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THE INTERNATIONAL LEGAL STATUS OF JERUSALEM
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I. INTRODUCTION

On September 24, 1996, the State of Israel opened a new entrance to an archaeological tunnel adjacent to the Temple Mount in Jerusalem.¹ The tunnel is actually a 400-yard water conduit, which was constructed during the Herodian period, passing from the Western Wall under the Muslim Quarter of the Old (walled) City and exiting onto the Via Dolorosa, an avenue *2 that is holy to Christians.² Israel's Religious Affairs Ministry began excavating the tunnel, a place of reverence for devout Jews, in 1968, and finished digging in 1985.³

Since its excavation, the tunnel has become a popular tourist attraction. It is replete with ancient Jewish and early Christian and Muslim masonry lying along a buried extension of the Western Wall, which King Herod had constructed around the Jewish Temple.⁴ Until 1996, the tunnel had only one entry and exit point in the Jewish Quarter of the Old City.⁵ The construction of the new entrance was designed to nearly quadruple the number of tourists visiting the tunnel.⁶

In 1988, Israel had intended to open a second entrance to the tunnel, but the mere plans to create such an opening resulted in Palestinian violence, causing Israel to postpone the project.⁷ The Palestinian violence erupted anew on September 24, 1996, in protest of the opening of the tunnel's new entrance. Muslim officials claimed that digging had been done on Muslim property and the opening of the new entrance undermined the structural integrity of nearby Islamic holy sites.⁸ The violence came in response to a call to protest by Palestinian President Yasser Arafat,⁹ and these protests turned fatal when Palestinian police shot at Israeli soldiers stationed in the West Bank.¹⁰ The ensuing *3 unrest resulted in the deaths of fifty-one people in a week's time.¹¹

The Hashemite Kingdom of Jordan criticized the opening of the new entrance to the tunnel as violative of Article 9 of the Jordan-Israel Peace Treaty, which provides, *inter alia*, that "Israel respects the present special role of the Hashemite Kingdom of Jordan in the Muslim Holy Shrines in Jerusalem."¹² Jordan argued that in accordance with the treaty, Israel was obliged to consult with Jordan and obtain Jordan's consent for any action directly or indirectly relating to the Temple Mount.¹³

In the Israeli view, the tunnel had been extended to provide visitors with an expanded view of the extent of the Second (Herodian) Temple, of which only the Western Wall remains exposed.¹⁴ The tunnel did not run under the Temple Mount; it merely skirted the Western Wall.¹⁵ Hence, Israel contended that there was no violation of the Jordan-Israel Treaty.

At the center of these arguments concerning the propriety of Israel's opening of the new entrance to the tunnel is the pivotal question of sovereignty over Jerusalem in general and over the Old City in particular. If Israeli Prime Minister Benjamin Netanyahu had acceded to the demands of Jordan, the Palestinian Arabs, and ultimately the United States to close the new entrance to the tunnel,¹⁶ the Israelis would have regarded this as the ceding of sovereignty over Jerusalem, which it has regarded since 1950 *4 as its capital,¹⁷ and since 1967 as its undivided and "eternal" capital.¹⁸

On the other hand, the Palestinians claim the Old City of Jerusalem and the Hasmonean tunnel therein as an integral part of the capital of a future independent state of Palestine.¹⁹ As such, the Palestinians consider Israel's opening of the new tunnel entrance as a "crime"²⁰ and an attempt to "Judaize" the city.²¹ Specifically, the Palestinians see this act as an infringement of their claim to sovereignty over Jerusalem.

This article will trace the respective Jordanian, Israeli, and Palestinian claims to the city of **Jerusalem**, analyze these claims under principles of **international law**, and attempt to devise a solution to the hitherto intractable problem of sovereignty over **Jerusalem**.

II. HISTORICAL BACKGROUND

As of 1517, the city of **Jerusalem**, together with the whole of Palestine, was under Ottoman rule.²² As such, **Jerusalem** was under the exclusive sovereignty of the Turkish Empire.²³ During the nineteenth century, Turkey promulgated several arrangements known as *firmans*, which regulated the **status** of churches in Palestine.²⁴ The most important *firman* was passed in 1852 and dealt with the powers and rights of several holy places in ***5 Jerusalem**.²⁵ It came to be known as the **status quo**.²⁶ This arrangement with respect to holy places under Ottoman control received **international** recognition in Article 62 of the Treaty of Berlin, entered into in 1878, which stated: “[I]t is well understood that no changes can be made in the **status quo** of the Holy Places.”²⁷

In 1917, **Jerusalem** came under British occupation as a result of the First World War. At the outset of its occupation of Palestine, Great Britain proclaimed the Balfour Declaration, asserting that the British government “view(s) with favor the establishment in Palestine of a national home for the Jewish people.”²⁸ However, the Balfour Declaration made no specific reference to **Jerusalem**²⁹ or to its Jewish inhabitants, who have constituted a majority of the city’s population since 1830.³⁰

In 1922, the Council of the League of Nations approved a grant of the Palestine mandate to Great Britain.³¹ **Jerusalem**, as such, is not specifically mentioned in the League of Nations mandate for Palestine.³² The mandate instrument does, however, ***6** make explicit reference to the Holy Places in Palestine, wherever situated.³³

Sovereignty over the city of **Jerusalem** during the period between 1922 and 1946 lay in the League of Nations and Great Britain acting jointly.³⁴ However, in 1946, the members of the dissolving League of Nations reached a unanimous agreement (*dehors* the United Nations Charter) with respect to the continuation of the mandate system.³⁵ Members of the League who had been administering mandated territories would continue to administer them in accordance with the obligations of the mandate for the benefit of the peoples concerned. However, this system would only last until other arrangements could be made between the United Nations and the respective mandatory powers. Accordingly, the United Nations was granted the right to authorize the transfer of power over territories under mandate.³⁶ Therefore, since the United Nations was arguably taking the place of the League of Nations with respect to the mandated territories, it can reasonably be concluded that, as of 1946, sovereignty over **Jerusalem** lay jointly in the United Nations and Great Britain.

In 1947, consonant with the 1946 agreement to which the United Kingdom was a signatory, Great Britain requested that the United Nations General Assembly consider the question of the government of Palestine.³⁷ In response, the General Assembly appointed the United Nations Special Committee on Palestine (hereinafter referred to as “UNSCOP”) to investigate the British request.³⁸ The UNSCOP issued two investigatory reports,³⁹ and, ***7** in accordance with the recommendations of the UNSCOP majority report, the United Nations General Assembly adopted Resolution 181 (II), also called “The Partition Resolution.” This resolution provided, *inter alia*, for the establishment of a Jewish state, an Arab state, and a special **international** regime for the city of **Jerusalem**.⁴⁰ However, the Partition Resolution did not enjoy universal acceptance among all of the peoples of Palestine. Whereas representatives of the Jewish community reluctantly accepted the plan for partition,⁴¹ the Arab states, as well as the Arabs living in Palestine, rejected the resolution.⁴²

The British government reacted to the Partition Resolution by disassociating itself from the plan and refusing to cooperate in the plan’s implementation. Britain refused to fix a schedule for the withdrawal of its armed forces from Palestine.⁴³ The United Kingdom’s ambassador to the United Nations, Sir Alexander Cadogan, indicated that his government would not play a leading role in effecting a partition plan that would not be acceptable to both Arab and Jewish communities.⁴⁴ In addition, the United Kingdom refused to consider a gradual transfer of authority over ***8** Palestine to a United Nations commission, since such a procedure would result in “confusion and disorder.”⁴⁵

Yet it was Great Britain itself that fostered disorder in Palestine upon termination of the mandate. It appropriated 300,000 £ for the Supreme Moslem Council, which was equivalent to an indirect subsidy of the Arab war effort.⁴⁶ Furthermore, at the same time that Britain proscribed Jewish weapons acquisition, it sold arms to Transjordan and Iraq, pursuant to treaties that were in force in both states.⁴⁷ In the meantime, despite the growing disorder in Palestine, the British refused to allow

members of the UNSCOP to enter the country.⁴⁸ Consequently, the UNSCOP requested that the United Nations Security Council provide it with a non-Palestinian military force. This request was denied, and on May 14, 1948, the UNSCOP was disbanded and a United Nations mediator for Palestine was appointed.⁴⁹

At **eight** o'clock on the morning of May 14, 1948, the United Kingdom unilaterally terminated the Palestinian Mandate.⁵⁰ At four o'clock that afternoon, the representatives of the Jewish community in Palestine proclaimed the State of Israel.⁵¹ In response to the proclamation of the independence of Israel by the Jews, the armies of six neighboring Arab states invaded Israel and Palestine, thereby joining the campaign of violence directed at frustrating the Jewish effort at statehood.⁵² Both the armies of Transjordan and Egypt invaded **Jerusalem**, and ***9** the Transjordanians captured the Old City and forced the Israeli defenders of the Jewish Quarter therein to surrender.⁵³

On November 30, 1948, the United Nations Cease-Fire Agreement was concluded between military representatives of Transjordan and Israel. This agreement delineated the respective military positions in **Jerusalem**.⁵⁴ On April 3, 1949, these positions were subsequently incorporated as armistice lines in the armistice agreement signed by Israeli and Jordanian representatives in Rhodes.⁵⁵

In late 1949, despite the rejection of Resolution 181(II) by the Arab states and the Arabs of Palestine, the United Nations General Assembly adopted Resolution 303(IV), which provided for the complete territorial **internationalization** of **Jerusalem** through revival of the *corpus separatum*.⁵⁶ The Israeli government categorically rejected the territorial **internationalization** plan in 1950 by declaring that “[up]on the establishment of the State of Israel, **Jerusalem** once again became its capital.”⁵⁷ With this emphatic declaration of **Jerusalem** as its capital, Israel transferred its governmental headquarters to **Jerusalem**⁵⁸ and applied Israeli domestic law to the western sector of the city.⁵⁹

The Jordanian government likewise rejected the *corpus separatum* plan envisaged for **Jerusalem**. On April 24, 1950, the ***10** Transjordan National Assembly adopted a resolution annexing the West Bank and eastern **Jerusalem** into the Hashemite Kingdom.⁶⁰

Later in 1950, the United Nations' attempt to resuscitate the idea of establishing a *corpus separatum* for the city of **Jerusalem** was thwarted. The Soviet Union withdrew its support for territorial **internationalization** of the entire city, since neither the Jews nor the Arabs would accept such a scheme.⁶¹ In addition, two proposals to the United Nations General Assembly, one calling for territorial **internationalization**, or *corpus separatum*, and the other providing for the functional **internationalization** of the Holy Places in **Jerusalem**,⁶² failed to receive the requisite majority for passage.⁶³ Accordingly, during the period between 1952 and 1967, the search for a solution to the **Jerusalem** issue based on the principle of **internationalization** was suspended.⁶⁴

The jettisoning of the *corpus separatum* by the **international** community resulted in a *de facto* partition of the city of **Jerusalem** between its western sector, administered by the State of Israel, and the eastern sector, including the Old City and the Holy Places therein, administered by Jordan. The community of nations acquiesced to this partition but did not recognize it *de jure*. The **international** community of states reached a *modus vivendi* with respect to **Jerusalem** that enabled life to go on as close to normal as possible in the two sectors.⁶⁵ Territorially, the ***11** armistice **status quo** was maintained, and Jordan and Israel exercised sovereignty in their respective sectors.

