

Enrico Molinaro

Negotiating
Jerusalem

Preconditions for Drawing Scenarios
Based on Territorial Compromises



PASSIA

Palestinian Academic Society for the Study of International Affairs

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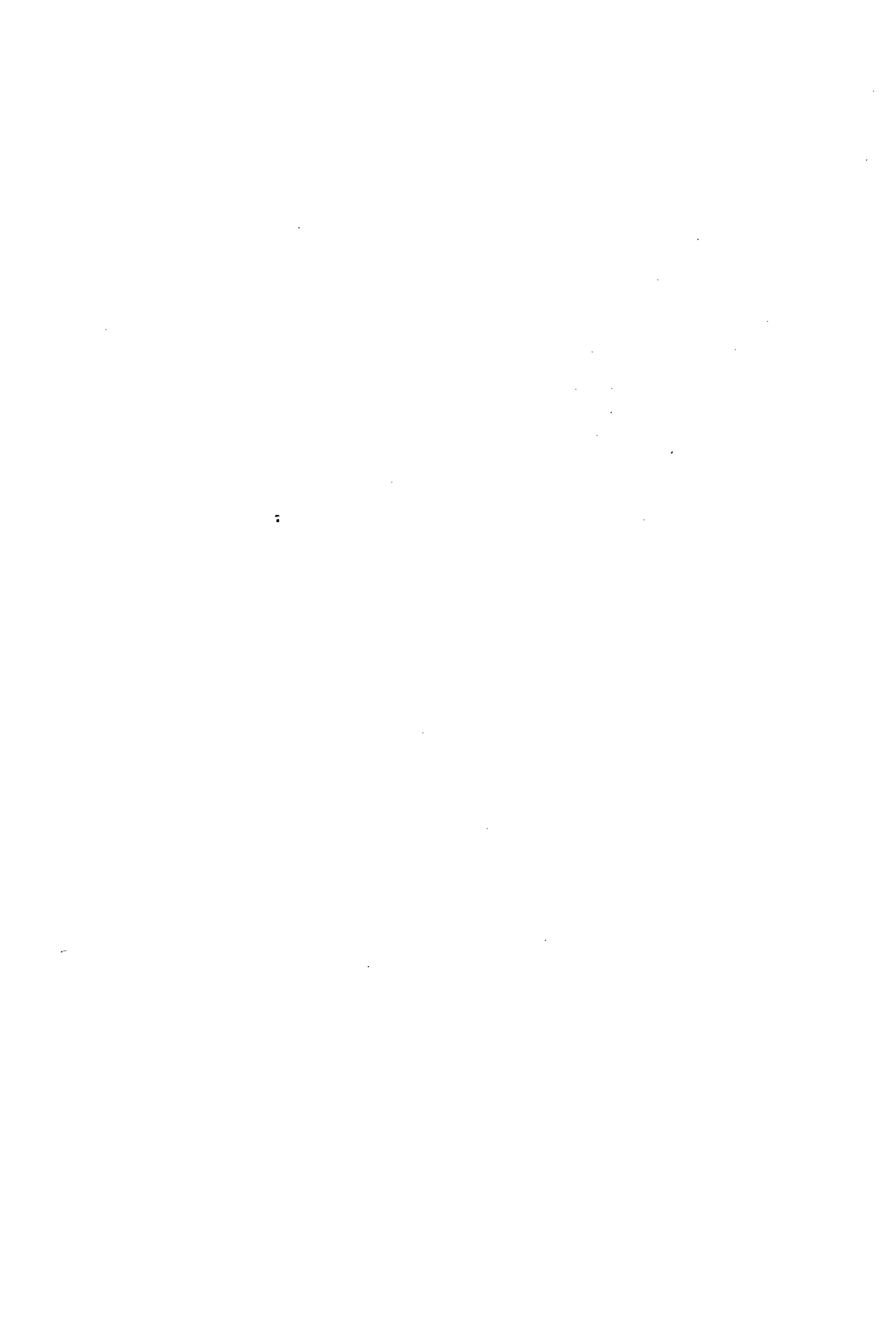
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or **judicial jurisdiction**, depending on the organization of the particular state's constitutional system.

- b) **Territorial jurisdiction** refers to the spatial (*ratione loci*) dimension or scope of authority in international law.
 - c) **Personal jurisdiction** refers to the (categories of) people (*ratione personarum*) – whether citizens or not – under the state's authority.
-

b. Different meanings of the expression 'status quo' in Jerusalem

1. **The Status Quo in the Holy Places in the narrow sense.** The Latin expression, when capitalized, refers to the temporary legal regime to manage and suspend disputes on respective rights and interests with regard to several important sacred sites in the Jerusalem area (including Bethlehem), crystallized since Ottoman rule (1517-1917). This rather coherent, sufficiently organized, set of norms is a special, *sui generis*, *ad hoc*, system of law, related to the relationship among the recognized communities.
2. **The cultural/religious status quo.** This expression broadly defines the cultural and religious aspects of the city, including the relations between the recognized religious communities and the territorial authorities.
3. **The political/territorial status quo.** The political balance of powers *in situ* between the Israeli and the Arab sides since 1967, pending a final solution that the relevant parties will negotiate.

INTRODUCTION

Israel and the PLO have decided to exclude from the framework of the interim peace agreements the discussion over the highly sensitive and strategic issue of Jerusalem until the beginning of the permanent status negotiations. Introducing two opposite – and specular - models of collective identity may offer one possible explanation for this decision.

The first, the territorial/national approach emphasizes the special importance of Jerusalem as the national capital for two warring parties. The second model follows a universalist-religious approach. This view stresses Jerusalem's significance as a spiritual center for Christians, Jews and Muslims spread throughout the world.

The paper's basic assumption is based on the premise that "[a]ll Western nations tend to think and behave in bipolar terms."¹ The resulting dichotomist approach characterizes Western culture in many different fields, influencing its scholarly language and current popular terminology. Examples include Particular/Universal, Secular/Religious, Profane/Sacred, Public/Private or Territorial/Trans-territorial.

Without going back to Emmanuel Kant's *apriori*, it is sufficient to mention, more recently, the outstanding contribution of George Simmel to stress the importance of pre-constructed views in the interpretation of social and cultural phenomena.

In the context of this dichotomist approach to the issue at hand, a 'religious and cultural status quo' (in the broad sense) in respect to the city as well as the Status Quo in the narrow sense applied to the major Holy Places located in the area govern the relations between the members of

¹ Bateson, (1972) *Steps to an Ecology of Mind*, p. 104. In various articles included in his book, Bateson has shown how polarized models apply to the motives of Dominance/Submission, Exhibitionism/Spectatorship, Succoring/Dependence. This dichotomic attitude is a result of the Western modern epistemological approach. "The Western mind carefully sifts, weighs, selects, classifies" (Carl Gustav Jung, foreward to *The I Ching or Book of Changes*, p. iiii).

the religious orders that reside there as well as their relations with the territorial authority.

These explanations allude to the various claims made on the city. Their determination as well as the exact definition of the parties who make them is a complicated task. One of the reasons is the complex interweaving of both the aforementioned territorial/national and the universalist-religious discourses.

An apparent clear-cut dichotomy emerges between the two described models of collective identity. This work aims at awakening awareness of this dichotomist approach, with the ambitious goal of helping to better understanding of the issue at hand. The drafters and supporters of the Palestinian-Israeli agreements and the Oslo Peace Process tend to stress the territorial/national discourse. However, they have an interest not to overlook the possibility of incorporating the universal/religious discourse to achieve a successful compromise in the negotiations process.

Western and European conquerors, especially in the last two centuries, have influenced models of collective identities in the Middle East, which were organized in more flexible frameworks, such as the Millet system. An exhaustive study of this phenomenon would go far beyond the limited scope of this work. Nevertheless, it is important to stress the fact that models, however sophisticated and complex they may be, always contain an element of abstract simplification. Human reality is much more complex and, by definition, dynamic. For example, different models of collective identity and corresponding symbols are not necessarily mutually exclusive.

One may adopt either a national territorial-oriented or a universalist-oriented approach - whether religious or not - as a heuristic tool to interpret social realities as long as it works and makes sense. However, this does not necessarily imply that the resulting models *are* the reality. The same cautious attitude is required when considering the models of governmental power described in this paper along different criteria of jurisdiction or authority.

When incorporating the universalist-religious model of identity into the policy process, negotiators may focus their attention, its very symbols in the area, namely Jerusalem and the Holy Places. In this respect, negotia-

tors may try to take into account - as much as possible - temporary 'status quo' arrangements in order to avoid the obstruction of peace compromises by religious conflicts. The author, to address this issue, has developed policy options potentially applicable to the current permanent status negotiations. These include creative solutions such as the replacement of controversial words by alternative terms (for example 'sovereignty' or 'status quo') that otherwise in the negotiations could become the source of political manipulation.

The author has discussed his ideas in several international conferences and seminars with the participation of Arab, Israeli, European and American diplomats and academics, including, in the year 2000, the Committee on Jerusalem chaired by Dr. Moshe Amirav on the request of the Israeli Prime Minister. Several governmental and academic bodies funded his research, including the Holy See, the Royal Court of Jordan, the Tami Steinmetz Center for Peace Research at the Tel Aviv University as well as the Minerva Center for Human Rights at the Hebrew University.

It should be mentioned here that the work presented in the following is based on a lecture given by the author for PASSIA on 23 August 2001. It includes updated portions of the following articles by the author: "Alternative Definitions of Sovereignty: An Analysis of Coexisting of National and Religious Identities in Jerusalem"², and "Creative Approaches for the Coexistence of National and Religious Identities in Jerusalem."³

Last but not least, the author would like to acknowledge the help of his research assistants who contributed as well as were involved in the reviewing and editing process of this work – Devorah Brous, Brendon Carlill, Kristopher Colbert, Svetlana Greenfield, Ephraim Mor, Jacob Raver, Marco Zarfati – as well as the team's coordinator Merav Barlev.

² In Bazzoni, Stefania & Chartouni-Doubarry, May (eds.) *Politics, Economics and the Search for Mediterranean Stability* (Monte Carlo: Institut d'études politiques méditerranéennes, 2002), pp. 103-139.

³ in Ginat, Joseph, Perkins, Edward J. Edwin & Corr, G. (eds.), *The Peace Process: Vision Versus Reality* (Brighton, U.K.: Sussex Academic Press & Norman, Oklahoma: The University of Oklahoma Press, forthcoming).

I. THE TERRITORIAL/NATIONAL-ORIENTED APPROACH PREVAILING DURING THE OSLO NEGOTIATIONS

After a meeting held in London in December 1992, Afif Safieh, the PLO's representative in Britain, as well as at the Holy See, Abu Ala (Ahmad Qrei'a), the Fateh's financial affairs chief on one hand, and Dr. Yair Hirschfeld, from the University of Haifa, on the other have initiated the secret, unofficial, semi-academic 'Oslo channel.'¹

After this first meeting, Israel conducted secret negotiations in Oslo with the PLO under the auspices of Norway's Minister of Foreign Affairs. The Oslo talks resulted in the Declaration of Principles on Interim Self-Government Arrangements (hereinafter the DOP), initialed in Oslo on 19 August and signed in Washington, D.C., a few weeks later, on 13 September 1993.

Shimon Peres for the Government of Israel and Mahmoud Abbas (Abu Mazen) "(f)or the PLO team (in the Jordanian-Palestinian Delegation to the Middle East Peace Conference), representing the Palestinian people" signed the DOP, also known as the 'Oslo Declaration' or the 'Oslo Agreement'. Representatives of the United States of America and the Russian Federation have witnessed the document's signature as well.

On 9 September 1993, shortly before signing the DOP, Yasser Arafat, Chairman of the Palestine Liberation Organization and Israeli Prime Minister Rabin exchanged two letters.² On the same day, Arafat sent an additional letter to Johan Jorgen Holst, Foreign Minister of Norway.³

Arafat's letter to Rabin stated, among other things, that "the PLO recognizes the right of the State of Israel to exist in peace and security," and "commits itself ... to a peaceful resolution of the conflict between the two sides." He added that the PLO

¹ See Klein (2001) *Jerusalem. The Contested City*, pp. 137-138.

² The letters are reproduced in Abdul Hadi (ed.) (1997) *Documents on Palestine*, vol. 2, *From the Negotiations in Madrid to the Post-Hebron Agreement Period*, p.142.

³ *Ibid.*

“(a)ffirms that those articles of the Palestinian Covenant which deny Israel's right to exist and the provisions of the Covenant which are inconsistent with the commitments of this letter are now inoperative and no longer valid.”⁴

Rabin replied that

“...in light of the PLO commitments included in your letter, the Government of Israel has decided to recognize the PLO as the representative of the Palestinian people and commence negotiations with the PLO within the Middle East peace process.”⁵

From the correspondence it emerges that only “the two sides,”⁶ by exchanging the letters and engaging in direct negotiations, are the legitimate parties who recognize each other the right to represent their respective national communities. The Chairman of the PLO by recognizing “the right of the State of Israel to exist in peace and security,”⁷ also indirectly recognized Israel's right to legitimately and exclusively represent its own people. The Israeli Prime Minister, in turn, recognized “the PLO as the representative of the Palestinian people.” Now the PLO no longer needed to be included in “the Jordanian-Palestinian Delegation to the Middle East Peace Conference,”⁸ as provided by the letter of invitation to the Madrid Peace Conference. This letter, jointly issued by the US and the Soviet Union on 30 October 1991, had stated instead that “Palestinians will be invited and attend as part of a joint Jordanian-Palestinian delegation.”⁹ Since the conclusion of the DOP, the PLO began conducting direct negotiations with Israel *on its own*.

