful for demographic, technical, and economic purposes like water supply and disposal of sewage, as well as for communication and transportation planning. Second, the enlargement could facilitate the achievement of a compromise with regard to the national aspirations of the parties and could perhaps accommodate co-existing national institutions of both parties.83

Another question concerns the possible substantive scope of negotiations on Jerusalem. The three principal areas of dispute probably are: national aspirations, Holy Places, and municipal government. Will Israeli negotiators be restricted by the 1980 Basic Law: Jerusalem, Capital of Israel?84 It seems likely that this law does not prevent the government from negotiating on the status of the Holy Places,85 nor on municipal arrangements.86 Even in the political sphere, the law affords the negotiators considerable leeway since the law provides only that Jerusalem is Israel’s capital, and that it must be united. The government could of course initiate a proposal to amend the Basic Law, but future negotiations probably will not require such a change.

The second provision in the Declaration of Principles relating to Jerusalem concerns the elections for the “Council”—the Palestinian Self-Government Authority.87 As already mentioned, the Declaration stated that “Palestinians of Jerusalem who live there will have the right to participate in the election process, according to an agreement between the two sides.”88 This provision has raised several legal questions. The Is-

84. See supra note 41 and accompanying text.
85. In an unpublished 1993 paper, Dr. Moshe Hirsch has outlined some of the possible alternatives in this sphere. The author is grateful to him for having let her consult this manuscript.
86. Id.
87. Declaration of Principles, supra note 76, art. 1.
88. Id. Annex I, para 1. The second and third paragraphs read as follows:
2. In addition, the election agreement should cover, among other things, the following issues:
   a. the system of elections;
   b. the mode of the agreed supervision and international observation and their personal composition; and
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The Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip,\(^9\) signed on September 28, 1995, and an additional agreement on the Initial Registration Canvass, signed on September 23, 1995, resolved some of these problems. The first question that comes to mind is: Who are Palestinians? Will a person’s declaration of being Palestinian be accepted as binding, or will ethnic or religious affiliation be considered? The agreements do not address these questions but the Palestinian Election Law of December 7, 1995 has dealt with them (Section 7). The question of defining Jerusalem also remains. Presumably, the existing municipal boundaries were to apply for the purpose of qualifying for participation in these elections. The expression “who lives there” begs another question: what are the criteria for “living there”? How long must a person have lived in Jerusalem to qualify to participate in the elections? The 1995 agreements provide a practical answer to this matter. For all the relevant areas in the West Bank and the Gaza Strip, Electoral Registers were to be compiled on the basis of a canvassing operation undertaken by Polling Station Commissions, established by the Central Election Commission, and appointed by the Palestinian Authority. For the Palestinians of Jerusalem, however, no official Polling Station Commission was foreseen by the Agreement, but it was stipulated that:

a. A canvass of Palestinians of Jerusalem will be undertaken, on a contractual basis, by the Ibrahimiya College, which will contract Palestinian teachers of Jerusalem possessing Jerusalem identity cards to conduct the canvass. The canvass documentation shall accordingly not bear any titles or emblems. b. The results of this canvass will be provided to the relevant DEO [District Election Offices] which will be responsible for their inclusion in the initial draft register.\(^9\)

The results of this canvass were submitted to a joint Palestinian-Israeli Committee.

The inclusion of a person in the Electoral Register pursuant to canvassing does not confer the legal right to live in Jerusalem and to be included

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\(^9\) Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, Sept. 28, 1995 [hereinafter Interim Agreement]. So far it was published by the Israel Information Center.

\(^9\) The Initial Registration Canvass Agreement of Sept. 23, 1995, art. 4. The Agreement was published by the Israel Information Center.
in the Population Register of the City: "The inclusion of any person on the Electoral Register at any address shall be without prejudice to the question of that person's legal abode at that address." The aim of this provision was to permit the numerous West Bankers who practically live in Jerusalem to participate in the vote, without granting them a legal right to live there.

But the most difficult question concerns the expression "participate in the election process." Does it refer only to the active right to vote, or does it also include the passive right to be elected? The parties probably had contradictory intentions with regard to the meaning of this provision when they signed the Declaration of Principles.