Thus, the issue of the **status** of **Jerusalem** was relegated to the background until 1967, when the armistice **status quo** was violently terminated by a Jordanian attack on western **Jerusalem**.⁶⁶ In response to the Jordanian invasion, Israel counter-attacked, recapturing the area that had been taken and gaining control over the entire city of **Jerusalem**, including the eastern sector and the Old City.⁶⁷ Following the conclusion of hostilities and the imposition of a United Nations cease-fire on the **Jerusalem** front, Israel, beginning in June of 1967, worked to physically reunite the eastern and western sectors of **Jerusalem**.⁶⁸

In order to provide a basis in domestic law for its physical unification of **Jerusalem**, Israel promulgated Section 11B of the Law and Administration Ordinance 5708-1948. Section 11B provided that “the law, jurisdiction, and administration of the State shall apply to any area of Eretz Israel [mandatory Palestine] designated by the Government by order.”⁶⁹ In addition, Israel enacted Section 8A to the Municipalities Ordinance, providing that “the Minister may, at his discretion and without inquiry under Section **8** being made, enlarge by proclamation the area of a particular municipality by the inclusion of an area

designated by order under Section 11B of the Law and Administration Ordinance, 5708-1948.”⁷⁰

*12 The United Nations’ response to this Ordinance and to the Israeli unification of **Jerusalem** in general was bifurcated. On one hand, the United Nations General Assembly adopted Resolutions 2253 and 2254, which condemned the Israeli legislation and called upon Israel “to rescind all measures already taken and to desist forthwith from taking any action which would alter the **status** of **Jerusalem**.”⁷¹ On the other hand, on November 22, 1967, the Security Council adopted Resolution 242, which provided, *inter alia*:

A just and lasting peace in the Middle East should include the application of both the following principles: (i) withdrawal of Israeli armed forces from territories occupied in the recent conflict; and (ii) ... acknowledgment of the ... political independence of every State in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force.⁷²

However, the **status** of the city of **Jerusalem** is not mentioned in the text of Resolution 242.

Similarly, neither the Camp David accords of 1978 nor the Egypt-Israel Peace Treaty of 1979 make mention of **Jerusalem**.⁷³ However, the issue of **Jerusalem** is in fact addressed in the 1993 Declaration of Principles on Interim Self-Governing *13 Arrangements Between Israel and the Palestine Liberation Organization.⁷⁴ Articles 5(2) and 5(3), when read together, provide that permanent **status** negotiations over **Jerusalem** between Israel and the Palestinian people’s representatives shall commence no later than the third year of the interim period.⁷⁵ Article 4 excludes from the jurisdiction of the Palestinian Council issues that will be covered in the permanent **status** negotiations, which include the issue of **Jerusalem**.⁷⁶ Likewise, Articles XI(2) and XXI(5) of the Israel-Palestinian Interim Agreement on the West Bank and Gaza Strip mention **Jerusalem**, but only as an issue which will be addressed in the permanent **status** negotiations.⁷⁷

III. ANALYSIS

A. Jordan’s Claim to Eastern **Jerusalem** During the Period Between 1948 and 1967

On May 14, 1948, units of Transjordan’s Arab Legion crossed the Jordan River and entered the territory of Palestine in order to fulfill Transjordan’s “national duty toward Palestine in general and **Jerusalem** in particular.”⁷⁸ Specifically, Transjordan argued that it entered Palestine in order to protect unarmed Arabs against massacres.⁷⁹ Egypt, which also entered Palestine and southern **Jerusalem**, maintained that it was doing so in order to *14 restore law and order to Palestine.⁸⁰ However, Transjordan and Egypt’s entry into Palestine was not in accordance with Resolution 181(II),⁸¹ nor does a nation have the right to restore order in a territory besides its own.⁸² Instead, this entry was “an invasion with a definite purpose,” specifically, the elimination of the State of Israel at its inception.⁸³ Hence, the invasion of Palestine by Transjordan and Egypt was violative of Article 2(4) of the United Nations Charter and the principle of customary **international law** derived therefrom, specifically, the illegality of the use of force against another state.⁸⁴

In addition, it can be argued that Transjordan’s invasion of Palestine in 1948 was a violation of the mandate system that the United Nations inherited in 1946 from the League of Nations.⁸⁵ In 1922, the League of Nations assigned Great Britain the administration of what was known as an “A” mandate to Palestine. An “A” mandate was recognized as one administered *15 to a community that had reached a stage of development wherein its existence as an independent nation could be recognized. This recognition was subject to the rendering of administrative advice and assistance by a Mandatory, for instance, the United Kingdom, until such time as the community was able to stand alone.⁸⁶ By invading Palestine, Transjordan violated the mandate system since partition, although a compromise, would have effectuated self-determination for the Jewish and Arab inhabitants of Palestine.⁸⁷

Jordan’s 1950 claim to sovereignty over eastern **Jerusalem** can now be assessed based on the premise that Transjordan’s entry into Palestine (and into the city of **Jerusalem**) on May 14, 1948, was violative of Article 2(4) of the United Nations Charter, customary **international law**, and the mandate system. First, it must be noted that an annexation effected by force contrary to the provisions of the United Nations Charter ought not to be recognized by other states. **International law** does not recognize military conquest as a source of title.⁸⁸

In addition, the principle of “belligerent occupation” applies to Jordan’s actions. This principle of **international law** refers to a situation wherein “effective military control over held areas has been achieved, although the enemy has not surrendered and continues to retain control over substantial portions of his territory. Usually, fighting will have been brought to a close by means of a cease-fire or armistice.”⁸⁹ The **international legal** position vis-à-vis the belligerent occupant is as follows:

Insofar as possible, without risking military security or public welfare, the occupant [should] preserve the laws and institutions existing *ante* *16 *bellum*. It is the ousted power that retains sovereignty, albeit in a state of abeyance, over the held territory. Until a settlement is reached whereby the territory is returned in exchange for promises of a new relationship between the antagonists on the terms of a peace treaty, the occupying power may retain control over the conquered territories. However, to ensure that an indefinite retention of the territories does not occur, **international law** requires a freezing of the **status quo ante bellum**.⁹⁰

It can reasonably be concluded that Jordan was a belligerent occupant of eastern **Jerusalem** from 1948 to 1967. This belligerent occupation, notwithstanding the issue of the **legality** of entry under Article 2(4) of the United Nations Charter, was protected exclusively by Article II(2) of the Jordan-Israel General Armistice Agreement: “It is also recognized that no provision of this Agreement shall in any way prejudice the rights, claims, and positions of either party thereto in the ultimate peaceful settlement of the Palestine question, the provisions of this Agreement being dictated exclusively by military considerations.”⁹¹ As such, no subsequent unilateral act could alter the rights of any party as they existed when the Armistice was concluded.⁹² Accordingly, while Jordan’s **status** as a belligerent occupant may have been protected in 1949 by the armistice agreement, its subsequent annexation of eastern **Jerusalem** in 1950 was violative of the very same agreement.

Some **international legal** writers have made use of the term “prescription” to describe Jordan’s acquisition of sovereignty over eastern **Jerusalem** between 1948 and 1967. Professor L. Oppenheim defines this term as “the acquisition of *17 sovereignty over a territory through continuous and undisturbed exercise of sovereignty over it during such a period as is necessary to create under the influence of historical development the general conviction that the present condition of things is in conformity with **international** order.”⁹³ Therefore, it may be argued that Jordan acquired sovereignty over eastern **Jerusalem** by prescription during its nineteen years of undisturbed occupation.

However, this proposition is problematic. First, only one state, namely, Pakistan, recognized Jordan’s sovereignty claim over eastern **Jerusalem**.⁹⁴ Hence, there was no creation of a general conviction that the Jordanian presence was in conformity with **international** order. Second, the concept of prescription is inapposite to the **status** of eastern **Jerusalem** during the period between 1948 and 1967 because the unilateral act by which Jordan began to exercise sovereignty over eastern **Jerusalem** in 1950, namely, annexation, is specifically precluded by the Jordan-Israel General Armistice Agreement.⁹⁵ Third, the situation prevailing in eastern **Jerusalem** during the period between 1948-1967 was not in accordance with **international** order, since it was characterized by frequent cross-border violence.⁹⁶ Furthermore, Jordan denied Israel access to the Western Wall, in contravention of Article VIII(2) of the Armistice Agreement.⁹⁷ Hence, Jordan clearly does not set forth a strong claim to sovereignty by prescription over eastern **Jerusalem** for the time period at issue.

A final argument used to buttress the Jordanian presence in eastern **Jerusalem** during the period between 1948-1967 is that *18 Jordan was a trustee-occupant. A trustee-occupant is something less than a legitimate sovereign and more than a belligerent occupant.⁹⁸ Under this theory, Jordan entered the West Bank with the consent of the indigenous Arab population who had the right to assert sovereignty over the areas of Palestine that had not been allotted to the Jews pursuant to the Partition Resolution. Whereas it is doubtful that the Arabs of Palestine formally ceded sovereignty to Jordan, it is arguable that they temporarily gave it over to Jordan to hold in trust until such time as the indigenous Arab population could reassert control over all of mandatory Palestine.⁹⁹ Therefore, Jordan could be considered a trustee-occupant during that period, which, unlike the belligerent occupant, may amend legislation while holding sovereignty in trust for the indigenous inhabitants.¹⁰⁰

However, the trustee-occupant thesis justifying Jordan’s presence in eastern **Jerusalem** is problematic as well. The avowed purpose of the purported trust was for Jordan to hold sovereignty for the purported beneficiary, the Arabs of Palestine, until such time as all of mandatory Palestine could be liberated. Yet if this truly constituted the justification for Jordan’s entry into Palestine and holding of sovereignty in trust for the Arab residents therein, then this “trust” was void *ab initio* pursuant to the prohibition on the use or threat of force as it is articulated in Article 2(4) of the United Nations Charter.¹⁰¹ Such a scheme presupposes a second Jordanian invasion of Israel, to liberate all of Palestine for the purported beneficiary, the Arabs of

Palestine.