According to the DOP, the two sides agree that

⁴ *Ibid.*

⁵ *Ibid.*

⁶ Letter of Arafat to Rabin, reproduced in *ibid.*

⁷ *Ibid.*

⁸ *Ibid.*, p. 145.

⁹ *Ibid.*, p. 10.

“(t)he aim of the Israeli-Palestinian negotiations within the current Middle East peace process is, among other things, to establish a Palestinian Interim self-Government Authority, the elected Council (the "Council"), for the Palestinian people in the West Bank and the Gaza Strip, for a transitional period... (Article I. Aim of the negotiations).”¹⁰

Article III of the DOP, entitled *Elections*, states that

“1. In order that the Palestinian people in the West Bank and Gaza Strip may govern themselves according to democratic principles, direct, free and general political elections will be held for the Council...

“3. These elections will constitute a significant interim preparatory step toward the realization of the legitimate rights of the Palestinian people and their just requirements.”¹¹

The most important among the DOP’s provisions, for this paper’s purposes, is Article IV.

The article, entitled *Jurisdiction*, states that

“Jurisdiction of the Council will cover West Bank and Gaza Strip territory, except for issues that will be negotiated in the permanent status negotiations. The two sides view the West Bank and the Gaza Strip as a single territorial unit, whose integrity will be preserved during the interim period.”¹²

One may infer from this provision’s language that negotiators of the DOP, aiming “to put an end to decades of confrontation and conflict,” as stated in the Declaration’s Preamble, clearly envisaged an approach that defined here as territorial/national-oriented. The same Preamble continues

¹⁰ *Ibid.*, p. 145.

¹¹ *Ibid.*

¹² *Ibid.*

by stating that “the two sides” (The Government of the State of Israel and the PLO - the “Palestinian Delegation”),

“recognize their mutual legitimate and political rights, and strive to live in peaceful coexistence and mutual dignity and security and achieve a just, lasting and comprehensive peace settlement and historic reconciliation through the agreed political process.”¹³

By stressing the mutuality of the Israeli and Palestinian “legitimate and political rights,” the DOP seems to envision the most likely outcome of the “agreed political process”, that is the creation of an independent territorial subject of international law. Clear space boundaries would delimit territorial jurisdiction and authority of both territorial entities, which would be fully independent of each other. Once “the mutual dignity and security” of the two sides was recognized in the DOP, no logic or legal reasoning might possibly explain why the Palestinian side should not be entitled to enjoy the same status as that of the Israeli side in international law.

To better understand the described territorial-oriented framework prevailing in the ‘Oslo process’, it may be helpful to examine the evolution of the concept of *territorial sovereignty* throughout European history.

I.1 Ancient Rome and Modern Europe: From a Flexible Combination to An Exclusive Cyclical Dichotomy of Territorial and Personal Jurisdiction?

The term *sovereignty*, associated since the 19th Century with the model of the modern nation-state, may represent more than any other the core European political heritage adopted in the Middle East.

The European-born concept of territorial sovereignty touches upon the organization of governmental power according to institutional frameworks that may enhance the contemporary development of the identity of the people along national territorial lines as opposed to alternative trans-territorial models of group identification such as universal religious affiliation.

¹³ *ibid.*

Adapting the lessons of the past to modern political debate may help disabuse well-accepted clichés of the nation state's exclusive European model, and shape, in an innovative way a more stable future, where different levels of group identification find a suitable institutional representation.

It is not the author's intention to outline the existing theories on the complex relationship between state and territory in international law or to suggest new ones. Nor is it the purpose of this section to illustrate in details all the complex issues related to the problematic penetration of European cultural, political and economic influence in the Middle East in general. Rather, the limited goal of this section is to clarify - through a historical-hermeneutical approach - the main concepts involved in the European model of territorial sovereignty. A critical overview of a few selected legal-political experiences in European history may help to explain the different meanings of the term territorial sovereignty in international law.

Careful consideration of terminological and semantic issues, particularly when dealing with a term that has inherent symbolic appeal, may be helpful for those working towards a conflict-resolution approach. The different meanings of the term sovereignty can be determined and understood only in a historical perspective. The political need to defend and strengthen the power of the state or the monarch in the face of obstacles and setbacks was behind the creation and gradual general adoption of the concept in Europe.

Identifying the range of definitions of this term may help to remove ambiguous terminology as well as elucidate available policy options for the parties engaged in territorial conflict, particularly in the Middle Eastern and the Mediterranean regions. Avoiding narrow interpretations of the term, resulting from an exclusive approach of a nation state's authority, typical of European tradition, may facilitate a resolution of recent ethnic or religious conflicts in the area.

The different ways to distribute administrative power correspond to specific socioeconomic and political needs and conditions that have been changing over the centuries. Since early antiquity the laws of the group,

termed 'personal laws,'¹⁴ and not the laws of the polity of residence have governed in various instances all or part of the legal relationship of the different groups. This applied regardless of whether or not they were citizens of such political entities.

Romans applied a combination of *territorial* and *personal* jurisdiction to a broad area corresponding approximately to Europe and most of the Middle East. These two main criteria for organizing political authority were not mutually exclusive and the territorial rulers considered both in case-by-case decisions when distributing authority.

In Roman (and Hellenistic) antiquity, borders often defined the identity of the ethnic group (the *ethnos*). The boundary of a community thus coexisted inside a larger boundary of a territorial entity, commonly defined as an empire. In areas under her control, Rome did not exercise an absolute and exclusive authority on her subjects, allowing various degrees of autonomy, in particular in the judicial sphere. The residents of the conquered areas had the status of foreigners using their own law (*peregrini qui suis legibus utuntur*), and thus lived in accordance with local law (*secundum propriae civitatis iura*). Romans gave such autonomy to several areas of the Middle East, including Judaea, approximately modern Israel/Palestine.

The Romans used a system of personal laws, distinguishing between Roman citizens and foreigners. The former were subject of Roman civil law (*jus civile* or *jus Quiritium*). For the latter (*peregrini*), a special magistrate (*praetor peregrinus*) applied his own amalgam (*contaminatio*) of Roman and foreign provincial law. The resulting new branch of law (*jus gentium*) through the filter of his authority (*imperium*) and tempered by considerations of equity - was quite different from the original components.

This function of creating law - *jus reddere*, or *jus dicere*, from which the word *jurisdiction* (in Latin *jurisdictio*) originated - explains the full title given to this special magistrate. The *praetor peregrinus qui inter peregri-*

¹⁴ Vitta (1970) "The Conflict of Personal Laws," p. 170. See also Molinaro (2002) "Alternative Definitions of Sovereignty: An Analysis of Coexisting of National and Religious Identities in Jerusalem"; the section entitled "The current situation in East Jerusalem" (pp 121-123) analyses the complex intertwining of personal and territorial jurisdiction between different subjects of international law sharing powers in Jerusalem.

nos and inter cives et peregrinos jus dicit was the traveling magistrate, who - through jurisprudential decisions - made law (for disputes) between (foreign) travelers and citizens on one side and between (foreign) travelers themselves on the other.

Quite rarely, the expression *jus gentium* expressed a different meaning, referring to the law governing the relations of Rome with other polities, corresponding to the modern idea of international law. Another meaning of the expression was the natural law (*jus naturale*), or the natural order (*naturalis ratio*), also defined as the law of "all peoples" (*jus omnium gentium*), among whom the Romans were included.

In the context of the new legal system created by the *praetor peregrinus*, *jus gentium* represented the product of the political and economic contacts of Romans with foreign territories gradually conquered. This development relates particularly to the Eastern areas of the Mediterranean basin, since the sea was the quickest - and safest - way of communication and exchange. Commercial relations with foreign political entities explain why Roman courts used to consider their legal customs for transactions concluded in Rome and to develop new rules and institutions. This legal development took place particularly in the contractual field, while the law of family and succession remained untouched.¹⁵

Additionally, 'divine law,' unlike ordinary private law, applied to special things, or areas, belonging to nobody (*res nullius*), or to God (*res sacrae*). In such places as temples, churches and other separate areas with similar functions, Roman law forbade any business activity related to them (*extra patrimonium* and *extra commercium*). Sometimes ordinary judicial jurisdiction on substantive disputes did not apply to sanctuaries, including the main Holy Places of Jerusalem. No ordinary law (*jus humanum*) applied to them, since they were "set apart from ordinary use and dedicated to religious purpose."¹⁶

¹⁵ See on this account "*Ius Gentium*" entry in Berger (1953) *Encyclopaedic Dictionary of Roman Law*, pp. 528-529. See also Scarlata Fazio (1953) "Praetor," p. 550; and Eduardo Vitta (1970) "The Conflict of Personal Laws," p. 171.

¹⁶ Zander (1982) "Jurisdiction and Holiness: Reflections on the Coptic-Ethiopian Case," p. 270. See *ibid.* also for the information about the legal concept of *res divini juris* in Antiquity.

An historical approach suggests that both the aforementioned criteria of territorial and personal jurisdiction were relatively dynamic, envisaged to respond to complex realities. After the Barbarian invasions, and the wide-scale adoption of Roman law that followed, however, the two principles forged the political institutions of Europe following an apparent dichotomist cyclical process. In the new context, the described principles thus passed through the Middle Ages into Europe's legal heritage as a result of the changing sociopolitical interests of the time.

Given the overlapping and asymmetrical allegiances of its various forms of governments, some consider Medieval Europe "an archetype of nonexclusive territorial rule."¹⁷ Ruggie goes on to write

"The notion of firm boundary lines between the major territorial formations did not take hold until the thirteenth century; prior to that date, there were only *frontiers*, or large zones of transition."¹⁸

During this early period of European history, the Frankish State, and later the Lombardians in their conquered Italian territories, applied the first large-scale instance of a system of personal laws.¹⁹ Marked ethnic differences had been the main reason for the birth of this system. Gradually, however, the aforementioned ethnic difference became less manifest, weakening and undermining the described system. As a result, a "...process of mutual reaction between German customs and Roman law started to develop until both eventually came under the influence of canon law."²⁰ In this new context, the Emperor and the Pope exercised their authority on a universal basis through the Holy Roman Empire and the Church, respectively.

¹⁷ Ruggie (1993) "Territoriality and beyond: Problematizing modernity in international relations," p. 149.

¹⁸ Ruggie (1993) "Territoriality and beyond: Problematizing modernity in international relations," p. 150; see also Holsti (1967) *International Politics: A Framework for Analysis*, p. 84 and the entry "Sovereignty" in the 'Lexicon of Terms' in Hirsch, Housen-Couriel & Lapidoth (eds.) (1995) *Whither Jerusalem? Proposals and Positions Concerning the Future of Jerusalem*, p. 163. Here, like in other quotations in this paper, italicized words correspond to the original text.

¹⁹ See Vitta (1970) "The Conflict of Personal Laws," p. 170.

²⁰ Vitta (1970) "The Conflict of Personal Laws," p. 172.

As time progressed, however, local elites, predominantly territorial rulers such as kings and princes, started challenging these trans-territorial super-elites. The territorial-oriented elites, gradually emphasized - especially after the 1648 Peace of Westphalia, which ended the Thirty Years' War - territorial jurisdiction as a criterion to define the scope of state authority. The emerging modern state brought about a notion of "ideal political community"²¹ whose components would link the local residents together as citizens with a common national identity.

This brief description shows how temporary socioeconomic and political concerns of the competing elites have often succeeded in influencing and shaping the organization of power following abstract models. These correspond to the described ways of organizing political authority, according to principles of prevalently personal or territorial jurisdiction.

I.2 The European State's Model of Exclusive *Territorial Sovereignty*. Legal-Historical Background of the Term and Practical Distinction to its Three Different Aspects: *Independence, Authority and Title*

At the end of the 17th Century, the term 'sovereignty' – defining the king's supreme power within specified boundaries – became popular in Western and European legal literature, giving moral and philosophical legitimization to a legal reality already influencing large parts of Europe. The term has its etymological origin in the Latin word *supra*, literally meaning 'above,' referring to the superior position of the territorial ruler's power vis-à-vis any other authority within the country's boundaries.

Thomas Hobbes and Baruch Spinoza gave to the concept, originally developed by Jean Bodin, an absolute character. Introduced by philosophers, the term 'sovereignty' acquired a legal meaning in public municipal law. Similarly, the absolute and exclusive features of private property in Roman law influenced the patrimonial concept of state territory.

²¹ Ruggie (1993) "Territoriality and beyond: Problematizing modernity in international relations," p. 179.

The term 'sovereignty', appearing in scholarly literature as well as in diplomatic documents and treaties, made its appearance eventually in international law. This system corresponds to a different social and legal context, where the subjects of law are not individuals, as they are in municipal law. In international law the subjects are mainly governments and international organizations, entities capable of exercising international rights and duties and having the capacity to maintain their rights through international claims.²² This implies a need to interpret international legal norms in their proper context, a process that requires, for this system of law, a *vindicatio in libertatem*, in the sense of a quest for hermeneutical separate consideration from other systems of law.

In modern times 'sovereignty' has been used in reference to 'states', to the extent that these terms have been used to define two "twin concepts."²³ The term 'state' is also common in international practice, including important multilateral treaties, such as the United Nations Charter (Article 2, Paragraph 4) and the Statute of the International Court of Justice (Article 34, Paragraph 1).