The distinction between active and passive voting is not merely technical, since the granting of a passive right to be elected could be interpreted as incompatible with Israel's sovereignty over united Jerusalem, while a mere right of active voting may more easily be reconciled with that sovereignty. The 1995 Interim Agreement lays down that only a Jerusalemite who has an additional address in the West Bank, can be elected, and he will represent the other area, not the city of Jerusalem: "Every candidate for the Council . . . must have a valid address in an area under the jurisdiction of the Council in the constituency for which he or she is a candidate . . . Where a candidate has more than one valid address, he may enter all such addresses on his nomination paper."

The parties also have reached a compromise concerning the location of the polling stations at which the East Jerusalem Arabs were to cast their votes. The Palestinian Election Law has established the constituencies (in its Section 5). The municipal area of Jerusalem was included in a Jerusalem constituency which is much larger than the municipal area. In the elections which took place on January 20, 1996, most Jerusalemites voted within the boundaries of this constituency, namely in Abu Dees, beyond the limits of the city of Jerusalem.

The Interim Agreement, however, permitted a small number of Palestinians, to vote in post offices within the boundaries of the municipality of Jerusalem proper. The number of those allowed to vote at the desig-

91. Interim Agreement, supra note 89, Annex II, art. II(1)(b).
92. Declaration of Principles, supra note 76, Annex I.
94. Interim Agreement, supra note 89, Annex II, art. III(1)(b).
95. See HA'ARETZ, Jan. 18, 1996, at 4A.
96. Interim Agreement, supra note 89, Annex II, art. VI(2)(a). This article states that "[a] number of Palestinians of Jerusalem will vote in the elections through services rendered in post offices in Jerusalem, in accordance with the capacity of such post offices." Id.
nated post offices depended upon "the capacity of such post offices." In fact, about 4,500 people, including mainly old and sick people, voted at the post offices.\textsuperscript{97} Voting at the post office was procedurally somewhat different from voting at a regular polling station. This procedural distinction was intended to emphasize that Jerusalem is not part of the areas under the jurisdiction of the Palestinian Council. In Jerusalem, election campaigning required permits from Israel.

About a month after the signing of the 1993 Declaration of Principles, Israel's Foreign Minister Shimon Peres sent a letter concerning Palestinian institutions in East Jerusalem to the Foreign Minister of Norway, Johan Jurgen Holst.\textsuperscript{98} The letter remained secret for some time, and its discovery aroused much criticism in Israel. According to this letter,

\begin{quote}
I wish to confirm that the Palestinian institutions of East Jerusalem and the interests and well-being of the Palestinians of East Jerusalem are of great importance and will be preserved. Therefore, all the Palestinian institutions of East Jerusalem, including the economic, social, educational and cultural, and the holy Christian and Moslem places, are performing an essential task for the Palestinian population. Needless to say, we will not hamper this activity, on the contrary, the fulfilment of this important mission is to be encouraged.\textsuperscript{99}
\end{quote}

The meaning of this text and its legal or political effect raise difficult questions of interpretation.\textsuperscript{100}

Once the ice was broken between Israel and the Palestinians, the road was open for progress in negotiations between Israel and Jordan. The parties agreed on a "Common Agenda" on September 14, 1993, adopted a Joint Declaration on July 25, 1994, and on October 26, 1994 signed a Peace Treaty.\textsuperscript{101} This Treaty provides, \textit{inter alia}, that "Israel respects the present special role of the Hashemite Kingdom of Jordan in Muslim Holy shrines in Jerusalem. When negotiations on the permanent status will take place, Israel will give high priority to the Jordanian historic role in these shrines."\textsuperscript{102}