If, however, the Jordanian mission in assuming a sovereignty trust was to prepare the Arabs of the West Bank for self-determination, then the annexation of the West Bank and eastern **Jerusalem** is wholly inconsistent with a true trust relationship, in which the trustee administers the trust property *19 solely in furtherance of the interests of the beneficiary and not in furtherance of the trustee's personal interests.¹⁰² Additionally, Jordan suppressed Palestinian nationalists who attempted to establish an all-Palestine government in exile.¹⁰³ This discouragement of such a self-rule option is likewise inconsistent with the assumption of a sovereignty trust. Moreover, Jordan entered the city of **Jerusalem** in 1948. At that time, there was no such entity as "East **Jerusalem**," and the Jewish inhabitants of **Jerusalem**, who constituted a majority of the city's population,¹⁰⁴ certainly did not invite the Jordanians to occupy the city. Likewise, it is doubtful whether the Palestinians did indeed freely cede sovereignty to Jordan, even in a trust arrangement. Therefore, there is a major weakness in the trustee-occupant theory, in that the identity and wishes of the purported beneficiary are, at best, uncertain.

Given the problems inherent in the prescription and trustee-occupant theories, the more reasonable characterization of the Jordanian presence in eastern **Jerusalem** during the period between 1948 and 1967 is one of belligerent occupancy. Hence, Jordan did not acquire sovereignty in this sector.

B. Israel's Claim to Western **Jerusalem** During the Period Between 1948 and 1967

Israel has a colorable claim to sovereignty over the western portion of **Jerusalem** during the period between 1948 and 1967. Since the Jordanian entry into the city of **Jerusalem** and Palestine in general was illegal under the principle of **international law** embodied in Article 2(4) of the United Nations Charter, Israel's response was merely an act of self-defense *20 pursuant to the well-recognized principle manifested in Article 51 of the Charter.¹⁰⁵ Israel's subsequent occupation of areas outside of the 1947 Partition lines, including western **Jerusalem**, filled the "sovereignty vacuum" which had existed in Palestine upon the termination of the Mandate and the rejection of the Partition Resolution by the Arab states.¹⁰⁶

In addition, neither the United Nations General Assembly nor the United Nations Security Council protested Israel's 1950 declaration of western **Jerusalem** as its capital.¹⁰⁷ Such failure to protest as well as the general silence on the subject in post-1967 United Nations resolutions may constitute sufficient community acquiescence to give to Israel's actions some implied measure of **legal** authority.¹⁰⁸ Additionally, two states, El Salvador and Costa Rica, implicitly endorsed the Israeli declaration of **Jerusalem** as its capital by establishing embassies in the city's western sector.¹⁰⁹ Therefore, it can be argued that Israel acquired sovereignty over the western portion of the city of **Jerusalem**.¹¹⁰

Judge Antonio Cassese has criticized this analysis of the Israeli claim to western **Jerusalem**.¹¹¹ At the outset of his critique, he concedes two major points critical to the Israeli claim to sovereignty over western **Jerusalem**, and, as will later be *21 discussed, to the Israeli claim to sovereignty over eastern **Jerusalem**. Cassese notes that the better view is that Jordan's invasion of eastern **Jerusalem** was contrary to Article 2(4) of the United Nations Charter and to the general principle of **international law** derived therefrom.¹¹² Cassese further acknowledges that Israel's response was an act of self-defense pursuant to Article 51.¹¹³

Having made these concessions, Cassese then asserts that Israel cannot thereby acquire sovereignty over western **Jerusalem**.¹¹⁴ He argues that a state may acquire sovereignty over a territory by military force only if certain elements are satisfied. First, prior to the use of force, sovereignty over the territory must have belonged to the same state, which used force to expel the unlawful occupant. Second, all peaceful remedies, including recourse to the appropriate United Nations bodies, must have been exhausted and must have failed to expel the unlawful occupant. Third, the use of force must not have exceeded the limited goal of reacquiring the territory.¹¹⁵ In applying these principles, Cassese argues that Israel was not sovereign in western **Jerusalem** prior to the Jordanian invasion. Therefore, Israel could not acquire sovereignty by the use of military force.¹¹⁶

In addition, Cassese argues that the United Nations' failure to protest did not constitute the world's acquiescence to Israel's acquisition of full-fledged title to **Jerusalem**. Rather, inaction on the part of the United Nations after the Israeli response to Jordanian invasion meant merely that the world organization accepted *de facto* control of **Jerusalem** by Israel and Jordan.¹¹⁷ The granting of **legal** title to territory, and the *22 subsequent legitimate exercise of sovereignty over that territory cannot be brought about by mere silence.¹¹⁸

Furthermore, state practice supports the position that Israel (and Jordan) did not acquire *de jure* sovereignty over their respective sectors of **Jerusalem**.¹¹⁹ The foreign consuls in the city refused to apply to Israel or Jordan for the grant of *exequatur*, i.e., permission to carry out their functions in the city.¹²⁰ Although foreign states recognized that Israel and Jordan were *de facto* occupants of **Jerusalem**, they were not prepared to recognize Jordanian or Israeli sovereignty over eastern or western **Jerusalem** respectively.¹²¹

However, Judge Cassese's critique of the Israeli claim to sovereignty over western **Jerusalem** overlooks the application of the principle of self-determination to the city of **Jerusalem**, and specifically, to its western sector during the period between 1948 and 1967. First, the United Nations General Assembly Resolution 1514(XV) solemnly declared that "all people have the right to self-determination; by virtue of that right, they freely determine their political **status** and freely pursue their economic, social, and cultural development."¹²² In addition, this Resolution sets forth, *inter alia*, the following method of attaining self-government: "A non-self-governing territory can be said to have reached a full measure of self-government by ... integration with an independent State."¹²³ In 1948, the residents of western **Jerusalem**, a sector that included the highest number of Jewish *23 inhabitants,¹²⁴ chose to integrate with the State of Israel.¹²⁵ In this way, these individuals exercised their right of self-government.

It can also be argued that the United Nations' lack of criticism of Israel's 1950 declaration of **Jerusalem** as its capital, when juxtaposed with its recurrent and vociferous criticism of later Israeli acts with respect to **Jerusalem**,¹²⁶ was an implicit recognition of Israeli sovereignty over western **Jerusalem**.¹²⁷ Therefore, notwithstanding Judge Cassese's critique, the application of the principle of self-determination to the Jews in **Jerusalem**, coupled with the United Nations' inaction in the face of Israel's 1950 declaration of **Jerusalem** as its capital, supports Israel's claim to sovereignty over the western portion of the city of **Jerusalem**.

The only other possible objection to the Israeli claim to sovereignty over western **Jerusalem** could be interposed by the proponents of the *corpus separatum* regime for the city, as contemplated in the General Assembly's aforementioned Resolution 181(II). It has been argued that the community of nations has not explicitly abandoned the principle of *corpus separatum*.¹²⁸ However, it is important to note that the community of nations has implicitly abandoned this principle, since there has been no mention of the *corpus separatum* since 1952. Furthermore, the General Assembly, in Resolution 2253(2),¹²⁹ had called upon Israel to rescind all measures already taken and to desist forthwith from taking any action that would alter the **status** of **Jerusalem**. If the intention of the General *24 Assembly had been to return to the *corpus separatum*, it could have then demonstrated it with clear and unequivocal wording.¹³⁰

The more prevalent view regarding the *corpus separatum* characterizes the regime as a "dead letter."¹³¹ The Partition Resolution, which gave rise to the *corpus separatum*, had already been rejected by the Arabs and was further frustrated by the subsequent invasion of Israel. The failure to implement the Partition Resolution rendered its description of particular boundaries meaningless.¹³² Accordingly, the previous existence of the *corpus separatum* should not defeat the Israeli claim to sovereignty over the western sector of **Jerusalem**.

C. Israel's Claim to Eastern **Jerusalem** in the Aftermath of the 1967 War

The Israeli argument in favor of sovereignty over the eastern sector of the city of **Jerusalem** rests upon most of the principles put forward in support of its claim to sovereignty over the western sector. First, Jordan illegally occupied eastern **Jerusalem** in 1948 and illegally annexed it in 1950.¹³³ Second, only the Jordan-Israel General Armistice Agreement of 1949 protected Jordan's belligerent occupation of eastern **Jerusalem** between 1948 and 1967.¹³⁴ Third, Jordan's initiation of hostilities in 1967 on the **Jerusalem** front and subsequent invasion of western **Jerusalem** was a violation of Article III(2) of the same agreement, which states:

*25 No element of the land, sea, or air military forces of either Party, including non-regular forces, shall commit any war-like or hostile act against the military or paramilitary forces of the other Party, or against civilians in territory under the control of that Party; or shall advance beyond or pass over for any purpose whatsoever the Armistice Demarcation Lines set forth in Articles V and VI of this Agreement; or enter into or pass into the air space of the other Party.¹³⁵

Furthermore, Israel occupied the eastern sector of **Jerusalem** in self-defense pursuant to Article 51 of the United Nations Charter.¹³⁶ Finally, because Jordan's entry into **Jerusalem** was illegal as violative of Article 2(4) of the United Nations

Charter, the sovereignty vacuum which had existed in the city of **Jerusalem** following the termination of the mandate was not filled. On June 4, 1967, this sovereignty vacuum still existed because no state except Pakistan had recognized Jordanian sovereignty over eastern **Jerusalem**. Accordingly, in 1967, upon its displacement of Jordan from **Jerusalem** in self-defense, Israel could fill this sovereignty vacuum with respect to the entire city.¹³⁷

The Israeli claim to eastern **Jerusalem** and, by logical extension, to the entire city, is ostensibly in violation of the provisions of the United Nations Security Council Resolution 242, which emphasizes the “inadmissibility of the acquisition of territory by war.”¹³⁸ However, it is a mistake to infer from this Resolution that *all* territorial change as a result of the use of force *26 is impermissible.¹³⁹ A distinction must be made between aggressive and defensive conquest.¹⁴⁰ The failure of Resolution 242 to distinguish between aggressive and defensive conquest, is predicated upon an incorrect rendering of the applicable maxim “*ex injuria non jus oritur*.”¹⁴¹ Elihu Lauterpacht argues that the correct rendering of the maxim is that “territorial change as a result of the *unlawful* use of force is impermissible (emphasis added).”¹⁴² If this were not the case, then “if territory has once changed hands as a result of an unlawful use of force, the illegitimacy of the position thus established is sterilized by the prohibition upon the use of force to restore the lawful sovereign.”¹⁴³

Judge Stephen Schwebel has converted this rendering of the maxim into an argument for Israeli sovereignty over eastern **Jerusalem**, and by extension, the entire city. He asserts that a state, acting in the lawful exercise of self-defense, may seize and occupy foreign territory as long as such seizure and occupation are necessary to its self-defense.¹⁴⁴ Moreover, if the prior holder of the territory had unlawfully seized the territory, the state that subsequently takes that territory in the lawful exercise of self-defense has, against the prior holder, better title.¹⁴⁵ Professor Blum concurs in this analysis and points out that title to territory is based upon the appraisal of the relative, as opposed to the absolute, claims to sovereignty.¹⁴⁶ Since no state can make a *27 claim to eastern **Jerusalem** that is equal to that of Israel, Israel’s relatively superior claim may be sufficient, under **international law**, to make Israel’s possession of **Jerusalem** indistinguishable from that of a valid title-holder.¹⁴⁷

Finally, apart from the sovereignty vacuum and relative title arguments, Israel can advance an additional and no less compelling argument to justify the establishment of Israeli sovereignty over all of **Jerusalem**. This argument applies the principle of self-determination of peoples. First, the 1949 armistice lines, which divided **Jerusalem** into western and eastern sectors, were artificial delineations of a purely military character.¹⁴⁸ Prior to 1949, East and West **Jerusalem**, as such, did not exist. There was only the city of **Jerusalem in toto**. Prior to the division of **Jerusalem** by force in 1948, Jews in **Jerusalem** constituted a majority of the city’s population.¹⁴⁹ This Jewish majority in **Jerusalem** continued into 1967 and exists today.¹⁵⁰ Even the area of eastern **Jerusalem** maintains a Jewish majority.¹⁵¹ Therefore, if the principle of self-determination of peoples is today applied strictly to **Jerusalem**, or even to the eastern portion *28 thereof, Israel has a sound reason to apply its sovereignty to the entire city.