Traditionally, international legal scholars as well as diplomats consider the delimitation of the exercise of authority within the territory of a state as one of the main purposes of international law. According to this view, any foreign penetration might be dangerous for the territorial order and for the intimacy of the nation's life.

Territorial jurisdiction has been defined as

"the authority over a geographically defined portion of the surface of the earth and the space above and below the ground, which a sovereign claims as his territory, together with all persons and things therein."²⁴

²² See "Reparation for Injuries" ICJ Reports (1949), p.179; see also, Brownlie (1998) *Principles of Public International Law*, p. 57.

²³ Lapidoth (1995) "Redefining Authority: The Past, Present and Future of Sovereignty," p.8.

²⁴ Schwarzenberger & Brown (1976) *A Manual of International Law*, pp. 73-74. See also Jennings & Watts (eds.) (1992) *Oppenheim's International Law*, vol. 1, Peade, p. 384; Steinberger (1987) "Sovereignty," p. 399.

From this territorial-oriented perspective, any person or thing situated within or entering the territory of a state should *ipso facto* be subject to the state's authority.

A necessary link between a state's authority over an area and the state's ability to be an independent actor in the international arena was so established. Independence became a necessary corollary of (territorial) authority in the relation between states, as well as of its legal source (title). As a result, international legal scholars and diplomats, especially of European origin, started to use *sovereignty* to mean three different concepts: *independence*, *authority* and *title*.

I. International legal scholars as well as diplomats adopt the term 'sovereignty' on one hand, as a synonym for **independence**,²⁵ to define an essential prerequisite for the states to be subjects of international law.

Justice Dionisio Anzilotti has defined independence as ("external") sovereignty, or *suprema potestas*, "by which is meant that the state has over it no other authority than that of international law,"²⁶ in relation to persons, things and relationships within its territory. Hence, a state must be independent of other legal orders (particularly foreign governments), and any external interference must be justified by a specific norm of international law.

II. *Sovereignty* is also a synonym for (full) **authority** (otherwise defined as governmental *control*, *power* or *jurisdiction*²⁷), which states are enti-

²⁵ See, for instance, Brownlie (1998) *Principles of Public International Law*, p. 76, p. 292; "Palmas Arbitral Award" (1928) reproduced in Jennings (1963), p. 91, ("Palmas Arbitral Award" - Arbitral Award Rendered In Conformity with the Special Agreement Concluded on January 23rd, 1925, between the United States of America and the Netherlands Relating to the Arbitration of Differences Respecting Sovereignty over the Island of Palmas [or Miangas]", 4 April 1928); Dinstein (1966) "*Par in Parem non Habet Imperium*," p.413. Rousseau (1974) *Droit International Public, Tome II, Les sujets de Droit* p60 has clearly drawn the distinction between *independence* and *authority*.

²⁶ Judge Anzilotti, in his Individual Opinion of 5 September 1931, given in the "Austro-German Customs Union case" (1931) *PCIJ*, p. 57; see also Lauterpacht (1997) "Sovereignty: myth or reality?," p. 140.

²⁷ "Authority" is preferred here to alternative terms borrowed from Roman law terminology, such as *imperium* or *suprema potestas* (See Arangio-Ruiz (1993) *Le domaine réservé* p445, n848. According to Dinstein (1966) "*Par in Parem non Habet Imperium*," p. 413, the term *imperium* "clearly appears to connote power in the sense of

tled to exercise within the limits of customary international law. Arbitrator Max Huber of the Permanent Court of Arbitration, for example, refers in his decision on the Island of Palmas to the "facts showing the actual display of sovereignty."²⁸ Here the term has been used as a synonym for authority, and its "actual display" is nothing but its exercise, or manifestation.

Huber considered the principle of exclusive authority of the state over its own territory as the point of departure in settling most questions that concern international relations. Huber handed down his decision in 1928, during a period when the idea of the state's absolute and exclusive national powers dominated Europe. This territorial-oriented national-state model was a result of the historical process mentioned above, whose ideological, philosophical and political effects developed particularly in the 19th Century. It was from this period, for example, that a decision was enacted, which was later quoted by the *ad hoc* judge Chagla (designated by India) of the International Court of Justice, to confirm the fundamental principle of international law, according to which "a state exercises an exclusive competence on its own territory."²⁹

In the absence of a better alternative, the expression *territorial sovereignty* generally describes the authority of states within their territorial boundaries.³⁰ This encompasses all possible rights, duties, powers, liberties, and immunities that a state may exercise.

authority, control or even dominion." As explained in the following section, the term "jurisdiction" in this paper defines the scope of the *powers (functional jurisdiction)* attributed to the state vis-à-vis a defined area of the globe and a category of people (respectively, *territorial* and *personal jurisdiction*).

²⁸ "Palmas Arbitral Award" (1928) reproduced in Jennings (1963) *The Acquisition of Territory in International Law*, p. 88 and p. 90.

²⁹ "Right of Passage in Indian Territory" *ICJ Reports* (1957), pp. 175-176 (The decision quoted by Justice Chagla was of the Chief Justice Marshall, "Schooner Exchange", 1812, 7 *Cranch*, 116).

³⁰ See Briery (1955) *The Law of Nations* p150. See also Huber in the "Palmas Arbitral Award" (1928) reproduced in Jennings (1963) *The Acquisition of Territory in International Law*, p. 91. On *territorial sovereignty* in general, as well as different theories about the international legal qualification of the territory, see in particular Quadri (1968) *Diritto internazionale pubblico*, p. 628 ff; Giuliano (1955) *Lo Stato, il territorio e la sovranità territoriale*, p. 23. Romano (1945) *Principi di diritto costituzionale generale*, p. 257 ff. suggested the expression "*potestà territoriale*".

III. Finally, the term sovereignty, in relation to a chunk of the globe, may also mean the **title** (in Latin, *titulus*), the source of authority, of any particular state to such portion of territory. Legal titles correspond to the vestitive facts, since the law recognizes them as creating a right from which the state's authority flows.

Huber explained that he felt bound to keep to the terminology employed in the Special Agreement establishing the arbitration, whose preamble referred to "sovereignty over the Island of Palmas."³¹ Under Article I, Paragraph 2 of the agreement, the Arbiter had to determine whether the Island of Palmas (or Mingias) formed a part of Netherlands territory or of territory belonging to the United States of America. In determining to whom the territory belonged, sovereignty in this context referred to the *title* over the Island, rather than actual display of *authority*, even if these two meanings of *sovereignty* in the decision were related, the latter being an element to prove the existence of the former.

I.3 The Limits in International Practice of the Described Model: *Functional, Personal and Territorial Jurisdiction*

The territorial-oriented approach described in the previous section suggests a model characterized by the necessary full coincidence of three different aspects of state power (defined as *sovereignty*): *independence, authority and title*.

These three suggested terms, replacing the term sovereignty, offer a clearer terminology, which may help describe the range of exceptions to the territorial-oriented approach, ultimately facilitating solutions to territorial conflicts.

As stated above, however, temporary socio-political concerns have influenced the creation of the territorial-oriented model, as much as different interests explain the creation and development of its opposite parallel, the personal-oriented one. In the course of European history, the two models seem to follow a cyclic pattern, alternatively losing or gaining more weight.

³¹ "Palmas Arbitral Award" (1928) reproduced in Jennings (1963) *The Acquisition of Territory in International Law*, p. 91. For a definition of title to territory, see *Ibid.*, p. 4.

Territorial or personal-oriented models have been competing with each other, shaping the reality of the European institutions and political organization and characterizing, in a continuous mutual relationship of cause-effect, socio-political needs and administrative structures. International practice, however, is often more complex than any of these abstract opposite models and may include a wide range of options in shaping the relationship between the states and their territories.³²

The authority exercised by states may be limited according to the criteria of a) functional, b) territorial, and c) personal jurisdiction. These refer, respectively, to the delimitation according to a) the content of the various powers considered (*ratione materiae*); b) their scope in the space (*ratione loci*) or c) vis-à-vis specific categories of people (*ratione personarum*). A brief description of these three criteria follows:

- a) **Functional jurisdiction** refers to the wide range of powers that a state's authority implies. One may draw additional distinctions between legislative, executive, or judicial jurisdiction, depending on the organization of the particular state's constitutional system.
- b) **Territorial jurisdiction** refers to the spatial dimension or scope of authority in international law.
- c) **Personal jurisdiction** refers to the (categories of) people – whether citizens or not – under the state's authority.

A full discussion of these three aspects of authority, plus the additional element of the delimitation of a state's authority over time (*ratione temporis*) would go beyond the limited scope of this work.

A person crossing into another state's border may at once be subject to that state's territorial jurisdiction (unless he/she is exempt from such jurisdiction by virtue of a special status, such as diplomatic immunity) and may be accountable for his/her conduct on its territory. Following a terri-

³² See Camilleri & Falk (1992) *The End of Sovereignty? The Politics of a Shrinking and Fragmenting World* pp.141-142; see also, among others, Marchisio (1984) *Le basi militari nel diritto internazionale*, pp. 11-15 and p. 149 ff.

territorial-oriented perspective, the local authority can compel aliens residing in a state to pay rates and taxes.

At the same time, an alien may remain under the personal jurisdiction of his/her state of citizenship, since territorial jurisdiction has never entirely superseded personal jurisdiction. As mentioned above, in international legal practice personal jurisdiction was applied in Western and Northern Europe until the Middle Ages as the prevailing criterion, to assert and delimit authority over individuals on grounds of allegiance or protection.

The latter system, as described above, allows members of different local communities to be governed according to the laws of their own group - defined according to religious or ethnic criteria - as opposed to the laws of the territorial ruler.

The distinction between the functional, territorial and personal aspects of a state's jurisdiction may be useful to describe various cases of limitations to state authority and restrictions on a state's liberty to regulate the affairs of the area under its territorial jurisdiction.

Territorial and personal jurisdiction may also overlap, regardless of the abstract theory that excludes the possible joint exercise of authority of two or more states over the same area. One may add that, in principle, since the various state systems are homogeneous, each state may extend its authority to a limit that may overlap with the territorial or personal jurisdiction of the other. Accordingly, state A could extend its legislative jurisdiction (for example, the territorial scope of its private law) to the relations concerning all the subjects of the legal system of state B.³³

International law does not distinguish between different categories of subjects of international law, but rather determines whether an organized entity is a subject of the law or not. Nor can international law actively delimit the territorial competence of the various states, as states' systems of law do in relation to the various regional or municipal administrations established within their boundaries. The range of powers generally attrib-

³³ See Arangio-Ruiz (1993) *Le domaine réservé*, p. 476.

uted by international jurisprudence and doctrine to the states has changed over the centuries.

By implication, no subject of law is perfectly sovereign, in the sense that it can be outside and above the law. As a result, the antinomy between sovereignty and the very notion of subject of law questions the utility of this concept as a model of legal explanation ("*Procédé d'explication valable*"³⁴).

Procedural and other practical purposes may justify attempts to determine the powers that a state usually exercises in international law. In this limited perspective, one may assume that a state possess a specific power unless international law expressly excludes it, although in practice the state's powers may be limited in many ways. An inherent consequence is that courts may give restrictive interpretation to treaty provisions limiting a state's authority.

The well-known decision of the Permanent International Court of Justice in the Lotus case of 1927, on the assumption that international law governs relations between independent states, excluded the possibility to presume possible restrictions on the independence of states. According to the Court, there is a general presumption in favor of exclusive territorial authority, conditioning the possibility of the exercise of any state's powers in the territory of another to the existence of a permissive rule.

The Court justified this assumption by offering practical explanations, noting that even "the territoriality of criminal law," on which the quoted decision was based, "is not an absolute principle of international law."³⁵ In practice, this means that the courts may adopt the accepted pattern of state powers to decide on which party to place the burden of proof in case of claimed exceptions from (full) territorial authority.

³⁴ Rousseau (1974) *Droit International Public, Tome II, Les sujets de Droit*, p. 60.

³⁵ "S.S. Lotus" Case P.C.I.J., Series A, No 10 (1927) p19; see also Lapidoth (1995) "Redefining Authority: The Past, Present and Future of Sovereignty" p10. On the limits of judicial jurisdiction in criminal matters see, among others, Benvenuti (1974) *Sui limiti internazionali alla giurisdizione penale*.

through several documents, including the Cust's Memorandum and the Basic Agreement between the Holy See and the PLO, mentioned below.⁹

II. JERUSALEM AS A SPECIAL ISSUE POSTPONED UNTIL THE COMMENCEMENT OF PERMANENT STATUS NEGOTIATIONS: THE UNIVERSALIST/RELIGIOUS DIMENSION OF JERUSALEM AND THE STATUS QUO IN THE HOLY PLACES

Diplomatic and political language as well as legal literature frequently adopts the Latin expression 'status quo'. It literally means the situation as it is, and it denotes the preservation of the existing state of affairs.

The entire original phrasing of this short Latin expression was "*in statu quo ante*," in the state (things were) before. The expression, initially common only in British diplomatic language, came into general usage after Victor Hugo employed it in the introduction of his "Les Orientales" (1829): *Le statu quo européen, déjà vermoulu et lézardé, croque du côté de Constantinople* (The European status quo, already worm-eaten and cracked, is crumbling in Constantinople).¹ The original expression 'status quo', in the Latin ablative case form, became now 'status quo,' adopting the nominative case form.