In light of Israel's improved relations with both the Palestinians and Jordan, several other countries have established or re-established diplomatic relations with Israel. The normalization of relations between Israel

\begin{footnotes}
\textsuperscript{97} Ha'aretz, Jan. 18, 1996, at 4A.
\textsuperscript{98} Jerusalem Post, June 7, 1994, at 1.
\textsuperscript{99} Id.
\textsuperscript{100} For an analysis of these questions, see Lapidoth, supra note 24, at 428-30.
\textsuperscript{102} Id. art. 9, reprinted in 34 I.L.M. 50. For an analysis of this provision, see Lapidoth, supra note 24, at 430-32.
\end{footnotes}
and the Holy See, as expressed in the Fundamental Agreement of December 30, 1993, is of particular interest. 103 Although this document does not deal expressly with Jerusalem, some of its provisions are relevant to the City. For example, the agreement includes a commitment to favor Christian pilgrimages to the Holy Land, and the right of the Roman Catholic Church to establish schools and carry out its charitable function. The agreement includes an interesting provision under which the parties affirmed their “continuing commitment to maintain and respect the ‘status quo’ at the Christian Holy Places to which it applies.” 104 This is a reference to the status quo established in the eighteenth and nineteenth centuries by the Ottoman Empire that regulated the rights of various competing Christian churches at Holy Places in Jerusalem and in Bethlehem. 105

As already mentioned, Jerusalem will be on the agenda when negotiations on the permanent status of the West Bank and the Gaza Strip commence.

V. SOME REFLECTIONS ON THE FUTURE OF JERUSALEM

The diplomatic battle over Jerusalem is likely to be fierce and protracted, since feelings about the City are strong on all sides. It is submitted that the parties might facilitate negotiations by dividing the discussion into at least three components: national aspirations, Holy Places, and municipal government. These three components are interrelated, but for practical purposes more or less separate negotiations on each may be advisable.

Management of the sovereignty issue may be facilitated due to the changes that this concept has undergone during the present century as discussed below. 106 In defining sovereignty, a clear distinction exists between its internal and external aspects. The former denotes the highest original, as opposed to derived, power within a territorial jurisdiction. This power is not subject to the executive, legislative, or judicial jurisdiction of any foreign power or any foreign law other than public international law. The external aspect of sovereignty underlines the independence and equality of all States. It emphasizes that the State is an immediate and full subject of international law, it is not under the control

104. Id., Article 4, para. 1.
105. See supra note 4 and accompanying text (discussing the status quo).
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of any other State, and it is able and free to exercise a fair amount of State power subject to the limits of international law. Sovereignty also implicates the right to non-intervention in a State's affairs, in particular in its relations with its subjects, the exclusivity of a State's powers within its territory, the presumption in favor of a State's powers, the lack of any obligation to submit to binding third party adjudication, the right to wage war (jus ad bellum), and the theory that all international law has its source in the States' will.

The concept of sovereignty, however, has undergone great changes. The establishment of federal States, as well as the democratization and the recognition of the supremacy of international law, have reduced its impact. Although some earlier scholars believed that sovereignty was indivisible, in fact it has been divided in a number of historical and contemporary instances, such as condominiumia and federal States. In the eighteenth and nineteenth centuries, the expression “half sovereign” was used to describe entities, such as protectorates, which were dependent upon other States. Today, numerous conceptions of qualified sovereignty and of a variety of notions related to sovereignty have acknowledged its flexible nature. Residual or de jure sovereignty denotes a right to sovereignty that may be subject to certain limitations, while de facto sovereignty refers to the actual exercise of power over a territory. Others distinguish between territoriale Souveraenitaet (legitimate title to an area) and Gebietshoheit (physical control). Quebec politicians have used the expressions souveraineté-association and souveraineté partagée. The notion of spiritual sovereignty, an attribute of the Holy See, is of particular interest.

“Functional sovereignty” is a new notion based on developments in the law of the sea. According to the 1982 United Nations Convention on the Law of the Sea, the powers of littoral states vis-à-vis their continental shelves and exclusive economic zones have been defined as “sovereign rights for the purpose of exploring . . . and exploiting its natural resources.”

These developments tend to confirm that sovereignty is not indivisible and that two or more authorities may have limited, relative, differential, or functional sovereignty over certain areas, groups, or resources.


108. A term used by Amiram Gonen in an oral conversation with the author.
The demise of the notion that the State has full, comprehensive, and exclusive sovereignty is warranted by developments in the international system. Today's financial markets are interconnected worldwide by modern communication systems. People, ideas, and criminals move across borders in great numbers, while pollution and ballistic missiles reduce the relevance of those borders. The permeability of borders necessarily reduces the effectiveness and relevance of territorial sovereignty, while free trade agreements and common markets work to render notions of a State's self-contained economic system obsolete.