D. The Palestinian Claim to Eastern Jerusalem

The Palestinian claim to sovereignty over eastern **Jerusalem** is a mirror image of the Israeli argument for the imposition of its sovereignty over **Jerusalem**. First, its proponents argue that the Arabs constituted an ethnic majority in eastern **Jerusalem** in 1948.¹⁵² Second, the world community never accepted Jordanian control over eastern **Jerusalem** as definitive, nor, indeed, did the Arab League, which characterized Jordanian control over Palestine as temporary and stated that the country “should be handed [over] to its owners so that they may rule as they please.”¹⁵³ Third, the world community in its entirety has neither recognized the 1967 Israeli annexation of eastern **Jerusalem** nor its claim of sovereignty thereto.¹⁵⁴ Hence, the proponents of Palestinian sovereignty argue that Israel is no more than a belligerent occupant in eastern **Jerusalem**, having come into possession of the city by war.

A belligerent occupant cannot acquire sovereignty over the territory it occupies, even when the territory was previously controlled by another state, or when force is resorted to in order to repel an unlawful attack.¹⁵⁵ Any such annexation of eastern **Jerusalem** violates the Geneva Convention Relative to the Protection of Civilian Persons in Time of War.¹⁵⁶ Therefore, the *29 Palestinians, as beneficiaries of the sovereignty trust which Jordan held in eastern **Jerusalem** between 1948 and 1967, are entitled, pursuant to the principle of self-determination of peoples, to exercise their sovereign rights therein.¹⁵⁷

The Palestinian claim to sovereignty over eastern **Jerusalem** suffers from several shortcomings. First, granting that the **international** community has not recognized the sovereignty claims of Israel and Jordan to **Jerusalem**, it does not

necessarily follow that there has therefore been a formal recognition of the Palestinian claim to sovereignty over the city. Cassese points out the following:

The United Nations has never proposed a definite scheme for the final settlement of the [Jerusalem] question; it has neither insisted on the idea of internationalization nor has it favored the splitting of the city into two parts, each under the sovereignty of a different state. The Organization has preferred to take a very cautious stand by leaving either solution open. In particular, it has avoided pronouncing either on the legal title required for either solution, or on which state would have a better title to sovereignty over all or part of Jerusalem ... The United Nations has left all options open.¹⁵⁸

Second, subsumed within the Palestinian assertion that title to territory cannot be acquired by war is the implicit assumption that United Nations Security Council Resolution 242, with its proscription of the acquisition of territory by war and its demand for the withdrawal of Israel from territories occupied in 1967, is applicable to eastern Jerusalem. As such, it seems that eastern Jerusalem is occupied territory that Israel must return to its rightful sovereign. However, this interpretation of Resolution 242 *30 and the characterization of Jerusalem as occupied territory is contrary to the analysis of Resolution 242 put forth by Arthur J. Goldberg, the United States representative to the United Nations at the time the Resolution was adopted. He stated:

Resolution 242 in no way refers to Jerusalem, and this omission was deliberate ... At no time in [my] speeches [to the United Nations] did I refer to East Jerusalem as occupied territory ... On the contrary, I made it clear that the status of Jerusalem should be negotiable and that the armistice lines dividing Jerusalem were no longer viable.¹⁵⁹

In addition, the Palestinian argument to sovereignty posits that the law of belligerent occupation is applicable to Israel's entry into eastern Jerusalem. As a belligerent occupant in eastern Jerusalem, Israel would be subject to the provisions of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, specifically, Article 49(6), which forbids the transfer of the occupying power's own people into the territory it occupies,¹⁶⁰ and Article 47, which forbids the annexation of occupied territory.¹⁶¹ Accordingly, the introduction of tens of thousands of Jews by Israel into eastern Jerusalem after 1967 and its creation of numerous Jewish settlements therein constitutes a violation of Israel's duties as an occupying power under the Geneva Convention.

*31 On the other hand, it has been argued that the Geneva Convention is inapplicable to eastern Jerusalem because Israel does not constitute a belligerent occupant as that term is utilized in the Convention. Belligerent occupancy "assumes that the former government was the lawful sovereign of the territory before its loss to the occupying power."¹⁶² The concurrent existence, with regard to the same territory, of an ousted legitimate sovereign as well as a belligerent occupant, is the rationale behind those rules of international law which recognize both the occupant's right to administer the occupied territory and the reversionary rights of the ousted sovereign.¹⁶³ However, in the case of eastern Jerusalem, Jordan cannot possibly be a reversionary sovereign because she did not acquire sovereignty. It follows that, in a case like the present, where Jordan, as the ousted state, was never the legitimate sovereign, those rules of belligerent occupation directed to safeguarding the lawful sovereign's reversionary rights have no application.¹⁶⁴

Lastly, the Palestinian argument for sovereignty in eastern Jerusalem unjustifiably hallows the armistice lines of 1949 and asserts that "the right of people to self-determination requires that a home be granted to the Palestinian people, and this could be brought about ... by entrusting the Palestinians with full authority over eastern Jerusalem."¹⁶⁵ This assertion ignores the right of the Jewish people to self-determination over the city of Jerusalem and resurrects a border delineation for the city, which was never intended to be determinative of political sovereignty in the city.¹⁶⁶ It is an attempt to assert a claim of sovereignty over an administrative unit called "East Jerusalem" which had no *32 independent existence in fact prior to Jordan's invasion of the City in 1948.

D. Sovereignty Claims to Jerusalem: Conclusions and Attempts at Resolution

Several general conclusions can be drawn from the above discussion regarding the claims of Jordan, Israel, and the Palestinian Arabs to the city of Jerusalem. First, Jordan's entries into Jerusalem in 1948 and 1967 are regarded as contrary to Article 2(4) of the United Nations Charter and the principles of customary international law embodied therein. Second,

the principle of territorial **internationalization**, or the *corpus separatum*, embodied in Article III of United Nations General Assembly Resolution 181(II) is widely regarded as a stillborn proposal which is incapable of being resurrected. Third, there seems to be broad agreement that the military response by Israel to the Jordanian invasions was justified as an act of self-defense in accordance with Article 51 of the United Nations Charter and the principle of customary **international law** incorporated therein.

The points of discord, chiefly between Israel and the Palestinian Arabs, involve the question of Israel's declaration of sovereignty, first over western **Jerusalem** in 1950, and subsequently over eastern **Jerusalem** in 1967. The Israeli argument essentially amounts to the establishment of a new principle of **international law**, namely, the acquisition of territory by lawful force, coupled with a more compelling argument based on pure self-determination for the people of **Jerusalem**, of which the Jews have long comprised the majority. The Palestinian argument relies on the principle of self-determination of peoples in an artificial polity called "East **Jerusalem**," which was created in the Jordan-Israel General Armistice Agreement of 1949.

The respective proponents of these claims seem intractable, which is precisely how many **international legal** publicists have described the issue of sovereignty over ***33 Jerusalem**.¹⁶⁷ Recently, several attempts have been made to offer a solution to the **Jerusalem** problem and to thereby reconcile the Israeli and Palestinian positions regarding sovereignty over the city or any part thereof. These potential solutions for Jews and Arabs in **Jerusalem** will be set forth and examined individually.

The **status quo** approach implements the principle of self-determination of peoples and thus advocates the granting of *de jure* sovereignty to Israel over the entire city of **Jerusalem**,¹⁶⁸ since the entire city of **Jerusalem** has had a Jewish majority for hundreds of years¹⁶⁹ and "it is certain that the great majority of the residents [of **Jerusalem**] would opt for Israeli sovereignty."¹⁷⁰ In addition, the city under the **status quo** approach would remain undivided. Furthermore, the so-called entity of "East **Jerusalem**," wholly a creation of the 1949 armistice agreement, would not be artificially resurrected. In addition, access to the Holy Places, which has been a major concern of the United Nations¹⁷¹ as well as Christian communities throughout the world,¹⁷² would continue to be guaranteed by Israeli statute.¹⁷³ Finally, the **status quo** approach would be consistent with the various **legal** arguments advanced above in favor of Israeli sovereignty over **Jerusalem**.¹⁷⁴

On the other hand, the **status quo** approach envisions no political role for the Palestinians in **Jerusalem** and forecloses the possibility of declaring East **Jerusalem** the capital of a future Palestinian state. Also, the **status quo** approach ignores the fact ***34** that in 1948, the Palestinian Arabs constituted an ethnic majority in eastern **Jerusalem**.¹⁷⁵ Moreover, the continuation of Israeli sovereignty is in diametric opposition to the text of United Nations General Assembly Resolutions 2253 and 2254,¹⁷⁶ and is contrary to the spirit of, if not the letter of, United Nations Security Council Resolution 242, which proscribes the acquisition of territory by war.¹⁷⁷ The Israeli incorporation of eastern **Jerusalem** has likewise not attained recognition by any nation.¹⁷⁸ Furthermore, since the solution to the **Jerusalem** conflict must result from Israeli-Palestinian negotiations, the **status quo** approach will most likely not be adopted in view of the vociferous opposition of the Palestinians to such an option.¹⁷⁹

The second option for resolution of the conflict over **Jerusalem** is a return to the pre-1967 lines and physical redivision of the city, or the **status quo ante bellum** option. This approach is squarely in accord with the text of United Nations General Assembly Resolutions 2253 and 2254, as well as the principle of the inadmissibility of territory acquired by war embodied in United Nations Security Council Resolution 242. This option also affords the Palestinian people the right of self-determination with respect to eastern **Jerusalem** and allows the future State of Palestine to proclaim its capital in "East **Jerusalem**."