In state practice, as well as in the theory of international law, the expression began its usage mainly in connection with the legal effects of war.² After the conclusion of a state of war, two different options emerge. One option is the restoration of the situation preceding the war (*status quo ante bellum*). In the second option, the situation of the belligerents at the end of the hostilities becomes the legal basis of a new status quo *post bellum* (or *status quo nunc*).³ Sélim Sayegh has applied a similar distinction to the Holy Places of Jerusalem.⁴

¹ See "Statu quo" in Gabrielli (1996) *Si dice o non si dice?* p511; the translation from French is of the author. See also Molinaro (forthcoming) "Creative Approaches for the Coexistence of National and Religious Identities in Jerusalem".

² See Grewe (2000) "Status quo," p. 687.

³ See *ibid.*

⁴ See Sayegh (1971) *Le Statu Quo des Lieux-Saints. Nature juridique et portée internationale*, pp. 56-57.

salem,” such as “the rights of the refugees who left those areas,” or matters of common interest involving both parts of the city, such as “the question of freedom of access” may also come into consideration.¹⁹

According to Lapidoth, Israel used terms “with the meaning that they have in her internal legislation,”²⁰ when concluding the agreement. Therefore, the term “Jerusalem” should relate, according to Lapidoth’s interpretation of Israel’s intention, “to the area included in the municipal jurisdiction of the city under Israeli law.”²¹

The negotiators might have wanted to leave the borders of the area undefined, in order to leave themselves more flexibility when discussing the permanent status so as to decide not only how to settle the Jerusalem question but also to determine what was the very definition of the issue itself.

In this context, Lapidoth wrote that, “with the agreement of the parties, the negotiations on Jerusalem could also encompass a larger area.” This enlargement could be helpful in making decisions “for demographic, technical and economic purposes as well as for the planning in the spheres of communication and transportation.” Additionally, “the enlargement could perhaps facilitate the achievement of a compromise with regard to the national aspirations of the parties.”²²

This question of “territorial delimitation,” however, does not influence the issue of the Status Quo of the Holy Places, “since most of those are situated in the Old City, which under any definition is included in ‘Jerusalem.’”²³

Paragraph 4 of the aforementioned Article V of the DOP states that

“(t)he two parties agree that the outcome of the permanent status negotiations should not be prejudiced or preempted by agreements reached for the interim period.”²⁴

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ Lapidoth (1994) “Jerusalem and the Peace Process,” p. 422.

²² *Ibid.* p424. Lapidoth (1996) “Jerusalem – Some Jurisprudential Aspects,” p. 678.

²³ Lapidoth (1994) “Jerusalem and the Peace Process,” p. 424.

One may wonder whether Paragraph 4 also implies an international obligation on the parties to refrain from any act involving a change of the situation on the ground ('the political status quo.'). According to the above provision, the "agreements" stipulated by the parties during the "interim period" should not aim at modifying the political-territorial situation on the ground. The apparent goal of the provision, in other words, is to avoid a situation in which the outcome of the permanent status negotiations would be "prejudiced or preempted" before they actually take place. Certainly, as in any other agreement of this kind, the parties must behave according to the principle of good faith.

In the opinion of Prof. Yehuda Blum, former Israeli Ambassador to the United Nations, a pattern of "constant Palestinian attempts to change the existing *status quo*, by creating *faits accomplis* on the ground" has marked the period since the signing of the Declaration of Principles.²⁵

One example mentioned by Prof. Blum is the "New Orient House," located

"in the eastern part of the city, which had served as the office locale of the Palestinian contingent in the Jordanian-Palestinian delegation to the Madrid conference and to the subsequent Washington talks prior to the signing of the DOP."²⁶

The building, according to Prof. Blum, has been transformed into a *de facto* PLO Mission in Jerusalem. The PLO flag has been flying over the building, and official visitors to Israel have been hosted there as if they were entering extraterritorial "Palestinian" soil.

More recently, on 10 August 2001, in the aftermath of a terrorist attack in Jerusalem in which a suicide bomber killed 15 people, the Israeli police moved into the Orient House. An Israeli flag replaced the Palestinian flag hoisted atop the building, however it was later removed.²⁷

²⁴ Paragraph 4, Article V *Declaration of Principles Guiding Relations between Participating States* (1993).

²⁵ Blum (1994) "From Camp David to Oslo," p. 218 n20.

²⁶ *Ibid.*

²⁷ See Hirschberg "Officials say Orient House conquest a signal to Arafat; Palestinians vow 'war for Jerusalem'" *Ha'aretz*, 11 August 2001.

According to "an intelligence document," used as

"the legal basis for the decision to seize control of Orient House ... the actions of the Palestinian security service in East Jerusalem have tilted the balance of power in favor of the Palestinians and eroded Israeli control in the eastern half of the city."²⁸

The report adds that the Israeli police "have difficulties preventing Palestinian security services from operating in the area as they work undercover in civilian clothes."²⁹ In particular, the reports lists the following categories of activities carried out by the Palestinian security services in Jerusalem:

- Collecting intelligence information
- Enforcing directives from the Palestinian leadership
- Preventing activities harmful to Palestinian interests
- Guarding Palestinian VIPs and offices
- Presenting a presence of intelligence officials at central sites and carrying out patrols
- Policing the Palestinian population with regard to criminal matters.³⁰

According to Israeli Foreign Minister Shimon Peres, "after the six-month seizure injunction against the Orient House expires, Israeli control of the building will be reconsidered."³¹ Among other declarations of protests against the Israeli move, Nabil Sha'ath, Palestinian Minister for International Cooperation, was quoted as saying that the Palestinian Authority wants the United Nations to restore the "Jerusalem status quo"³² to the situation before the Orient House's seizure.

Another example given by Prof. Blum of PLO attempts to change the status quo in Jerusalem relates to the appointment of the Grand Mufti of Jerusalem, an issue that apparently could be related more directly to the religious dimension of the controversy on the city.

²⁸ *Ibid.*

²⁹ Shragai "Report: PA activities threaten Israeli control in Jerusalem" *Ha'aretz*, 11 August 2001.

³⁰ *Ibid.*

³¹ Gilbert & Lefkovits "Peres: We'll rethink Orient House in 6 months" *Jerusalem Post*, 15 August 2001.

³² "News Flashes" *Ha'aretz*, 15 August 2001.

In the wake of the death of Suleiman Ja'abari, the incumbent Mufti appointed by Jordan one year earlier, on 15 October 1994, the Government of Jordan appointed his successor (as it had since 1948, including the period since 1967), Sheikh Abdul Kader Abdeen, chief justice of the Islamic courts. According to Dr. Sami Musallam, Jordan had appointed Ja'abari "without due consultation with the PLO."³³

The following day, Hassan Tahboub, a member of the Palestinian Authority in charge of Waqf (Moslem Religious Trusts) Affairs, immediately made, on behalf of Chairman Arafat, a counter-appointment, calling the Imam of al-Aqsa Mosque, Sheikh 'Ikrima Sabri, to the post.³⁴ Dr. Musallam, adds that Sheikh Sabri, "a man known for his strong personality, ... was the Imam who led the prayers at al-Aqsa when President Sadat of Egypt visited Jerusalem and prayed at the Mosque in 1979."³⁵

According to Blum, agents of the Jericho-based Palestinian preventive security service, headed by Jibril Rajoub had been posted on the Noble Sanctuary/Temple Mount Compound in order "to isolate the Jordanian-appointed mufti and to prevent him from functioning."³⁶ Moreover, in the wake of his appointment "as Mufti, Sheikh Sabri accompanied the Turkish Prime Minister on her tour and prayer in al-Aqsa Mosque as well as attended meetings with her at the Orient House."³⁷

On 26 December 1994, the Israeli Knesset adopted the "Gaza/Jericho Agreement Implementation (Limiting of Activities) Law" by a vote of 56 to 6, with 32 abstentions.³⁸

The law establishes two different limitations for the Palestinian Authority and the PLO, respectively. Only the former needs a written permit from the Government of Israel. This permit is required whenever the PLO wants to open or operate any representation (including any institution,

³³ Musallam (1996) *The Struggle for Jerusalem: A Program of Action for Peace*, p. 109.

³⁴ Blum (1994) "From Camp David to Oslo," p. 218 n20.

³⁵ Musallam (1996) *The Struggle for Jerusalem: A Program of Action for Peace*, p. 110.

³⁶ Blum (1994) "From Camp David to Oslo," p. 218 n20.

³⁷ Musallam (1996) *The Struggle for Jerusalem: A Program of Action for Peace*, p. 110.

³⁸ See Lapidoth (1994) "Jerusalem in the Peace Process" p428; Blum (1994) "From Camp David to Oslo," p. 218 n20.

office, or agency) in Israel, or to hold any meeting (including marches, convocations, and conferences) on its behalf or under its auspices.

The Government, however, may order to close any of the PLO representation or cancel a meeting convened by it. These provisions were introduced together with parallel legislation intended to incorporate the May 1994 Cairo Agreement between Israel and the PLO on the Gaza Strip and the Jericho Area into Israel's legal system.³⁹ Recently Israeli Prime Minister Ariel Sharon has proposed to amend this legislation in order to limit PLO activities in Jerusalem in view of the "overlap between the PLO and the Palestinian Authority."⁴⁰

The 1994 law thus bars any activity in Israel of the PLO or the Palestinian Authority,

"of a political or governmental nature or other similar activity within the area of the state of Israel which does not accord with respect for the sovereignty of the state of Israel without the agreement of the state of Israel."⁴¹

While the law does not explain the meaning of the term 'sovereignty', it seems to stress the importance for the Israeli government of the stability of the political-territorial status quo in Jerusalem.

On the other hand, some observers have considered several decisions taken by the Government of Israel as attempts to change the political status quo in the city. A recent example is seen in the reaction of several United Nations members in the Security Council debate on the recommendations concerning Jerusalem adopted during the Israeli Cabinet meeting on 21 June 1998, chaired by then prime minister, Binyamin Netanyahu.

The Israeli Cabinet decided to adopt a plan for the expansion of Jerusalem's jurisdiction westwards and the creation of an umbrella Jerusalem

³⁹ See (1994) "Jerusalem in the Peace Process," p. 428.

⁴⁰ Shragai "PM orders legislation to bar PLO from Jerusalem" *Ha'aretz*, 3 March 2002.

⁴¹ Section 1 ("Purpose of the Law"), Law Implementing the Agreement on the Gaza Strip and the Jericho Area (Restriction on Activity) 1994. See Israel Ministry of Foreign Affairs website: <http://www.israel.org/mfa/go.asp?MFAH07tt0>.

municipality, officially with the intention to streamline services in the Jerusalem region.

On 30 June 1998, however, the Russian Federation representative in the Security Council defined such decisions as “unilateral actions aimed at changing the demographic composition and borders of Jerusalem in violations of the status quo.”⁴² Similarly, the representatives of China and France claimed during the same meeting that the Israeli decisions would “change” or “clearly alter the existing status quo” in Jerusalem.⁴³

II.2 The Original Overlapping of Personal and Territorial Jurisdiction in the Ottoman Empire

a. *The Holy Places of Jerusalem and the Capitulations*

Ever since Jerusalem became included within the confines of Muslim empires, and in particular from 1517, when the city became part of the Ottoman Empire, the area witnessed an intense competition in diplomacy between the European powers, under the pretext of the disputes over the Holy Places by the different recognized Christian communities.⁴⁴ Provisions related to these issues have been incorporated in some international bilateral agreements. These accords, however, generally only bound two parties, and never aimed at a complete and systematic regulation. They did, however, give international legal relevance to the interests of the different recognized communities in the Holy Places.

Bilateral commercial treaties known as *Capitulations* (from the succession of little *chapters* or *capitula*), concluded between the Sublime Porte and the Christian European powers included clauses that gave their citizens a special legal, judicial and administrative treatment. Other residents in the Ottoman territory under the protection of the said foreign powers

⁴² Security Council, 3900th Meeting (AM & PM), SC/6541, on 30 June 1998.

⁴³ *Ibid.*

⁴⁴ For a discussion of the complex issue of the settlement of disputes on the rights and claims in connection with the Holy Places according to the Mandate's provisions see *infra* section 6 c. for practical proposals on some policy options for the negotiations see *infra*, section 10 b.

also enjoyed, a similar status, different from that of the Muslim citizens, by virtue of the Capitulations.

These individuals were subjected not only to the laws and the judicial authorities of the territorial Ottoman rulers, but also to those of their protecting European powers,⁴⁵ - represented generally by the consuls. The described administrative arrangement followed the criterion of personal jurisdiction. This, consequently, limited the application of the territorial criterion by the local ruler, who, according to the European absolute, exclusive and abstract model, should apply the same rules of the land to all citizens and residents.

By extension, the term *Capitulations* refers not only to the aforementioned treaties but also to the administrative special arrangement enjoyed by the protected persons created by those treaties. This legal regime included the prohibition of forced conversion to Islam and "the right to practice their own religion."⁴⁶ The latter principle was included in the Treaty of Amity and Commerce signed in February 1535 by Suleiman the Magnificent for the Ottoman Empire, and Francis I, King of France. The quoted treaty's provisions were the only ones not devoted to commerce and business. They established, in the sensitive field of religious issues, the principle of immunity from ordinary local jurisdiction according to the aforementioned criterion of personal jurisdiction.⁴⁷

Although Genoa, Venice and Florence had obtained earlier Capitulations from the Porte, the French treaty of 1535 set the precedent for a long series of similar bilateral treaties concluded between the European Powers and the Ottoman Empire. The 1535 treaty, indeed, was renewed and expanded on 18 October 1569, July 1581 (this treaty established the right of precedence at the Ottoman Court for the Ambassador of France), Febru-

⁴⁵ See Oppenheim & Lauterpacht (1967) *International Law. A Treatise*, pp. 682-683. As an example, see the case of Great Britain, regulated upon the basis of the Foreign Jurisdiction Act, 1890.