Finally, certain normative developments, such as the severe limitation on the right to wage war, and the development of international protection of human rights, have reduced the scope of sovereignty.

Despite these developments, it seems that time is not yet ripe to dispense with sovereignty. Public opinion in most States, particularly new, small or fledgling ones, clings to the concept of sovereignty.

It is hoped that the diminished concept of sovereignty may assist in the quest for a compromise on Jerusalem. The parties should avoid arid discussions about sovereignty—an abstract notion with strong emotional appeal, thereby hindering compromise. It may be advisable, therefore, to avoid negotiations on this notion and, perhaps agree on suspending claims to sovereignty for a considerable period. Alternatively, a more subtle concept, such as functional, differential, or associate sovereignty might replace unqualified sovereignty. One could also envisage different kinds of sovereignty for particular locations, including shared sovereignty,109 or other "mixes of sovereignty."110 Instead of bickering about sovereignty, the negotiating parties should emphasize the division or sharing of powers. This division should be based on territorial, personal, and functional considerations.

As to the Holy Places, the parties may have to consult the representatives of the millions of Christians, Jews, and Muslims who do not live in Jerusalem. Israel's policy has been to entrust the administration of each Holy Place to the religious community for which it is sacred and to provide financial aid for maintenance and renovation. Moreover, the Holy Places enjoy certain fiscal privileges.111 The representatives of a consid-


111. HIRSCH, supra note 50, at 157-60.
erable number of religions are satisfied with Israel’s policy in this matter. Since, however, others prefer to have an international ingredient or guaranty, a degree of functional internationalization may be warranted. While excluding the obsolete notion of exterritoriality, the adoption of a special statute for the Holy Places, with some observation by an interreligious group or council, might be agreed upon.

At the municipal level, Jerusalem can perhaps learn some lessons from other heterogeneous cities. A division into boroughs or arrondissements, with each borough in charge of its own local affairs, may provide a possible solution. Coordination would be achieved through a joint, over-arching municipality. The division of powers between the various boroughs can be on a territorial basis in some spheres and on a personal one in other matters.

In addition, the future settlement should also assure cooperation and coordination in the Jerusalem metropolitan area, irrespective of any political boundaries, since severing the City from its surroundings would hamper its development and engender communications and services difficulties.

Finally, one could also consider the possibility of dealing with Jerusalem in stages.

VI. Conclusion

Writers have offered very different opinions on the status of West and East Jerusalem. To date, foreign States have not recognized any sovereignty over Jerusalem, but have acquiesced in de facto Israeli control over western Jerusalem, while claiming that East Jerusalem is occupied territory. For the Israeli authorities, the whole of Jerusalem is part of the State of Israel.

This article demonstrates that there has always been a close link between Jerusalem and the Holy Places. Differences of opinion about Jerusalem concerned sovereignty over the City, while disputes about the Holy Places related to ownership or the right of possession, as well as the right to free access and freedom of worship. Those Holy Places which are sacred to only one religion or one denomination have in general not been the subject of disputes.

Documents related to the peace process have already referred timidly to both Jerusalem and its Holy Places: the provisions on the participation

112. See HIRSCH, supra note 50 at 127-28.
of East Jerusalemites in the elections for the Council, the inclusion of Jerusalem in the list of matters to be discussed at the stage of the negotiations on the permanent status, as well as the provisions on the Muslim Holy Shrines in the Treaty of Peace with Jordan.

The difficulties concerning these early provisions provide but a foretaste of the diplomatic battle over Jerusalem, scheduled formally to commence in 1996. It is likely that disagreement will beset many thorny questions, such as sovereignty, jurisdiction and powers (in particular in the sphere of security, transportation and access roads, town planning), Holy Places (primarily those that are holy to two or more denominations), and municipal matters such as water, sewage, roads, and education. Any subject could potentially lead to conflict.

People often ask: Will Jerusalem cause a deadlock in the negotiations? Is it possible to reach a compromise? Certainly it will be difficult to build a bridge over conflicting opinions and interests, but it is helpful that at least on one matter there is quasi-unanimity, namely, that Jerusalem should not be physically redivided. This is a helpful point of departure.