***35** There are many shortcomings inherent in this option. First, the principle of free access to the Holy Places would be violated, because the Israelis would be denied the right to worship at the Western Wall, which is located in eastern **Jerusalem**. Second, this option would involve a forcible transfer of Israeli and Palestinian peoples across the lines dividing East and West **Jerusalem**.¹⁸⁰ Third, the physical barriers which would be erected in **Jerusalem** to ensure the separation of the two sectors would eliminate the free movement between the eastern and western portions of **Jerusalem** that has been characteristic of the city since 1967. Even the Palestinians are loath to divide the city, having been accustomed to the freedom of access to the New City since 1967.¹⁸¹ Fourth, the division of the city of **Jerusalem** into East and West **Jerusalem** violates the principle of self-determination of peoples with respect to the city as a whole. Israelis and Arabs themselves agree that **Jerusalem**, within its present municipal boundaries, must not be redivided, but must remain a united city, as it has been since

1967.¹⁸² Finally, the redivision of **Jerusalem** inherent in a return to the pre-1967 *status quo* would perpetuate “East **Jerusalem**,” an entity whose sole justification is the arbitrary movements of armies in the 1948 Arab-Israeli war. Consequently, this approach, abhorrent to Israel, will likewise not form the basis of a solution to the conflict over **Jerusalem**.

The third option advanced as a possible solution to the conflict over **Jerusalem** is territorial **internationalization**, or the *corpus separatum* option, initially proposed in United Nations General Assembly Resolution 181(II) of 1947 and most recently propounded by Mallison.¹⁸³ There are several advantages that territorial **internationalization** offers to **Jerusalem**. First, **Jerusalem** would remain a unified, open city. Second, there *36 would be effective **international** protection of the Holy Places of each religion. Third, the displacement and transfer of peoples, which was one of the disadvantages of the *status quo ante bellum* approach, would not take place.¹⁸⁴ Finally, the issue of sovereignty, one that has caused the intractability concerning the **Jerusalem** question,¹⁸⁵ would vest in the United Nations rather than in Israel or the Palestinians.¹⁸⁶

Nevertheless, **international** administration of **Jerusalem** as a separate entity would be “theoretically complicated and practically difficult,” even according to Mallison, its proponent.¹⁸⁷ The **international** regime would be very expensive to run. It would also violate the principle of self-determination of peoples with respect to the residents of **Jerusalem** and deny them an effective role in self-government. Furthermore, it is unacceptable to both Palestinians and Israelis and therefore cannot possibly constitute a viable solution to the **Jerusalem** conflict.

The fourth option, advocated by Adnan Abu Odeh, Chief of the Royal Hashemite Court of Jordan, envisions a three-pronged solution to the **Jerusalem** question. First, the walled city, wherein the main holy places of Judaism, Christianity and Islam are situated, would belong to no single nation or religion. Rather, it would belong to the whole world and to the three religions: Muslim, Christian and Jewish. No state would have political sovereignty over the walled city; this holy part of **Jerusalem** would remain a “spiritual basin.”¹⁸⁸

Second, Abu Odeh would grant to the Palestinians political sovereignty over the urban areas to the east, northeast, and southeast of the walled city. These areas would be called “Al-Quds,” the Arabic name for **Jerusalem**.¹⁸⁹ Third, Abu Odeh would grant sovereignty to Israel over the urban areas lying to the west, northwest, and southwest of the walled city. This district would be *37 called “Yerushalaim,” the Hebrew name for **Jerusalem**.¹⁹⁰ Abu Odeh’s proposal creates a scheme by which, in the Arab mind, Al-Quds would extend as far as the Arab and Christian holy sites in the walled city. Meanwhile, to the Jews, Yerushalaim would stretch as far as the Jewish holy sites in the walled city. Specifically, “the Western Wall, the Jewish Quarter surrounding it, and the Israeli communities at large outside the walls, linked geographically and demographically, would likewise form one uninterrupted entity.”¹⁹¹

There are several advantages inherent in the Abu Odeh proposal. First, the proposal seems to address the national aspirations of both Israel and the Palestinians with respect to **Jerusalem**. Both communities would finally be able to have **international** recognition accorded to their respective capitals in **Jerusalem**. Second, this proposal enables **Jerusalem** to remain an open, undivided city. Unlike the *status quo ante bellum* option or the *corpus separatum* option, the rights of the two parties to self-determination would not conflict with the principle of freedom of access to the Holy Places in the walled city. The constructive extension of sovereignty to the respective Old City shrines would accommodate each party’s devotion to a given holy site while not foreclosing the other party’s simultaneous claim to that site. Finally, the vesting of sovereignty over the walled city in three worldwide monotheistic religions reduces the intractability of the **Jerusalem** sovereignty conundrum.

Nevertheless, despite the ostensible attractiveness of the Abu Odeh plan and its clear superiority to the *status quo*, *status quo ante bellum* and *corpus separatum* approaches, the plan has its shortcomings. First, Abu Odeh does not offer a concrete solution for the inhabitants of the Jewish neighborhoods in eastern **Jerusalem**. He merely makes the laconic statement that “the Jewish settlements in Al-Quds ... would be subject to the same solution reached for the other settlements in the occupied territories.”¹⁹² Although Abu Odeh claims to have formulated his *38 solution based upon consideration of all of the parties’ declared positions,¹⁹³ he has simply adopted the Palestinian political position by equating any Jewish neighborhood in eastern **Jerusalem** with the Jewish settlements in the West Bank.¹⁹⁴ This is hardly an approach that considers the Israeli position with regard to the Jewish residents of eastern **Jerusalem**.

Furthermore, the entire proposal is violative of the principle of self-determination of peoples with respect to **Jerusalem in toto**. The Israeli residents of **Jerusalem**, according to Abu Odeh, are to be shunted to a “Yerushalaim” in western **Jerusalem**.

Their right of self-determination with respect to the entire city, including the residential Jewish Quarter inside the walled city as well as the large Jewish suburbs in northeastern **Jerusalem**, would be compromised in favor of the re-creation of the artificial entity called “East **Jerusalem**.”

An additional flaw in the Abu Odeh proposal involves the nature, extent, and modality of the sovereignty that Israel and Palestine would presumably exercise over the Muslim, Christian, and Jewish Holy Places. Abu Odeh argues that, in each party’s mind, that party’s concept of **Jerusalem** would extend to its respective holy sites in the walled city.¹⁹⁵ Is Abu Odeh thus suggesting an *imaginary* sovereignty over certain shrines in the walled city, one that exists only in the given party’s mind? What is the import of the demographic and geographic link between the Jews and the Jewish Quarter if the whole walled city belongs to the entire world? With regard to the Hasmonean tunnel issue,¹⁹⁶ would the Israeli Religious Affairs Ministry be obligated to obtain the world’s permission prior to opening any more entrances to the tunnel? If such permission is necessary, how would Israel go about securing it? Mallison’s critique of the *corpus separatum* *39 option as complicated and difficult to administer¹⁹⁷ would be equally relevant to analysis of the Abu Odeh proposal.

Finally, the dual sovereignty element of Abu Odeh’s proposal for **Jerusalem** may ultimately mean, according to former Mayor of **Jerusalem** Teddy Kollek, the institution of “two police forces, two sets of customs regulations, two governments, two different laws. You would have the wall up again in no time dividing the city.”¹⁹⁸ Unfortunately, Abu Odeh’s plan envisions three such competing authorities; consequently, despite its marked improvement over the *status quo*, *status quo ante bellum* and *corpus separatum* approaches, it would most likely not serve as a basis for the ultimate resolution of the **Jerusalem** issue, at least in its present formulation.

The fifth option posited for the solution of the **Jerusalem** problem is the “boroughs” approach, which was initially championed by former Mayor Teddy Kollek.¹⁹⁹ Kollek’s solution involves the declaration of Israeli sovereignty over the entire city of **Jerusalem**. However, Kollek has said that Israel must be willing to meet some of the nationalist aspirations of the capital’s Arab population. The setting up of Arab boroughs in **Jerusalem** would give the residents of Arab neighborhoods some control over their affairs.²⁰⁰ At the same time, Kollek has also pointed out that the Arab population’s nationalist aspirations will not be totally realized under Israeli rule.²⁰¹ Under Kollek’s plan, however, the **Jerusalem** Arabs would receive total and complete administrative autonomy over their religious and cultural affairs and representation on the **Jerusalem** city council.²⁰²

In 1992, Moshe Amirav, a member of the **Jerusalem** city council, proposed a refinement of Kollek’s boroughs proposal. *40 Under the Amirav plan, a metropolis of some twenty cities would be created out of **Jerusalem**, each with its own municipal government. The entire area would be under the jurisdiction of a greater **Jerusalem** council, which would be composed of Israelis and Palestinians from each of the cities. The chair of the council would be appointed on a rotating basis.²⁰³ On a similar note, a Palestinian analyst, Khalil Tufakji, has advocated a proposal that also involves the creation of individual municipalities, but with no overall city authority. Each municipality would have the same specific urban responsibilities, but each one would make its own decisions as to administration and taxation.²⁰⁴

The boroughs approach, except under the Kollek plan, would present no intractable sovereignty problem. Each “borough” would be under Israeli or Palestinian sovereignty; sovereignty over **Jerusalem** as a whole would be suspended. Second, the artificial entity of “East **Jerusalem**” would not be created. Third, the principle of self-determination of peoples would be observed, although the extent of the principle’s application would be more circumscribed than in the case of full sovereignty over the city, or even divided sovereignty, since the powers vested in each borough would necessarily be less than those of a full sovereign. The proposal is consistent with the gradual evolution that has taken place in the concepts of sovereignty and self-determination toward a more functional approach.²⁰⁵ Finally, the Palestinians might endorse this proposal since Palestinian as well as Israeli boroughs would be established.

However, there are two relatively minor shortcomings to the boroughs proposal. First, the initial Kollek proposal, with its declaration of Israeli sovereignty over all **Jerusalem** and the creation of boroughs therein, would probably be rejected by the Palestinians. Second, with respect to the Tufakji refinements of *41 Kollek’s proposal, there seems to be an extreme level of self-determination involved. Each independent neighborhood would become a veritable city-state in a patchwork of twenty or more such city-states presumably split up between Israel and Palestine. Furthermore, if these neighborhoods are to be represented on a unified city council, as Kollek advocates, then there is great potential for municipal strife as well as paralysis. In the words of one commentator, “a Jewish-Arab council is easier to imagine as a cockpit of rancorous conflict

than of coexistence.”²⁰⁶ Lastly, the boroughs approach neither addresses the **status** of the Holy Places (in which borough would they be included?), nor does it resolve the question of access to such Holy Places.