⁴⁶ Article 6 of the Treaty of Amity and Commerce. For the text in English, see Hurewitz (1956) *Diplomacy in the Near and Middle East. A Documentary Record*, vol. 1, 1914-1956, p. 10.

⁴⁷ See Hurewitz (1956) *Diplomacy in the Near and Middle East. A Documentary Record*, vol. 1, 1914-1956, p. 10.

ary 1597, 20 May 1604, 5 June 1673 and in perpetuity⁴⁸ on 28 May 1740 until it was terminated on 6 August 1924.⁴⁹

Over the centuries the various European powers have been competing with each other to establish an exclusive protectorate over the Christian residents in the area ruled by the Ottoman Empire. Examples of these attempts are: Article 11 of the Treaty of Peace of Belgrade between the Ottoman Empire and Russia, of 7-18 September 1739 (establishing a similar right of protection), and Articles 6, 7 and 14 of the Treaty of Peace of Küçük Kaynarca between the same countries, of 10-21 July 1774.⁵⁰

In this context, however, the French case was particularly noteworthy, due to the fact that in 1740

“France received the right to extend individual or group protection to all Latin-rite Catholics throughout the empire, regardless of nationality. By custom this protection was broadened to include Eastern-rite Catholics as well.”⁵¹

Moreover, in the absence of diplomatic relations between the Holy See and the Ottoman Empire, “France took upon itself the representation of the Holy See before the Sublime Porte,”⁵² under the form of an official protectorate. At the Congress of Berlin in 1878, France, opposing England, ultimately succeeded in mentioning its rights by Article 62 in the Berlin Treaty. Eventually, the Holy See formally recognized France’s rights and “in 1888 instructed all priests in the Levant to seek France’s protection when needed.”⁵³

⁴⁸ See Colbi (1969) *Christianity in the Holy Land, Past and Present*, p. 70.

⁴⁹ See Hurewitz (1956) *Diplomacy in the Near and Middle East. A Documentary Record*, vol. 1, 1914-1956, p. 10.

⁵⁰ See Hurewitz (1956) *Diplomacy in the Near and Middle East. A Documentary Record*, vol. 1, 1914-1956, pp. 50, 56-58.

⁵¹ Minot (1990) *The Vatican and Zionism: Conflict in the Holy Land, 1895-1925*, p. 24.

⁵² *Ibid.*

⁵³ *Ibid.*

b. The Millet System

The implementation of the personal jurisdiction criterion, can be better understood by analyzing the *Millet* system of the Ottoman Empire. Most of the members of the various recognized communities already living in the Ottoman Empire seemed to find it as an acceptable administrative arrangement, notwithstanding phenomena of discrimination and sometimes even persecution. This *Millet* system guaranteed their administrative autonomy, particularly in the spheres of worship and spiritual-religious organization as well as in personal status. According to Baker,

“Islam was the religion of the Ottoman Empire, but subject thereto the state was required to protect the free exercise of all religions recognized in the empire and the integral enjoyment, in accordance with previous practice, of all religious privileges granted to the various communities.”⁵⁴

Baker continues by pointing out that the practice of such communities should not have been contrary to public morals or conducive to the disturbance of the public order.⁵⁵

In order to better understand the described *Millet* system one should remember

“the fact that the Qoranic traditional norms apply only to Muslims; non-Muslims, so long as they remain unconverted to Islam, being permitted to continue to be governed by their former national and religious laws.”⁵⁶

According to the provisions of the aforementioned Capitulations, national laws applied to foreigners resident in the Empire by their own consuls (consular courts).⁵⁷

⁵⁴ Baker (1974) “Judiciary and Legislation (Religious Legal and Judicial System),” p. 102.

⁵⁵ *Ibidem*.

⁵⁶ Vitta (1970) “The Conflict of Personal Laws,” p. 175.

⁵⁷ See Vitta (1970) “The Conflict of Personal Laws,” p. 174.

European culture gradually started to influence the Ottoman Empire in various ways. In the 19th Century, the territorial-oriented model of authority described above became generally known as nationalism, which started to gain popularity in the Middle East. Napoleon, after his stunning expedition to Egypt, encouraged the first developments of Arab nationalism, or Arabism, using a national-oriented argument.

For their fight against Napoleon, the Ottomans appointed Muhammad Ali as the viceroy of Egypt. In 1831, however, he rebelled and, together with his son Ibrahim Pasha, conquered and ruled Syria (including future Palestine), until the European powers' intervention in 1841.

His rule in the area introduced secular legislation, restricting the power of Shari'a bureaucracy, making officials dependent on the central authority's salaries and rules, and initiating a drastic program of national education in Arabic. Additionally, he "sent students on scholarships to Europe in order to acquaint Arab youth with nationalist ideas and thus to challenge the traditional conception of Ottoman-Arab Muslim fraternity."⁵⁸

In the 1830s and 1840s, most prevalently in Lebanon, American and French missionaries opened schools with instruction in Arabic and offered printing presses for the publishing of Arabic books. By the eve of World War I their influence, becoming increasingly political, had spread to Syria, Mesopotamia (present-day Iraq) and Egypt. Many new nationalistic Arab thinkers sprouted from similar Western Christian educational institutions – particularly the Syrian Protestant College in Beirut, opened in 1844.⁵⁹ In the decade before 1914, particularly after the Young Turk *coup d'état* of 1908, a number of Arab nationalist societies – a few of them secret – with avowed political objectives were founded.

⁵⁸ Safran (1961) *Egypt in Search of Political Community, an analysis of the intellectual and political evolution of Egypt, 1804-1952*, pp. 31-33.

⁵⁹ For a description of the rising of Arab nationalism (including the role of Christian institutions) see also *Palestine [Peel] Partition Commission Report, 1937*, particularly Chapter II, "The War and the Mandate. 1. The Arab Revolt"; see also Muslih (1988) *The Origins of Palestinian Nationalism*, p. 53. On this issue, as well as other developments of Palestinian nationalism see Kimmerling (2000) "The formation of Palestinian collective identities: The Ottoman and mandatory periods".

These societies did not demand independence but wanted political autonomy for the predominantly Arab districts and Arab representation in the Imperial government at Istanbul on a basis of full equality with the Ottoman Turks. This emphasis is manifest in the resolution, adopted by an Arab-Syrian Congress in Paris (18-24 June 1913), attended by 24 official delegates who, with the exception of three from the United States and two from Mesopotamia, came from Lebanon and Syria.⁶⁰

World War I brought about the end of the Ottoman Empire. As a result of the general development towards nationalism described above, in the Turkish core region of the Empire "the Kemalist revolution completely abolished both religious law and religious jurisdiction."⁶¹ In the rest of the Empire a parallel evolution towards the European 'sovereign state' model followed a slower path, to be completed only after World War II.⁶² A different case - beside the newly created Arab and Islamic states - is Israel, which has continued to apply until today most of the described principles of personal law inherited from the Ottoman Empire through the British Mandate in Palestine, to the various recognized communities.

A general process of codification, along the lines of the Napoleonic code, took place in the area formerly under the Ottoman Empire. Similarly, "with the secularization of the law, there has been a corresponding reduction in the jurisdiction of the religious, in favor of the civil courts."⁶³

The above considerations show how the principle of territorial sovereignty, which developed among the European powers and became a basic feature of 19th Century international law, started to influence the Middle East as well. The Ottoman Empire, in particular

"started after the end of the Crimean War in 1856 to abandon the communal aspects of the Islamic system of international law and to adopt the modern rules prevailing among the European concert of nations to which the Sublime Porte became a fully-integrated

⁶⁰ See Hurewitz, (1956) *Diplomacy in the Near and Middle East. A Documentary Record*, vol. 2, 1914-1956, p. 268.

⁶¹ Vitta (1970) "The Conflict of Personal Laws," p. 174.

⁶² See Vitta(1970) "The Conflict of Personal Laws," p. 177.

⁶³ Vitta (1970) "The Conflict of Personal Laws", *ibid.*

party during the Berlin Congress of 1875. According to this new modern international law, the legal concept of "territorial sovereignty" became a cornerstone for most of the state powers."⁶⁴

The "historic rights" which developed "through a process of historical consolidation as a sort of *servitude internationale*" is only one additional example of Ottoman practice "falling short of territorial sovereignty," providing "a sufficient legal basis for maintaining certain aspects of a *res communis* that had existed for centuries."⁶⁵ This practice corresponds to classical Islamic law concepts, which were in perfect harmony with Middle Eastern socio-economic and cultural patterns.⁶⁶

In its controversy with Eritrea before the Permanent Court of Arbitration, Yemen introduced the doctrine of *uti possidetis*, according to which "on the dismemberment of an empire like the Ottoman Empire there is a presumption, both legal and political in character, that the boundaries of the independent states which replace the Empire will correspond to the boundaries of its administrative units."⁶⁷

In a memorandum quoted in the same section of the arbitration, however, "sovereignty" (in the sense of title), "which the Ottoman Empire possessed over all these possessions" was "carefully distinguished" from "a right of jurisdiction over the African side, which had been conferred on the Khedive."⁶⁸

The arbitral court, moreover, raises the question "whether this doctrine of *uti possidetis* ... could properly be applied to interpret a juridical question arising in the Middle East shortly after the close of the First World War."⁶⁹ In other words, the Tribunal was hesitant about applying European conceptions of the acquisition of territorial sovereignty in an area in

⁶⁴ Award of the Arbitral Tribunal between Eritrea and Yemen (1998) Phase I: Chapter IV – Historic Title And Other Historical Considerations, Paragraph 131. I wish to thank Prof. Shabtai Rosenne for having kindly suggested I look at this decision of the Permanent Arbitral Court.

⁶⁵ *Ibid.*, Paragraph 126.

⁶⁶ See *ibid.*, Paragraph 130.

⁶⁷ *Ibid.*, Phase I: Chapter III – Some Particular Features of This Case, Paragraph 96.

⁶⁸ *Ibid.*, Paragraph 98.

⁶⁹ *Ibid.*, Paragraph 99.

which the concepts of Islamic law prevailed and which had once been part of the Ottoman Empire.

This is emphasized again in the conclusions, where it is stated that

“(i)n making this award on sovereignty, the Tribunal has been aware that Western ideas of territorial sovereignty are strange to peoples brought up in the Islamic tradition and familiar with notions of territory very different from those recognized in contemporary international law.”⁷⁰

Moreover, the Tribunal believed that only an appreciation of regional legal traditions would “allow the re-establishment and the development of a trustful and lasting cooperation between the two countries.”⁷¹

This idea appears again in the second award of 1998, where “the sovereignty that the Tribunal has awarded to Yemen over” the contested area should respect, embrace and be “subject to the Islamic legal concepts of the region.”⁷² In this context, the Tribunal quoted the *Encyclopaedia of International Law*, in which it is written

“Islam is not merely a religion but also a political community (*umma*) endowed with a system of law designed both to protect the collective interest of its subjects and to regulate their relations with the outside world.”⁷³

II.3 The Status Quo in the Holy Places in the Narrow Sense

a. Origins of the Christian Holy Places' Status Quo

The delicate compromise in the Holy Places of Jerusalem eventually known as the Status Quo has crystallized since Ottoman rule (1517-1917)

⁷⁰ *Ibid.*, Chapter X – Conclusions, Paragraph 525.

⁷¹ *Ibid.*

⁷² *Ibid.*, Phase II, Paragraph 94.

⁷³ Khadduri, *Encyclopaedia of International Law*, vol. 6, p. 227, quoted in *ibid.* Phase II, Paragraph 93.

of the city. Following the conflicting claims of the different Christian communities, the Ottoman government promulgated a set of Firmans (Imperial decrees), which attempted to impose a temporary truce to settle disputes on respective rights and interests with regard to several important Christian sacred sites.⁷⁴ According to Cust, the Christian Holy Places affected by the Status Quo are the following:

“The Holy Sepulcher with all its dependencies, the Deir Al-Sultan, the Sanctuary of the Ascension, the Tomb of the Virgin (near Gethsemane) [and] the Church of the Nativity.

The Grotto of the Milk and the Shepherds' Field near Bethlehem are also in general subject of the Status quo, but in this connection there is nothing on record concerning these two sites.”⁷⁵

The front page of this important confidential Paper, or “*vade mecum*”, as H.C. Luke, the Chief Secretary to the Mandatory Government of Palestine called it, in his introductory note to the book), clarified that “(t)he accounts of practice given in this Print are not to be taken as necessarily having official authority.”⁷⁶ Nevertheless, the author defines his book in the Introduction as

“the first attempt to discover and codify as far as is possible what is the practice at the present time, and, irrespective of what is claimed, what *are* the existing rights that thus the Palestine Government is bound to preserve.”⁷⁷

Given the inability of the interested Christian communities to find a proper and equitable solution based on mutual consent, and taking into account the apparent difficulty of an ordinary judicial settlement, this kind of arrangement became the Status Quo in the Holy Places.