The sixth option for the resolution of the problem over **Jerusalem** is an approach that calls for expansion of **Jerusalem's** borders. Under this plan, the boundaries of **Jerusalem** would be expanded to include Arab villages in the West Bank. Jewish neighborhoods would similarly connect with adjacent Jewish settlements.²⁰⁷ The Holy Places in the Old City would be administered by each respective religion and would be situated in autonomous zones.²⁰⁸ A parallel proposal would involve an exchange of territory in **Jerusalem**, such that the northeastern Jewish neighborhoods would be included within the Israeli zone in exchange for uninhabited areas of southeastern **Jerusalem** being included in the Arab zone.²⁰⁹ These two ideas have in common the expansion of **Jerusalem** as a tool to facilitate its delineation and the ultimate solution to the intractable **Jerusalem** problem.

The expansion and redivision approaches address self-determination, since the proposed new delineations would be made between areas where Jews live as well as areas where *42 Arabs live. Second, Israel and Palestine could declare **Jerusalem** their respective capitals, though the city would be stretched to accommodate both sovereigns. Third, access to the Holy Places would be guaranteed because the Holy Places would be in autonomous areas of the Old City and under the control of each respective religion.²¹⁰ On the other hand, the expansion and redivision approaches advocate the functional division of the city. Since both Arabs and Jews have expressed agreement as to the importance of the city's unity, any proposal, however generous, which would lead to the city's physical division is seen as disadvantageous.²¹¹

F. A PROPOSED SOLUTION TO THE INTRACTABLE PROBLEM OF JERUSALEM

A possible solution to the seemingly intractable **Jerusalem** issue would incorporate the positive elements of the Abu Odeh proposal, the boroughs proposal and the expansion and redivision proposal. First, as in the expansion and redivision proposal, the boundaries of **Jerusalem** could be expanded outward toward the south and east to encompass additional Arab villages as well as Jewish settlements. Since the current boundaries of the city are not “biblical writ,” the boundaries could be “fuzzed” in order to work out a mutually acceptable solution.²¹² Second, the boroughs approach could be adopted as well; however, there would have to be a municipal council for all of **Jerusalem**. The council would serve as a unifying element, which would preclude the “city-state” character of Tufakjil's boroughs plan and reinforce the fact that the autonomous municipalities together encompass **Jerusalem**.

Third, despite the fact that the city's municipal boundaries would be reconfigured, the city cannot and must not be redivided politically and physically. **Jerusalem** is a city of *43 peace and should not be a scene for snipers, barbed wire, and no-man's land, as it was during the period between 1948 and 1967. Fourth, the Old City should be allocated to religious groups. The Old City is divided into four quarters; each quarter, Christian, Jewish, Armenian, and Moslem, should be autonomous. Access to the Holy Places should be guaranteed to all persons. In contradistinction to elements of several of the other proposals, the religious community should not have total control over access to the Holy Places.

Finally, the issue of sovereignty is perhaps the root cause of the intractability of the **Jerusalem** problem. A basis for agreement as to sovereignty might exist in allowing each respective borough, Arab or Jewish, to vote on whether that borough is to be affiliated with Israel or Palestine. As to the Old City, while administrative control over each Quarter could remain with the four respective religious communities, the Jewish Quarter and Western Wall areas might be placed under Israeli sovereignty. Similarly, the Temple Mount and its mosques could be placed under Arab (Palestinian or Jordanian) sovereignty, and the residents of the Armenian, Muslim, and Christian Quarters could vote on sovereignty as well. This proposal would acknowledge the right of self-determination of peoples, as opposed to that of states. Most importantly, adoption of this proposal would enable **Jerusalem** to emerge from being a site of violence over the course of the past one hundred years. Instead, the city would become one of shared aspiration for Arabs and Jews alike.

Footnotes

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research assistance and guidance, and to Esther M. Schonfeld for proofreading this article. I dedicate this article to the memory of my beloved grandparents, Haskel and Marion Mark. Both exemplified the following principles of peace and justice: "Execute judgment and righteousness and do no wrong, do no violence to the stranger, the fatherless, or the widow; neither shed innocent blood in this place." Jeremiah 22:3. One would hope that all parties to the **Jerusalem** conflict would similarly effectuate Jeremiah's prophetic message.

¹ **Jerusalem** Tunnel Sets Off Worst Palestinian-Israeli Violence in Three Years, FACTS ON FILE WORLD NEWS DIGEST (Facts On File, Inc. ed.), September 26, 1996, at 697 A1, available in LEXIS, World/AllNews database. This tunnel is often referred to as the "Hasmonean tunnel."

² See Eric Silver, **Jerusalem** Tunnel Sparks Arab Fury, THE INDEPENDENT, Sept. 25, 1996, at 12, available in LEXIS, World/AllNews database. The Western Wall is also known as "the Wailing Wall."

³ See *id.*

⁴ See Wafa Amr, **Jerusalem** Tunnel Inflames Jewish, Moslem Passions, Sept. 25, 1996, available in REUTERS WORLD SERVICE.

⁵ Wafa Amr, **Jerusalem** Tunnel the Spark for Frustrated Arabs, Sept. 27, 1996, available in REUTERS NORTH AMERICAN WIRE.

⁶ See Ilene R. Prusher, A Trip into **Jerusalem's** Tunnel of Trouble, CHRISTIAN SCIENCE MONITOR, Oct. 1, 1996, at 1, available in LEXIS, World/AllNews database.

⁷ FACTS ON FILE WORLD NEWS DIGEST, *supra* note 1.

⁸ See generally Amr, *supra* note 4.

⁹ *Id.*

¹⁰ See FACTS ON FILE WORLD NEWS DIGEST, *supra* note 1.

¹¹ *Id.* at 697 A1.

¹² **Jerusalem** Tunnel Sparks Official Jordan Protest to Israel on Treaty Violation, HAARETZ (in Hebrew), Oct. 8, 1996, excerpted and translated in BBC SUMMARY OF WORLD BROADCASTS, ME/D2738/MED, available in LEXIS, World/AllNews database.

¹³ *Id.*

¹⁴ Prusher, *supra* note 6, at 1.

¹⁵ See FACTS ON FILE WORLD NEWS DIGEST, *supra* note 1.

- ¹⁶ See *id.* Pressure to close the new entranceway came from the Palestinian Arabs, Jordan, and ultimately the United States.
- ¹⁷ See 4 D.K. (1950), at 603, translated and reprinted in THE **JERUSALEM** QUESTION AND ITS RESOLUTION: SELECTED DOCUMENTS 105 (Ruth Lapidoth & Moshe Hirsch eds., 1994).
- ¹⁸ *Protests over Jerusalem Tunnel Rage across Palestinian Areas*, Sept. 25, 1996, AGENCE FRANCE-PRESSE, available in LEXIS, World/AllNews database.
- ¹⁹ *Id.*
- ²⁰ *Id.*
- ²¹ Amr, *supra* note 4.
- ²² THE **JERUSALEM** QUESTION AND ITS RESOLUTION: SELECTED DOCUMENTS (Ruth Lapidoth & Moshe Hirsch eds., 1994), at xix.
- ²³ Antonio Cassese, *Legal Considerations on the International Status of Jerusalem*, 3 PAL. Y.B. **INT'L** L. 13, 16.
- ²⁴ Lapidoth & Hirsch eds., *supra* note 22, at xx.
- ²⁵ *Id.* These holy places included, *inter alia*, the Church of the Holy Sepulchre in **Jerusalem** and the Church of the Nativity in Bethlehem.
- ²⁶ *Id.*
- ²⁷ *Id.*
- ²⁸ The Balfour Declaration, Nov. 2, 1917, reprinted in JULIUS STONE, ISRAEL AND PALESTINE: ASSAULT ON THE LAW OF NATIONS 146 (1981).
- ²⁹ See Ruth Lapidoth, *Jerusalem and the Peace Process*, 28 ISR. L. REV. 402, 404.
- ³⁰ *Id.* at 403.
- ³¹ See HENRY CATTAN, PALESTINE AND **INTERNATIONAL LAW** 26 (1973). Article 22 of the Covenant of the League of Nations provided that: "Certain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the Mandatory." *Id.* at 25.
- ³² W. THOMAS MALLISON AND SALLY V. MALLISON, THE PALESTINIAN PROBLEM IN **INTERNATIONAL LAW** AND WORLD ORDER 209 (1986).

- 33 See Terms of the British Mandate for Palestine, confirmed by the Council of the League of Nations on July 24, 1922, art. 13-15, reprinted in Lapidoth & Hirsch eds., *supra* note 22, at 1.
- 34 Cassese, *supra* note 23, at 16, quoting from ELIHU LAUTERPACHT, **JERUSALEM** AND THE HOLY PLACES 13-14 (1968).
- 35 See Cassese, *supra* note 23, at 17 n.10.
- 36 *Id.* at 18.
- 37 Lapidoth & Hirsch eds., *supra* note 22, at xx.
- 38 *Id.*
- 39 See Lapidoth & Hirsch eds., *supra* note 22, at 2 (the majority plan) and 4 (the minority plan).
- 40 See G.A. Res. 181(II), U.N. GAOR, 2d Sess., Nov. 29, 1947, at 146-150, quoted in MALLISON & MALLISON, *supra* note 32, at 160. Part III of Resolution 181 (II) dealt at length with the **internationalization** of the city of **Jerusalem** and its **status** as a *corpus separatum*, or a separate body. Part III also delineated the borders of the city of **Jerusalem** as the old walled city with its many holy places, as well as the surrounding areas in the new city, Bethlehem, and villages on the city's periphery.
- 41 See STONE, *supra* note 28, at 63.
- 42 See Lapidoth & Hirsch eds., *supra* note 22, at 13-17; see also STONE, *supra* note 28, at 63 (it was the view of the Arab states that the partition infringed Arab rights and was *ultra vires* of the General Assembly); Shlomo Slonim, *The United States and the Status of Jerusalem*, 19 *ISR. L. REV.* 179, 183 (detailing the rejection of the partition by Arabs living in Palestine).
- 43 1 HOWARD M. SACHAR, *A HISTORY OF ISRAEL: FROM THE RISE OF ZIONISM TO OUR TIME* 295 (1979).
- 44 *Id.*
- 45 *Id.*
- 46 *Id.* at 297.
- 47 *Id.*
- 48 M. Cherif Bassiouni, *The Palestinians' Right to Self-Determination and National Independence*, INFORMATION PAPER NO. 2 (Association of Arab-American University Graduates, Detroit, Mich.), 1978, at 13.
- 49 *Id.*
- 50 See SACHAR, *supra* note 43, at 311.

- 51 Lapidoth & Hirsch eds., *supra* note 22, at xxi. *See also* SACHAR, *supra* note 43, at 311. The United States recognized the independent State of Israel at 6:10 P.M. on May 14, 1948. *Id.* at 312.
- 52 Slonim, *supra* note 42, at 183. *See also* Lapidoth, *supra* note 29, at 405.
- 53 *See* Lapidoth, *supra* note 29, at 405.
- 54 United Nations Cease-Fire Agreement, *reprinted in* Lapidoth & Hirsch eds., *supra* note 22, at 35 n.1.
- 55 Jordan-Israel General Armistice Agreement, art. V(1)(b), *reprinted in* Lapidoth & Hirsch eds., *supra* note 22, at 35.
- 56 G.A. Res. 303(IV), Dec. 9, 1949. *See also* Slonim, *supra* note 42, at 195.
- 57 4 D.K. (1950), at 603, *translated and reprinted in* Lapidoth & Hirsch eds., *supra* note 22, at 105.
- 58 *See* Slonim, *supra* note 42, at 197.
- 59 *See* Lapidoth, *supra* note 29, at 406. Meanwhile, the Transjordanian monarch, Abdullah, warned that **Jerusalem** would be internationalized over his dead body. SACHAR, *supra* note 43, at 433.
- 60 Resolution of the Newly Elected National Assembly of Transjordan, *reprinted in* Lapidoth & Hirsch eds., *supra* note 22, at 147.
- 61 *See* SACHAR, *supra* note 43, at 434.
- 62 Slonim, *supra* note 42, at 200. Under the functional **internationalization** approach (the Swedish proposal), Israel and Jordan would enter into certain pledges with respect to the Holy Places. The United Nations would appoint a Commissioner to ensure freedom of access to, and non-interference with, the religious shrines. Jurisdiction and administrative control of the respective sectors would be left to the states concerned, namely, Israel and Jordan. Therefore, functional **internationalization** would have no territorial dimension. *Id.* at 194.
- 63 *Id.* at 201.
- 64 *Id.* at 201. *See also* Lapidoth, *supra* note 29, at 406.
- 65 Slonim, *supra* note 42, at 208-209.
- 66 Lapidoth, *supra* note 29, at 406-407. *See also* SACHAR, *supra* note 43, at 644.
- 67 Lapidoth, *supra* note 29, at 406-407. *See also* Cassese, *supra* note 23, at 28. For a detailed description of the Israeli capture of eastern **Jerusalem**, *see* SACHAR, *supra* note 43, at 650-655.

- ⁶⁸ See Report of the United Nations Secretary-General concerning the situation in **Jerusalem**, submitted Sept. 12, 1967, reprinted in Lapidoth & Hirsch eds., *supra* note 22, at 183.
- ⁶⁹ 1967, 21 L.S.I. 75 (5727-1966/67), reprinted in Lapidoth & Hirsch eds., *supra* note 22, at 167. “L.S.I.” is an abbreviation for “Laws of the State of Israel.”
- ⁷⁰ 1967, 21 L.S.I. 75-76 (5727-1966/67), reprinted in Lapidoth & Hirsch eds., *supra* note 22, at 167.
- ⁷¹ G.A. Res. 2253(2), U.N. GAOR, 5th Emergency Special Session, 1967, Resolutions, Supp. 1 (A/6978), at 4, reprinted in Lapidoth & Hirsch eds., *supra* note 22, at 170, and G.A. Res. 2254(2), U.N. GAOR, 5th Emergency Special Session, 1967, Resolutions, Supp. 1 (A/6978), at 9-11, reprinted in Lapidoth & Hirsch eds., *supra* note 22, at 178.
- ⁷² S.C. Res. 242, U.N. SCOR, 1382d mtg. at **8-9** (1967), reprinted in STONE, *supra* note 28, at 165.
- ⁷³ See Lapidoth, *supra* note 29, at 417. Both Prime Minister Menachem Begin and President Anwar Muhammed al-Sadat sent letters to President Jimmy Carter, outlining their respective positions on the **status** of **Jerusalem**, despite its absence from the peace treaty. See Lapidoth & Hirsch eds., *supra* note 22, at 300, for the text of these letters and for President Carter’s response to Sadat’s letter.
- ⁷⁴ See Declaration of Principles on Interim Self-Governing Arrangements Between Israel and the Palestine Liberation Organization, Sept. 13, 1993, art. 4, 5(2), and 5(3), reprinted in Lapidoth & Hirsch, *supra* note 22, at 474-475.
- ⁷⁵ *Id.* at 475.
- ⁷⁶ *Id.* at 474.
- ⁷⁷ Interim Agreement on the West Bank and Gaza Strip, reprinted in THE ARAB-ISRAELI ACCORDS: **LEGAL PERSPECTIVES** 280, 294-295 (Eugene Cotran & Chibli Mallat, eds., 1996).
- ⁷⁸ Yehuda Z. Blum, *The Missing Reversioner: Reflections on the **Status** of Judea and Samaria*, 3 ISR. L. REV. 279, 284, quoting King Abdullah of Transjordan, in a cablegram to the Security Council.
- ⁷⁹ *Id.*
- ⁸⁰ *Id.* at 284.
- ⁸¹ See *supra* Part II.
- ⁸² See U.N. SCOR, May 15, 1948, 292d mtg., at 25 (statement of the Ukrainian representative to the Security Council as quoted in Blum, *supra* note 78, at 284).
- ⁸³ See U.N. SCOR, May 22, 1948, 302d mtg., at 41-42 (statement of the United States delegate to the Security Council as quoted in Blum, *supra* note 78, at 286). See also Blum, *supra* note 78, at 287.

- ⁸⁴ Cassese, *supra* note 23, at 23. Article 2(4) states: “All members shall refrain in their **international** relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.” U.N. CHARTER, June 26, 1945, art. 2, para 4, *reprinted in* LELAND M. GOODRICH & EDVARD HAMBRO, CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS 584 (2d ed. 1949). Since Transjordan was not a member state of the United Nations in 1948, the invasion of Palestine would not constitute an express violation of the United Nations Charter. However, non-member states are similarly obliged by the Charter to refrain from the threat or use of force against other states. *See* Blum, *supra* note 78, at 283 n.11. The principle against the use of force in the conduct of **international** relations would therefore arguably be *jus cogens*.
- ⁸⁵ Alan Levine, *The Status of Sovereignty in East Jerusalem and the West Bank*, 5 N.Y.U. J. INT'L L. & POL. 485, 492 (1972).
- ⁸⁶ CATTAN, *supra* note 31, at 25, *quoting* Article 22 of the Covenant of the League of Nations.
- ⁸⁷ Levine, *supra* note 85, at 492.
- ⁸⁸ *See* J.G. STARKE, AN INTRODUCTION TO **INTERNATIONAL LAW** 150 (1977).
- ⁸⁹ ALLAN GERSON, ISRAEL, THE WEST BANK AND **INTERNATIONAL LAW** 3 (1978).
- ⁹⁰ *Id.* at 4.
- ⁹¹ Jordan-Israel General Armistice Agreement, April 3, 1949, art. II(2), *reprinted in* Lapidoth & Hirsch eds., *supra* note 22, at 34.
- ⁹² YEHUDA BLUM, THE JURIDICAL **STATUS** OF **JERUSALEM** 15 (1974).
- ⁹³ L. OPPENHEIM, **INTERNATIONAL LAW** (H. Lauterpacht ed., 6th ed. 1947), at 527.
- ⁹⁴ BLUM, *supra* note 92, at 17, 17 n.44.
- ⁹⁵ *See* Jordan-Israel General Armistice Agreement, April 3, 1949, art. II(2), *reprinted in* Lapidoth & Hirsch eds., *supra* note 22, at 34.
- ⁹⁶ *See, e.g.,* SACHAR, *supra* note 43, at 445 (describing the eruption of violence in **Jerusalem's** demilitarized zone).
- ⁹⁷ *See* Jordan-Israel Armistice Agreement, April 3, 1949, art. VIII(2), *reprinted in* Lapidoth & Hirsch eds., *supra* note 22, at 37.
- ⁹⁸ GERSON, *supra* note 89, at 78-79.
- ⁹⁹ *See id.*
- ¹⁰⁰ *Id.* at 79.

- 101 See Allan Gerson, *Trustee-Occupant: The Legal Status of Israel's Presence in the West Bank*, 14 HARV. INT'L L.J. 1, 41.
- 102 See RESTATEMENT (SECOND) OF TRUSTS § 170(1) (1959); see generally Charles Bryan Baron, *Self-Dealing Trustees and the Exoneration Clause: Can Trustees Ever Profit from Transactions with Trust Property?*, 72 ST. JOHN'S L. REV. 43.
- 103 See Gerson, *supra* note 101, at 41.
- 104 See STONE, *supra* note 28, at 203 n.51. In 1948, there were 100,000 Jews and 45,000 Muslims residing in Jerusalem.
- 105 See U.N. CHARTER, art. 51, reprinted in GOODRICH & HAMBRO, *supra* note 84, at 596. The text of Article 51 states: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security...."
- 106 ELIHU LAUTERPACHT, JERUSALEM AND THE HOLY PLACES 44 (Anglo-Israel Association, 1968). The sovereignty vacuum was a function of the lack of an orderly devolution of sovereignty upon the mandate's termination.
- 107 MALLISON & MALLISON, *supra* note 32, at 214.
- 108 *Id.* at 235.
- 109 See List of Diplomatic Missions in Israel, July 1997, Information Division, Israel Foreign Ministry, <http://www.israel-mfa.gov.il>, at <gopher://israel-info.gov.il:70/00/dip/dipmiss.dip>.
- 110 See Cassese, *supra* note 23, at 22-23 (Elihu Lauterpacht's analysis of the situation that developed in Jerusalem).
- 111 See Cassese, *supra* note 23, at 22-28.
- 112 *Id.* at 23. It should be noted that this concession is made in the *Palestine Yearbook of International Law*, hardly known for Israeli sentiment.
- 113 *Id.*
- 114 See *id.*
- 115 *Id.* at 24-25.
- 116 See *id.* at 25.
- 117 *Id.*
- 118 *Id.*