⁷⁴ For a discussion of the complex issue of the settlement of disputes on the rights and claims in connection with the Holy Places according to the Mandate's provisions see *infra* section 6 c. for practical proposals on some policy options for the negotiations see *infra*, section 10 b.

⁷⁵ Cust (1929) *The Status Quo in the Holy Places*, p. 12.

⁷⁶ Cust (1929) *The Status Quo in the Holy Places*, cover page.

⁷⁷ *Ibid.*, p. 1 (original emphasis)

The Sultan Abdul Mejid substantially reaffirmed the pre-existing situation since 1757, after referring to a careful examination conducted by a committee of lawyers appointed by the Porte in an important Firman. This Firman, enacted in 1852, constitutes a sort of official declaration of the Status Quo in the Holy Places, "to serve constantly and for ever as a permanent rule."⁷⁸ According to the aforementioned Cust,

"The present position therefore is that the arrangements existing in 1852, which corresponded to the Status Quo of 1757 as to the rights and privileges of the Christian communities officiating in the Holy Places have to be meticulously observed, and what each rite practiced at that time in the way of public worship, decorations of altars and shrines, use of lamps, candelabra, tapestry and pictures, and in the exercise of the most minute acts of ownership and usage has to remain unaltered. Moreover, the Status Quo applies also to the nature of the officiants."⁷⁹

In other words, the Status Quo became a sort of truce imposed by the territorial government upon the different conflicting Christian communities. This truce is comprised of a legal regime dividing space and time for the use (for religious purposes) and possession of the Holy Places among the aforementioned communities.

b. *The Status Quo's Extension to the Jewish-Muslim Holy Places*

The Status Quo principles originally applied exclusively to the Christian Holy Places. After the end of the Ottoman rule in Jerusalem, the British Mandatory power began to apply this arrangement, by analogy, to the Jewish and Muslim shrines as well as to the relationship between the respective communities. According to the above quoted Memorandum, *The Status quo in the Holy Places*,

⁷⁸ Translation of 1852 firman into English by Zander (1971) *Israel and the Holy Places of Christendom*, p. 180.

⁷⁹ Cust (1929) *The Status Quo in the Holy Places*, cover page.

"The Wailing Wall and Rachel's Tomb, of which the ownership is in dispute between the Moslems and the Jews, are similarly subject to the Status Quo."⁸⁰

It is beyond the scope of this section to ascertain the specific contents of the Status Quo arrangements between the different communities. Nor will the extent to which the traditional principles applied to the new Status Quo established by Israel after 1967 between the Christian, Muslim, and Jewish communities in their respective Holy Places be examined here. This section's focus is limited to a clarification of the meaning of the Latin expression as applied to the Holy Places of Jerusalem. According to Prof. Itzhak Englard, currently Judge on the Supreme Court of Israel,

"The Mandatory Power strove hard to retain the existing system of rights of the various religious communities in the Holy Places, as it was bound to do under international law."⁸¹

Moreover, Herbert Samuel, High Commissioner and Commander-in-Chief at the time of the Mandate in Palestine, wrote that,

"The Mandate, in its thirteenth article, gave a clear direction. By it, the Mandatory assumed full responsibility, and undertook to preserve existing rights and the free exercise of worship, subject, of course, to the requirements of public order and decorum. The duty of the Administration, therefore, was to secure the observance of the status quo.

...Fortunately, during the last five years no serious difficulties have in fact arisen. The Government has been strictly impartial in maintaining whatever arrangements existed under the former régime, even to the extent of continuing in their functions the Moslem family who are the hereditary doorkeepers of the

⁸⁰ Cust (1929) *The Status Quo in the Holy Places*, p. 12.

⁸¹ Englard (1983) "The Legal Status of the Holy Places," p. v; see also Molinaro (1995) "Religious Freedom in the Holy Places of Jerusalem" (in Italian), p. 58.

Church of the Holy Sepulcher. Its impartiality has been recognized by the several creeds and churches and sects..."⁸²

Several international agreements contributed to give international legal relevance to this special arrangement between the different communities in the Holy Places. Article IX of the peace treaty between Israel and Jordan signed on 25 October 1994 offers the most significant recent example. The full text of the article, titled "Places of Historical and Religious Significance and Interfaith Relations," reads as follows:

1. Each Party will provide freedom of access to places of religious and historical significance.
2. In this regard, in accordance with the Washington Declaration, 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.
3. The Parties will act together to promote interfaith relations among the three monotheistic religions, with the aim of working towards religious understanding, moral commitment, freedom of religious worship, and tolerance and peace."⁸³

The above quoted provisions seem to confirm, at least indirectly, the Status Quo in the Holy Places. However, the only provisions included so far in international documents signed by Israel which explicitly mention the expression "Status Quo" have been Article 4, § 1, of the Fundamental Agreement between Israel and the Holy See (13 December 1993) on one hand and Paragraph 8 (e) of the preamble as well as Article 4 of the Basic Agreement between the Holy See and the Palestine Liberation Organization, signed on 15 February 2000, on the other.

These agreements, though formally concluded outside the context of the Middle East peace negotiations, were signed during the same period of

⁸² Samuel (1925) *Report of the High Commissioner on the Administration of Palestine, 1920-1925*, pp. 48-50

⁸³ Article 9, Paragraph 3, *Peace between The State of Israel and The Hashemite Kingdom of Jordan*.

time of the current peace negotiations. Article 4, § 1 of the Fundamental Agreement, reads as follows:

"§ 1. The State of Israel affirms its continuing commitment to maintain and respect the "Status quo" [sic] in the Christian Holy Places to which it applies and the respective rights of the Christian communities thereunder. The Holy See affirms the Catholic Church's continuing commitment to respect the aforementioned "Status quo" [sic] and the said rights."⁸⁴

Article 4 of the Basic Agreement between the Holy See and the PLO is very similar to the parallel article of the Fundamental Agreement quoted above:

*Article 4.

The regime of the "Status Quo" will be maintained and observed in those Christian Holy Places where it applies."⁸⁵

Paragraph 8 of the Preamble of the Basic Agreement includes a similar provision (section e), but in this provision the adjective "Christian" has been dropped from the reference to the Status Quo "in those Holy Places where it applies:"

*Preamble, Paragraph 8 (e).

Calling, therefore, for a special statute for Jerusalem, internationally guaranteed, which should safeguard the following: a. Freedom of religion and conscience for all b. The equality before the law of the three monotheistic religions and their institutions and followers in the City; c. The proper identity and sacred character of the City and its universally significant, religious and cultural heritage; d. The Holy Places, the freedom of access to

⁸⁴ For the full text of the Fundamental Agreement between the Holy See and the State of Israel see, among other sources, *International Legal Material*, vol. 33 (1994), p. 153; Fisher & Klenicki (eds.) (1996) *A Challenge Long Delayed. The Diplomatic Exchange Between, the Holy See and the State of Israel*, pp. 49-53.

⁸⁵ Article 4 Basic Agreement between the Holy See and the Palestine Liberation Organization.

them and of worship in them. e. The Regime of "Status Quo" in those Holy Places where it applies."⁸⁶

One possible explanation for this difference may be the implied confirmation of the progressive extension of the Status Quo principles to the Jewish-Muslim Holy Places. This interpretation seems to be confirmed also by the general context of the Preamble's provisions, which refer both to the broader cultural/religious status quo⁸⁷ and to the Status Quo in the narrow sense.

c. *The Settlement of Disputes on the Rights and Claims in Connection with the Holy Places According to the Mandate's Provisions*

According to Article 14 of the aforementioned Terms of Mandate on Palestine dealt (in its second paragraph):⁸⁸

"A special Commission shall be appointed by the Mandatory to study, define and determine the rights and claims in connection with the Holy Places and the rights and claims relating to the different religious communities in Palestine. The method of nomination, the composition and the functions of this Commission shall be submitted to the Council of the League for its approval, and the Commission shall not be appointed or enter upon its functions without the approval of the Council."

It is interesting to note in this context also the reference to the same Article embodied in article 28 of the Terms of Mandate.⁸⁹ During the discussion of the draft Mandate on 22 July 1922, the British delegate at the Council of the League of Nations, Lord Balfour, insisted "that the appointment of a permanent commission as a sort of executive power by the

⁸⁶ *Ibid.*

⁸⁷ See *infra*, section 7.

⁸⁸ See also Paragraph 2 Article 95, of the Treaty of Sèvres, signed by Turkey on August 10, 1920.

⁸⁹ For the text of the Article see *infra*, Annex II.

side of the mandatory power must be avoided.”⁹⁰ Lord Balfour referred to the commission, being set up on the sensitive issue of “the rights and claims in connection with the Holy Places and the rights and claims relating to the different religious communities in Palestine”, according to above quoted article 14 of the Terms of the Mandate,⁹¹ suggesting that it meet whenever it appeared necessary.

This declaration, together with a letter sent on 12 October 1920 by the first British High Commissioner in Palestine, Sir Herbert Samuel, to the Foreign Office, helps better interpret the provisions of the aforementioned Article 14. Sir Samuel expressed his doubts about appointing the High Commissioner as Chairman of the commission on the Holy Places. In that case, Samuel explained in the letter, any decision taken by such commission might have brought the High Commissioner into conflict with some sections of the population. Samuel preferred, therefore, that the commission be “in the nature of outside arbitration between local divergent claims.”⁹² Moreover, he urged the constitution of such a commission as soon as possible after the mandate’s approval, even though he thought it should be summoned only after long intervals. In this respect, Dr. Minerbi adds that

“Samuel elaborated his position one month later, in reply to questions from the Foreign Office. He proposed a commission of thirty-one members: eight Muslims recommended by the grand mufti; three Catholics recommended by the Vatican; three Greek Orthodox; two Armenians; eight Jews; and one each from the Coptic, Abyssinian, and Anglican Churches. Samuel also proposed that the members of the commission not be residents of Palestine ‘who have been actively engaged in controversies on the Holy Places.’ In addition, four representatives of the administration should also sit on the commission.”⁹³

⁹⁰ Quoted from Bovis (1971) *The Jerusalem Question, 1917-1968*, p. 13.

⁹¹ For the text of the Article see *infra*, Annex I.

⁹² Minerbi (1990) *The Vatican and Zionism: Conflict in the Holy Land, 1895-1925*, p. 48, quoting Samuel to Foreign Office, October 12, 1920, PRO, FO 371/5191, E 12614/589/44.

⁹³ Minerbi, *ibid.* quoting Foreign Office to Samuel, October 19, 1920; cable from Samuel to Foreign Office, no. 367, November 12, 1920, PRO, FO 371/5191, E 12614/589/44.

In the first annual report to the Council of the League, submitted by Great Britain in 1923 in accordance with article 24 of the Mandate,⁹⁴ the British Government answered a question about the measures taken in connection with

“the Holy Places and religious buildings or sites, including the responsibility of preserving existing rights, and of securing free access to the Holy Places, religious buildings and sites, and the free exercise of worship.”

The British claimed to have assumed responsibility, in this respect, “as successor to the Turkish Government.” Accordingly,

“in all specific cases that have arisen, it has strictly maintained the *status quo* and has postponed the final determination of any disputed questions until the establishment of the Holy Places Commission, contemplated by Article 14 of the Mandate.”

The quoted document added that one of the functions of that Commission will also be “the definition of the purely Moslem sacred shrines.”⁹⁵

In this context, the aforementioned Sir Herbert Samuel was one of the most convinced sponsors of the principle according to which the disputes “in connection with the Holy Places or religious buildings or sites or the rights or claims relating to the different religious communities in Palestine” should not be referred to the ordinary courts. Sir Samuel supported this principle, widely accepted today also in Israeli case law, until its formal adoption, with the 1924 Order-in-Council quoted below.

The Colonial Office in London asked Samuel’s opinion about a proposal according to which ordinary Palestinian Courts should settle disputes regarding the Holy Places. In his reply, given on 28 December 1922, Samuel concluded that, after having given these proposals very careful con-

⁹⁴ For the text of the Article see *infra*, Annex I.

⁹⁵ *Report by His Britannic Majesty’s Government on the Palestine Administration for 1923 to the Council of the League of Nations* (1925), p. 19.

sideration, "the question of the Holy Places cannot be satisfactorily dealt with by the Palestine Courts."⁹⁶

Samuel explained his quite surprising answer with the "great difficulty" that would arise in adequately dealing with "such important issues" on a strictly legal basis (involving the application of Ottoman Law.) He had already experienced such difficulties in relation to the questions of the *Coenaculum* (last supper place) and of the Wailing Wall. Such questions, therefore, "being of a nature deeply interesting to religious communities throughout the world should be dealt with by a higher authority than a local Court."⁹⁷

The British High Commissioner repeated his views on a different issue related to a claim raised by the Soviet Union on some Christian property in Palestine. He reaffirmed his opinion that cases of that kind, involving intricate problems of history and international law, if dealt with by the Palestine Courts, would seriously encumber their normal work and should therefore be decided by "jurists of international repute and standing."⁹⁸ Samuel, therefore, proposed to enact an Order-in-Council aimed at referring, pending the creation of the Holy Places commission, "any question touching holy sites and religious buildings in Palestine" to "a special judicial procedure".⁹⁹

In conclusion, the High Commissioner suggested that the expenditure of that judicial body should not be charged on the revenues of the country. The explanation lay in the fact that the service to be rendered concerns "rather the whole Religious Community than the members or properties of the Community in Palestine."¹⁰⁰

Therefore, in order to implement the principle embodied in the provisions of article 14, on 25 July 1924 Great Britain, as the mandatory power,

⁹⁶ Public Record Office, CO 733/28, 415; quoted from Zander (1973) "On the Settlement of Disputes about the Christian Holy Places," pp. 353-354.