- 119 *See id.* at 25.
- 120 Lapidoth & Hirsch eds., *supra* note 22, at xxiii. Such request would arguably constitute recognition of a state's sovereignty over a given territory.
- 121 *See id.* *See also* the statement of the American Consul General at **Jerusalem**, *quoted in* Cassese, *supra* note 23, at 26.
- 122 G.A. Res. 1541(XV), Dec. 14, 1960, Declaration 2, U.N. GAOR, *reprinted in* MICHLA POMERANCE, SELF-DETERMINATION IN LAW AND PRACTICE: THE NEW DOCTRINE IN THE UNITED NATIONS 123 (1982).
- 123 G.A. Res. 1541(XV), Principle VI(c), *reprinted in* POMERANCE, *supra* note 122, at 124-125.
- 124 *See* Cassese, *supra* note 23, at 38.
- 125 *See* MARTIN GILBERT, **JERUSALEM** IN THE TWENTIETH CENTURY 239 (1996).
- 126 *See* G.A. Res. 2253(2), *reprinted in* Lapidoth & Hirsch eds., *supra* note 22, at 170. *See also* G.A. Res. 2254(2), *reprinted in* Lapidoth & Hirsch eds., *supra* note 22, at 178.
- 127 *See* Melinda Crane, *Middle East: Status of Jerusalem*, 21 **HARV. INT'L L.J.** 784, 791 (1980).
- 128 *See* MALLISON & MALLISON, *supra* note 32, at 220.
- 129 G.A. Res. 2253(2), 5th Emergency Special Session, 1967, Resolutions, Supp. 1 (A/6978), at 4, *reprinted in* Lapidoth & Hirsch eds., *supra* note 22, at 170.
- 130 MALLISON & MALLISON, *supra* note 32, at 216-217.
- 131 *See* Cassese, *supra* note 23, at 22. *See also* Crane, *supra* note 127, at 788 n.25.
- 132 *See* BLUM, *supra* note 92, at 12. *Contra* Gerson, *supra* note 101, at 35. "The Arabs' rejection of the Partition Plan of 1947 represented a denial of limitation [of their sovereignty] rather than a rejection *in toto*." *Id.*
- 133 *See supra* Part III.A.
- 134 *See* Jordan-Israel General Armistice Agreement, April 3, 1949, art. II(2), *reprinted in* Lapidoth & Hirsch eds., *supra* note 22, at 34.
- 135 Jordan-Israel General Armistice Agreement, art. III(2), *reprinted in* Lapidoth & Hirsch eds., *supra* note 22, at 34.
- 136 U.N. CHARTER, art. 51, *reprinted in* GOODRICH & HAMBRO, *supra* note 84, at 596.

- 137 See STONE, *supra* note 28, at 118.
- 138 S.C. Res. 242, Nov. 22, 1967, 22 U.N. SCOR, 1382d mtg., at 8-9, reprinted in STONE, *supra* note 28, at 165.
- 139 See Stephen M. Schwebel, *What Weight to Conquest?*, 64 AM. J. INT'L L. 344, 345 (1970).
- 140 *Id.*
- 141 LAUTERPACHT, *supra* note 106, at 51.
- 142 *Id.*
- 143 *Id.*
- 144 Schwebel, *supra* note 139, at 345.
- 145 *Id.* at 346.
- 146 See BLUM, *supra* note 92, at 21. Blum notes that the idea for the relative validity of a sovereignty claim is derived from the *Minquiers and Ecrehos Case*, where the International Court of Justice, when called upon to adjudicate the territorial dispute between England and France, decided to “appraise the relative strength of the opposing claims to sovereignty.” 1953 I.C.J. 67, quoted in Blum, *supra* note 78, at 294-295 n.60.
- 147 BLUM, *supra* note 92, at 21.
- 148 See, e.g., the characterization, after the 1967 war, of the 1949 armistice line by former Defense Minister Moshe Dayan: “The armistice agreements of 1949 are no sacred law. Those agreements and the armistice relations provided by them-not peace but armistice-and the borders and all other provisions ... were the result of the war of 1948. Today’s conditions are the result of the war of 1967. Nothing confers on the results of the 1948 war any priority over the results of the last war. We are no longer bound by what happened in 1948.” SACHAR, *supra* note 43, at 673.
- 149 See STONE, *supra* note 28, at 203 n.51. In 1948, there were 100,000 Jews resident in Jerusalem, as opposed to 25,000 Christians and 45,000 Moslems.
- 150 See, e.g., Karin Laub, *Sacred City that stands in Way of Peace*, THE GUARDIAN, May 22, 1995, available in 1995 WL 7602670.
- 151 In August 1993, the Jewish Municipality Planning Department announced that Jews in East Jerusalem out-numbered Arabs, 152,800 to 150,600. By May 1995, these figures rose to 168,000 Jews and 160,800. Nancy Murray, *The Battle for the Future of Jerusalem*, MIDDLE EAST JUSTICE NETWORK NEWSLETTER, June-July 1995, available in <http://salaam.org/palestine/alquds.html>.
- 152 See Cassese, *supra* note 23, at 39.

- 153 *Id.*
- 154 See G.A. Res. 2253(1), 22 U.N. GAOR, 5th Emergency Special Session, 1967, Resolutions, Supp. 1 (A/6978), *reprinted in* Lapidoth & Hirsch eds., *supra* note 22, at 170.
- 155 Cassese, *supra* note 23, at 23.
- 156 Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 47, *reprinted in* MALLISON & MALLISON, *supra* note 32, at 486. This Article states: “Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention ... by any annexation by the Occupying Power of the whole or part of the occupied territory.”
- 157 See Cassese, *supra* note 23, at 39.
- 158 *Id.* at 33-34.
- 159 Slonim, *supra* note 42, at 217-218. For a contrasting perspective, see the speech of United States Ambassador to the United Nations Charles Yost, which described eastern Jerusalem as occupied territory subject to the rules of belligerent occupation, and further subject to a return to Jordanian sovereignty. *Id.* at 215. However, Ambassador Yost did not himself advocate the return of eastern Jerusalem to the Palestinians.
- 160 Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 49(6), *quoted in* MALLISON & MALLISON, *supra* note 32, at 486.
- 161 Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 47, *quoted in* MALLISON & MALLISON, *supra* note 32, at 486.
- 162 See Slonim, *supra* note 42, at 222, *quoting* Gerson, *Trustee-Occupant: The Legal Status of Israel's Presence in the West Bank*, 14 HARV. INT'L L.J. 1, at 39.
- 163 Blum, *supra* note 78, at 293. For a rebuttal to Blum's argument, see MALLISON & MALLISON, *supra* note 32, at 254-258.
- 164 Blum, *supra* note 78, at 293. See also Slonim, *supra* note 42, at 224.
- 165 Cassese, *supra* note 23, at 39.
- 166 See Jordan-Israel General Armistice Agreement, April 3, 1949, art. II(2), *reprinted in* Lapidoth & Hirsch eds., *supra* note 22, at 34.
- 167 See, e.g., Adnan Abu Odeh, *Two Capitals in an Undivided Jerusalem*, 71 FOREIGN AFFAIRS, Spring 1992, at 184; S. Zalman Abramov, *The Goal of an Undivided Jerusalem*, THE JERUSALEM POST, March 18, 1990.
- 168 See, e.g., Karin Laub, *Sacred City that Stands in Way of Peace*, THE GUARDIAN, May 22, 1995, [available in 1995 WL 7602670](#).

- ¹⁶⁹ See STONE, *supra* note 28, at 203 n.51. In 1995, the city of **Jerusalem** had approximately 410,000 Jews and 155,000 Arabs. See Laub, *supra* note 168.
- ¹⁷⁰ Abramov, *supra* note 167.
- ¹⁷¹ See SACHAR, *supra* note 43, at 430-436.
- ¹⁷² *Id.* at 433.
- ¹⁷³ *Id.* at 667.
- ¹⁷⁴ See *supra* Part III.C.
- ¹⁷⁵ See Cassese, *supra* note 23, at 39.
- ¹⁷⁶ See *supra* note 126.
- ¹⁷⁷ See *supra* note 138.
- ¹⁷⁸ See, e.g., Imad Musa, *Israel Celebrates Jerusalem's Capture, Unification*, AAF NEWSFEED, May 24, 1998, available in LEXIS, World/AllNews database; Bill Hutman, *Former Mayor: Jerusalem Must Not Be Redivided*, THE JERUSALEM POST, May 9, 1993 (former East **Jerusalem** mayor Ruhi Khatib referring to himself as the mayor of "Arab **Jerusalem**" for that very reason). *But cf.* *supra* note 108, which evidences implicit endorsement by Costa Rica and El Salvador of the Israeli declaration of **Jerusalem** to be its capital.
- ¹⁷⁹ The reaction of Gaza protesters to the opening of a new entrance to the Hasmonean tunnel in **Jerusalem** is an example of this opposition. The demonstrators chanted, "No to the Judaization of **Jerusalem**." *Protests Over Jerusalem Tunnel Rage Across Palestinian Areas*, *supra* note 18.
- ¹⁸⁰ See MALLISON & MALLISON, *supra* note 32, at 237.
- ¹⁸¹ See generally Alon Ben-Meir, *United Jerusalem—A Catalyst for Peace*, CHRISTIAN SCIENCE MONITOR, June 24, 1992, at 19. See also Abramov, *supra* note 167.
- ¹⁸² See Abramov, *supra* note 167.
- ¹⁸³ See MALLISON & MALLISON, *supra* note 32, at 237.
- ¹⁸⁴ See *id.*
- ¹⁸⁵ See Abramov, *supra* note 167.

186 See MALLISON & MALLISON, *supra* note 32, at 237.

187 *Id.*

188 Abu Odeh, *supra* note 167, at 187.

189 *Id.*

190 *Id.*

191 *Id.* at 188.

192 *Id.* at 187-188.

193 *Id.* at 184.

194 Note Abu Odeh's reference to the Jewish neighborhoods in eastern **Jerusalem** as "settlements." *Id.*

195 *Id.* at 188.

196 See *supra* Part I.

197 MALLISON & MALLISON, *supra* note 32, at 237.

198 See Abraham Rabinovich, *The Old Lion Still Has Teeth and a Sense of Humor*, THE **JERUSALEM** POST, October 22, 1993, at 4B.

199 See *id.*

200 Bill Hutman, *Kollek Suggests Capital Boroughs Idea to Grant Arabs Increased Self-Rule*, THE **JERUSALEM** POST, January 30, 1992.

201 *Id.*

202 Alon Ben-Meir, *supra* note 181.

203 *Id.*

204 Deborah Horan, *Six Hundred Grand Designs for Divided **Jerusalem***, INTER PRESS SERVICE, March 20, 1996, [available in 1996 WL 9809507](#). The Tufakji proposal is modeled on the city of London, the British capital.

- ²⁰⁵ See Benedict Kingsbury, *Claims by Non-State Groups in International Law*, 25 CORNELL INT'L L.J. 481, 503.
- ²⁰⁶ Abraham Rabinovich, *An Arab Identity in the Capital*, THE JERUSALEM POST, May 15, 1995, [available in 1995 WL 7557636](#).
- ²⁰⁷ See Ben Lynfield, *Palestinians, Israelis Test Ideas on Jerusalem Dispute*, AGENCE FRANCE-PRESSE, February 19, 1996, [available in 1996 WL 3807472](#).
- ²⁰⁸ See Bill Hutman, *Plan to Share Jerusalem Presented to PA*, THE JERUSALEM POST, March 19, 1996, [available in 1996 WL 4070608](#).
- ²⁰⁹ See *id.*
- ²¹⁰ See *id.*
- ²¹¹ See Abramov, *supra* note 167.
- ²¹² Rabinovitch, *supra* note 206.

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