⁹⁷ *Ibid.*

⁹⁸ P.R.O., CO 733/50, 410; quoted from Zander (1973) "On the Settlement of Disputes about the Christian Holy Places," p. 359.

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

adopted the Palestine (Holy Places) Order-in-Council.¹⁰¹ The Order officially withdrew from the courts of Palestine any case in connection with rights and claims in the Holy Places.

In the Report for 1924, Great Britain informed the Council of the League of Nations of the promulgation of the Order, answering to a question on the measures taken (and their effects)

“to place the country under such political, administrative and economic conditions as will safeguard the civil and religious rights of all the inhabitants of Palestine, irrespective of race and religion.”¹⁰²

The British answer listed the main Ordinances on Legal and Judicial matters (including “the Charitable Trusts Ordinance”) adopted by the Mandatory. In this framework it added the Order-in-Council enacted in July 1924, in order to exclude the “matters within the purview of the proposed Holy Places Commission” from the jurisdiction of the Civil Courts.¹⁰³

A similar answer was given, in section “IX. – *Holy Places*” of the same Appendix to a question related to the measures taken for

“the assumption by the Mandatory of responsibility in connection with the Holy Places and religious buildings or sites, including the responsibility of preserving existing rights and of securing free access to the Holy Places, religious buildings and sites, and the free exercise of worship.”¹⁰⁴

A different question relates to how the above Order-in-Council is to be constructed in order to determine which body should have jurisdiction over the said disputes. In this respect, it is submitted here that the Order’s paragraph 3 should be interpreted in the sense that the territorial authority

¹⁰¹ *Palestine (Holy Places) Order-in-Council, 1924*. Official Gazette of the Government of Palestine (1924), no. 123, p. 814.

¹⁰² *Appendices to the Report by His Britannic Majesty’s Government on the Palestine Administration for the year 1924 to the Council of the League of Nations* (1925), p. 4.

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*, p. 11.

(at that time Great Britain) shall decide only the question whether "any cause or matter comes within the terms of the preceding Article hereof."

In other words, the territorial authority may, and must, decide only the (preliminary) question as to whether any particular dispute should be referred to the ordinary courts or not, and not necessarily the question of the substance of the dispute under examination.

The quoted British Report to the League of Nations Council for the year 1924 confirms this interpretation. According to the Report, the Palestine (Holy Places) Order in Council provides that actions touching matters within the purview of the Commission on the Holy Places shall not be heard or determined by any Court. It is the High Commissioner who should decide, in case of doubt, "*whether any action shall be withdrawn from the Civil Courts.*"¹⁰⁵ The provision, however, does not affect or limit the jurisdiction of the religious courts.

In other words, the task of the Mandatory Government is clearly limited to the preliminary, procedural phase. An earlier confirmation of this interpretation may be found in a letter sent by the British Colonial Office to the Foreign Office dated 5 June 1924 (one month before the adoption of the Order), in which a draft of the proposed Order-in-Council was attached. In relation to the proposal to remove from the jurisdiction of the Palestine Courts cases related to the Holy Places, the letter clarified that the High Commissioner should decide (under the instructions of the Secretary of State for the Colonies) only "if any question were to arise as to whether the matter in dispute fell within this definition or not."¹⁰⁶

Accordingly

"as soon as any cause or matter is removed by the High Commissioner from the jurisdiction of the Palestine Courts ... the

¹⁰⁵ *Report by His Britannic Majesty's Government on the Administration under Mandate of Palestine and Transjordan for the year 1924*, p. 20 (italics added).

¹⁰⁶ Public Record Office, CO 733/28, 415; reproduced in Zander (1973) "On the Settlement of Disputes about the Christian Holy Places," p. 360.

matter should be referred to the Council of the League of Nations, and proposals laid before that body for approval.”¹⁰⁷

Pending the formation of the Commission referred to in Article 14 of the Palestine Mandate, the British Colonial Secretary suggested that the matters considered by the High Commissioner to fall within the competence of the Commission should be brought before a special Commission. This Commission, according to the Colonial Secretary proposal, was to be composed of the Chief Justice of Palestine and not less than two British Judges of the Palestine Courts. According to the same proposal, however, it would not sit, as a Palestine Court, but as a special *ad hoc* Commission “charged with the duty of enabling the Mandatory to carry out the provisions of Article 13 of the Mandate, subject to subsequent endorsement by the Commission referred to in Article 14.”¹⁰⁸

Although the text of the aforementioned Order-in-Council appears to be clear, some authors¹⁰⁹ have interpreted its Article 3 to authorize the High Commissioner to decide the substance of those causes or matters which had been removed from the jurisdiction of the Palestine Courts. As Zander points out “The error is of importance because if the High Commissioner had been authorized by the Order to decide the disputes, this authority would have been transferred to the Israel Government.”¹¹⁰ In light of the documentation quoted above, it is definitely possible now to have a clearer understanding of the issue under examination here. One author, for instance, quite radically changed his position on this point, recognizing that

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*

¹⁰⁹ Stoyanovski (1928) *Mandate for Palestine: A contribution to the Theory and Practice of International Mandates*, p. 302; Collin (1948) *Les Lieux Saints*, p. 152; Collin (1956) *Le Problème Juridique des Lieux-Saints*, p. 98 n5; Zander (1971) *Israel and the Holy Places of Christendom*, p. 70; Bovis (1971) *The Jerusalem Question, 1917-1968*, p. 17. See also Chapter 3 Section 6 of *Report of the United Nations Special Committee on Palestine (UNSCOP)*, 1947 quoted *infra* in the following section.

¹¹⁰ Zander (1973) “On the Settlement of Disputes about the Christian Holy Places,” p. 362, n74. On this issue, see *infra* section 10 b. The text of the quoted Order in Council is reproduced below, in Annex 2. Recent works also include the same error; see, for example, Pieraccini (1996) *Gerusalemme, Luoghi Santi e comunità religiose nella politica internazionale*, p. 246; Dumper (2002) *The Politics of Sacred Spaces: The Old City of Jerusalem in the Middle East Conflict*, p. 23.

"No such opinions can be held any longer. Moreover the files of the Foreign Office contain a statement on this question which gives an irrefutable official interpretation of the Order, and at the same time shows which part of the arrangements was to be made known, and which was to be kept secret for the time being."¹¹¹

The Foreign Office, indeed, on 27 October 1924, referred to this misunderstanding when replying to the British Minister to the Holy See, Sir Odo Russell. Sir Russell had asked London for exact information on the interpretation of the Order-in-Council. The reply from the Foreign Office clearly stated that Article 3 of the Order did not empower the High Commissioner in Palestine to settle disputes connected with the Holy Places and religious questions.

The Order, as maintained by this author, merely entrusted the High Commissioner with the responsibility to decide whether or not a case should be removed from the jurisdiction of the ordinary courts within the meaning of Article 2 of the Order. The document thus confirmed the procedure indicated in the Colonial Office's letter of 5 June 1924 quoted above. According to this interpretation,

"if the High Commissioner decides that any case should be removed from the jurisdiction of the ordinary courts in Palestine, the matter will be referred to the Council of the League of Nations."¹¹²

This reasoning can explain why the question of implementing the Mandate's article 14 came up again later. One such occasion were the riots over the Western Wall in August 1929. The British Government could only propose (on 18 November 1929¹¹³) to the Permanent Mandates Commission of the League of Nations the appointment, under the aforementioned article 14, of an *ad hoc* commission to settle the question of

¹¹¹ Zander (1973) "On the Settlement of Disputes about the Christian Holy Places," pp. 362-363.

¹¹² Public Record Office, CO 733/28, 415; reproduced in Zander (1973) "On the Settlement of Disputes about the Christian Holy Places," p. 363.

¹¹³ League of Nations, Permanent Mandates Commission, *Minutes of the Sixteenth Session held at Geneva from November 6 to 26, 1929*, pp. 198-99; reproduced in Bovis (1971) *The Jerusalem Question, 1917-1968*, p. 17, n34.

Jewish and Muslim rights and claims to the Western Wall. The British Government, in other words, did not have the power to unilaterally set up such a body.

The Permanent Mandates Commission, however, rejected this proposal, on the grounds that article 14 of the Mandate called for a special commission to deal with all of the Holy Places and not with only one.¹¹⁴ Despite this objection, the British delegate insisted, during the debate in the Council of the League, that the United Kingdom was in fact willing to proceed with the appointment of the special commission provided for by article 14, and to limit its duties for the time being to the problem of the Western Wall.¹¹⁵

The Council, however, decided, on 14 January 1930, that while article 14 should continue to be implemented (and interpreted) in the current way - namely, according to this author, pending the constitution of the commission provided for in article 14, by supervising directly, through its yearly Reports, the mandatory administration of the Holy Places - the appointment of an *ad hoc* commission could be authorized only under article 13¹¹⁶. This, eventually, was the procedure adopted for the appointment of the "Wailing Wall Commission," as described also in the Introduction of the Report of this Commission.¹¹⁷

In conclusion, one further comment may be added on the reasons given by the above-mentioned dispatch of 28 December 1922 in which Sir Herbert Samuel advised that "the question of the Holy Places cannot be satisfactorily dealt with by the Palestine Courts." In the High Commissioner's words, the jurisdiction over the Holy Places was not part of the "juridical

¹¹⁴ League of Nations, *ibid.*, pp. 143 and 156-171; reproduced in Bovis (1971) *The Jerusalem Question, 1917-1968*, p. 17, n35.

¹¹⁵ League of Nations, *Official Journal*, February 1929, pp. 172-174; reproduced in Bovis (1971) *The Jerusalem Question, 1917-1968*, p. 17, n36.

¹¹⁶ League of Nations, *Official Journal*, February 1930, 92-93; reproduced in Bovis (1971) *The Jerusalem Question, 1917-1968*, p. 17, footnote.

¹¹⁷ Introduction, *Report of the Commission appointed ... to determine the rights and claims of Moslems and Jews in connection with the Western or Wailing Wall at Jerusalem* (1930) reproduced in *The Rights and Claims of Moslems and Jews in Connection with the Wailing Wall at Jerusalem* (1968), p. 9.

work in Palestine” but “an additional function,” affecting interests outside the country.

Walter Zander¹¹⁸ interpreted these words in the sense that “the worldwide interest in the Christian Holy Places is relevant to the question of the jurisdiction over the Sanctuaries.” This interest, according to this view, could be legally recognized in different ways, including various proposals ranging from territorial internationalization of the Sanctuaries to the establishment of special tribunals. In this respect, “self-imposed limitations of jurisdiction for the sake of a matter transcending the borders of a country” are a common feature of international law in the field of extraterritoriality and immunity. Accordingly, these principles of international law might be usefully applied, directly or by way of analogy, to the question of the jurisdiction over the Christian Holy Places, “in addition to the consideration of constitutional issues which hitherto have dominated the discussion.”

d. The Status Quo System of Law

One should take into consideration, in order to understand the complexity of the Status Quo arrangement, that it relates to the relationship among communities responding to and bound by rules belonging to separate, original respective systems of law (for instance, the Canon Law for the Latin Catholic community). Special courts, moreover, generally have the specific task to apply these rules for each of the different recognized communities.

The object of the Status Quo arrangement relates to events and behaviors that have a proper meaning only in a transcendental, or ritual, context. Should one try to apply some municipal law analogies, such terms as rights of property, possession or use might be adopted. That terminology, however, cannot aptly explain the type of relationship at stake, because of the different context where the Status Quo rules have to be construed and applied. According to Prof. Englard,

¹¹⁸ Zander (1973) “On the Settlement of Disputes about the Christian Holy Places,” pp. 365-366.

“By its very nature, the dispute over the Holy Places lies outside the usual framework of settlement by means of law. (...) It is difficult, however, to define precisely what legal rights derive from the status quo. These ‘rights’ do not fit easily into the traditional categories of law, such as proprietary rights. The Supreme Court of Israel has touched upon the question where Justice Landau has said ‘we may perhaps regard the right of access to a Holy Place as a kind of easement (or servitudes) in the sense of the (Israeli) Land Law (of 1969).’ Dr. Berkovitz, who dealt with the question in his doctoral thesis on the Holy Places, has suggested that the rights should be treated as *sui generis*.”¹¹⁹

One might draw the conclusion, from the point of view of the theory of law that a special, *sui generis*, *ad hoc*, system of law has come into existence. This rather coherent, sufficiently organized, set of norms has showed its effectiveness over the years and, in its basic legal structure, over the centuries. If this is true, then the only hermeneutic legal context to interpret correctly the norms of the Status Quo seems to be its own context, namely the Status Quo system of law.

Other systems of law, such as international law, the law of the recognized religious communities or the law of the territorial rulers generally take into account the Status Quo system of law, even though they may not mention it explicitly, as an autonomous source of law (*lex specialis*) that may prevail over general rules.

In this context, one may say that if there is any international obligation on the part of the territorial authority, this may stem from a special application of the principle of non-interference, which thus has become a corollary of the Status Quo in the Holy Places. In this sense, according to Ferrari:

“While ... the status quo which governs the relations of the various Christian communities attending the Church of the Holy Sepulcher ... is far from perfect, it nevertheless ... provides proof that the sharing of the same Holy Place among a number of

¹¹⁹ England (1983) “The Legal Status of the Holy Places,” p. iv, v; internal quotation quoted by England from *The Orthodox Coptic Metropolitan Patriarchate v. The Government of Israel*, (1979) 33 P.D. (I), 238.

different religious communities is possible. Particular attention should be paid to the provisions excluding modifications of the status quo that are not agreed upon by the religious communities, and preventing any interference from external powers.”¹²⁰

More recently, on 14 November 1994, the Patriarchs and the Heads of Christian Communities in Jerusalem signed an important Memorandum on the Significance of Jerusalem for Christians,¹²¹ confirming the Status Quo in the Christian Holy Places. The Memorandum, signed by the Greek Orthodox, Latin and Armenian Patriarchs, the Custodians of the Holy Land, the Coptic, Syriac, Ethiopian Archbishops, the Anglican and Lutheran Bishops and the Greek Catholic, Maronite and Catholic Syriac Patriarchal Vicars, under the headline “Legitimate Demands of Christians for Jerusalem”, reads as follows:

*“11. (...) Those rights of property ownership, custody and worship which the different Churches have acquired throughout history should continue to be retained by the same communities. These rights which are already protected in the same Status quo [sic] of the Holy Places according to historical ‘firmans’ and other documents, should continue to be recognized and respected.”*¹²²

One should not interpret, however, the various confirmations of the Status Quo as a decision on the part of the various interested communities to consider it as a perfect arrangement and permanent, without any possibility of change or improvement in order to meet new and unpredictable needs. On the contrary, the Status Quo, by definition, allows such improvements, provided they receive the consent of all interested parties.

In this context, one may consider the difficulty in preserving a certain situation when other circumstances change. For example, in modern times, one should take into account any improvement or change imposed

¹²⁰ Ferrari (1996) “The Religious Significance of Jerusalem in the Middle East Peace Process: Some Legal Implications,” p. 738.

¹²¹ *Memorandum of their Beatitudes the Patriarchs and of the Heads of the Christian Communities in Jerusalem on the significance of Jerusalem for Christians* (1994).

¹²² Emphasis in the original text.

by new or unforeseen needs in the use of the Holy Places, such as the introduction of electrical lights, or the need to provide toilets for pilgrims, particularly for special events.

II.4 The Cultural/Religious Status Quo

As described at the beginning of this chapter, the expression 'status quo,' suggests varied meanings related to the international dimension of the Jerusalem question. The first of these refers to the universal/religious dimension of Jerusalem, often contrasted against that of the territorial/national one.

The remark made recently by Msg. Celestino Migliore, Undersecretary of State for the Relations with the States of the Holy See, about the clear distinction between the territorial dimension of the Jerusalem Question on one hand and its religious and cultural one on the other demonstrates these two definitions of 'status quo.' Referring to the latter dimension Msg. Migliore quotes the definition given in John Paul II's Apostolic Letter *Redemptiois anno*, of 20 April 1984: "a sacred heritage for all believers and desired framework for peace for the Middle Eastern peoples."¹²³

Msg. Migliore, who is also a scholar of international law, stresses in this context the similarity in terminology between article 24 of the 1929 Lateran Treaty between Italy and the Holy See and article 11, section 2 of the aforementioned Fundamental Agreement between Israel and the Holy See, which states as follows:

"The Holy See, while maintaining in every case the right to exercise its moral and spiritual teaching-office, deems it opportune to recall that, owing to its own character, it is solemnly committed to remaining a stranger to all merely temporal conflicts which principle applies specifically to disputed territories and unsettled borders."

The expression 'status quo,' applies to two different aspects of the universalistic/religious dimension of Jerusalem: the broad sense and the narrow

¹²³ Migliore (2000) "L'azione della Santa Sede," p. 681 n23.

sense. The former includes general principles referring to the broad cultural and religious aspects of the city, including the relations between the recognized religious communities and the territorial authorities, but *excluding* the relationship between the territorial authorities themselves, defined above as the territorial/national status quo.

The Status Quo in the narrow sense, on the other hand, applies only to the relationship between the recognized religious communities and their Holy Places. One should add, however, that the principle of non-interference in the narrow Status Quo refers to the relationship between the religious communities and the territorial authorities as well.

A detailed and comprehensive analysis of the group of norms defined above as the broad status quo goes far beyond the purpose and the scope of this work. This author has listed the main principles related to broader status quo in Jerusalem, in the document quoted below titled "Statement of policy for the protection of the cultural-religious status quo."¹²⁴

This author suggests the idea that international law may have incorporated this wider group of principles, either by virtue of a sort of international local custom (or objective regime) or by the legally binding effect of several unilateral declarations. Various territorial authorities ruling the city over the centuries have issued such declarations on the subject of the Holy Places.¹²⁵

The broad status quo, in this respect, relates to all aspects and established principles embodied in the regulations enacted by the Ottoman Empire vis-à-vis the different communities of Jerusalem. These principles apply to the main places of worship within Jerusalem, as well as in its immediate proximity. They include the protection of the ways of worship, access and pilgrimage to these sacred places of significant importance for Christians, Jews and Muslims.¹²⁶ Moreover, these traditional principles also guarantee the cultural interests of the different communities present in the city.

¹²⁴ See *infra*, Annex 6.

¹²⁵ Molinaro (1995) "La Liberta' religiosa nei Luoghi Santi di Gerusalemme," p. 59 ff.; Molinaro (1996) "Israel's Position on Jerusalem and international Norms for the Holy Places," p. 3 ff.

¹²⁶ See Berkovitz (1978) *The Legal Status of the Holy Places in Israel*, p. xi.

Study reveals that the practice of the different territorial powers that administered the territory under examination vis-à-vis the special privileges, immunities or exemptions granted to the recognized communities present in Jerusalem has been rather coherent. In fact, it went even beyond the standard of similar rights granted by the majority of the other countries in the world in the context of freedom of religion and worship.

In any case, the aforementioned principles guaranteeing freedom of worship and religion described above as 'broad cultural-religious status quo' in Jerusalem should be interpreted in the wider context of the norms of general custom addressed to all subjects of international law, discussed in the following section.

II.5 The Wider Context of the Human Right of Freedom of Religion and Worship

Recently and in particular after 1989, with the fall of the Berlin Wall, a progressive homogeneity in the political-institutional systems of an increasingly wider number of states has developed. As time passed, correspondent manifestations of these states' international practice have confirmed this phenomenon. It seems possible to ascertain today the general recognition of a number of civil and political freedoms in the broader framework of the human rights law as legal international norms.

Principles protecting freedom of worship and, more generally, freedom of religion, tend today to be customary norms of universal scope. This phenomenon occurred in other sectors of the normative promoted by the United Nations in the field of human rights as well, because of the wide participation of various states in its formation.

If one answers positively the question of the existence of legal values of this type – in light of the recent evolution of the attitude of the states –, the need of a precise definition of the contents and scope of such principles arises. In particular, the aforementioned principles of freedom of religion are of rather general nature, a fact that has often led to their different interpretations. These two factors explain the extreme complexity of the issue at hand.

A first important application, at least indirectly, of the general principle of religious freedom in international law appears in the United Nations' Charter Article 1, devoted to the Organization's goals. Article 1, Paragraph 3, stresses the importance of achieving "international co-operation ... in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to ... religion."¹²⁷

An additional international obligation of the United Nations, calling members to respect religious freedom, appears as well, in almost identical terms, in Article 55 of the Charter that prohibits discrimination on religious ground.

The following Article 56 further reaffirms non-discrimination provisions of Article 55. Article 56 reads:

"All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55."¹²⁸

One may interpret Article 56 as a mere obligation of co-operation. The principle of religious freedom, however, may have acquired, in light of the progressive attitude of the various states, a customary (unwritten) nature as well. The best opportunity for this attitude to manifest itself was in the adoption of international acts of universal scope issued or stipulated – following the Charter's provisions – in the United Nations' context that included provisions for religious freedom.

In particular, among the acts without a direct binding effect, Article 18 of the Universal Declaration of Human Rights (adopted 10 December 1948 by the General Assembly without any vote against and with only eight abstentions) states the right of any individual to freedom of thought, conscience and religion.

¹²⁷ For the text, see the UN website: <http://www.un.org/aboutun/charter/index.html>. For an analysis of the United Nations practice on freedom of religion see Pocar (1988) "La liberta' di religione nel sistema normativo delle Nazioni Unite" and Barberini (1987) "L'attenzione delle Nazioni Unite per la liberta' religiosa."

¹²⁸ *Ibid.*

According to Prof. Francesco Margiotta-Broglio,

“the system of guarantee studied and planned in the framework of the United Nations organization... focuses above all on religious freedom of the individual, without protecting sufficiently the rights of the religious groups as such.”¹²⁹

The system provided by the “European Convention for the Safeguard of Human Rights and Fundamental Freedoms,” signed in Rome on 4 November 1950, according to the same author,¹³⁰ started to fill – at least at a regional level – this vacuum.

The two important pacts adopted by the General Assembly on 16 December 1966 have reaffirmed – after a long elaboration, during which states have manifested their progressive practice – the aforementioned human rights principles included in the 1948 Declaration. The two pacts deal with economic, social and cultural rights, and civil and political rights, respectively.¹³¹

Paragraph 1 of Article 18 of the latter Pact, in particular, reaffirms almost literally the expressions used in Article 18 of the Universal Declaration. The Pact’s article provides for a conventional obligation - of an essentially negative character - of abstention and non-interference in the freedom of religion.

An extensive interpretation of the provision may imply a positive obligation to adopt the measures necessary to permit and guarantee the right of religious freedom. This obligation would occur in all cases where only the adoption of such measures would create the conditions allowing the State’s residents to effectively exercise such a right. The *Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Opinion*, adopted by the General Assembly on 25 November 1981, seems to confirm the suggested interpretation.

¹²⁹ Margiotta-Broglio (1967) *La protezione internazionale della libertà religiosa nella convenzione europea dei diritti dell'uomo*, p. 78.

¹³⁰ *Ibid.*

¹³¹ These pacts are the *International Covenant on Economic, Social and Cultural Rights* 1966 and the *International Covenant of Civil and Political Rights* 1966, respectively.

Article 1 of the 1981 Declaration, which aims at an effective respect of religious freedom, confirms the formula used in Article 18 of the Pact of 1966. This general principle is clarified by seven other articles; in particular, according to Article 6, such a principle includes, among other things the freedom "(t)o worship or assemble in connection with a religion or belief, and to establish and maintain places for these purposes."¹³²

The discussion on the adoption of both the 1981 Declaration of Principles and the 1948 Universal Declaration of Human Rights was an opportunity for many states to solemnly express their adherence to such legal values. From this point of view, both documents have become material sources of States' attitudes vis-à-vis values inspiring the two Declarations.

A relevant example of a state's practice confirming the existence of such a principle in customary international law, in relation to Israel, is the Israeli Supreme Court's decision¹³³ given by Judge Cohn in 1967, one year after the adoption of the aforementioned Pact on Civil and Political Rights. In regards to the case at hand, related to freedom of religion, it was decided that

"The principles of freedom of religion, that like other human rights enshrined in the Universal Declaration of the Human Rights, 1948, and the Covenant of Civil and Political Rights, 1966, are today the heritage of all enlightened nations, whether or not they are members of the United Nations Organization, and whether they have ratified the 1966 Covenant or have not done so; for these instruments have been drafted by legal experts from all corners of the world, and have been approved by the General Assembly of the United Nations in which the vast majority of the world takes part."¹³⁴

¹³² Article 6 a. *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* 1981.

¹³³ "The American-European Beth-El Mission v. Minister of Public Welfare et al." (1967) Israeli High Court of Justice 21 (ii) P.D. 325; the phrase is reproduced in Benvenisti (1994) "The Influence of International Human Rights Law on the Israeli Legal System: Present and Future," p. 141 n23.

¹³⁴ *Ibid.*

An additional element, showing the development of the *opinio juris* as to the existence of a general customary principle guaranteeing religious freedom, is the commitment undertaken in Article 1 of the aforementioned Fundamental Agreement between the Holy See and the State of Israel. It is worthy to recall here such a provision, even though it is included in an international act of only bilateral nature:

“The State of Israel, recalling its Declaration of Independence, affirms its continuing commitment to uphold and observe the human right to freedom of religion and conscience, as set forth in the Universal Declaration of Human Rights and in other international instruments to which it is a party.

The Holy See, recalling the Declaration on Religious Freedom of the Second Vatican Ecumenical Council, 'Dignitatis Humanae', affirms the Catholic Church's commitment to uphold the human right to freedom of religion and conscience, as set forth in the Universal Declaration of Human Rights and in other international instruments to which it is a party. The Holy See wishes to affirm as well the Catholic Church's respect for other religions and their followers as solemnly stated by the Second Vatican Ecumenical Council in its Declaration on the Relation of the Church to Non-Christian Religions, 'Nostra Aetate.'”¹³⁵

Recent developments seem to confirm the conclusion that the territorial entity exercising authority on Jerusalem has the obligation to respect the various manifestations of religious freedom expressed in relation to the places venerated as sacred, which are present in the city.

When applying the aforementioned general principles to the issue at hand, one should take into consideration the extraordinary (or maybe unique) characteristics of the Holy Places of Jerusalem.

A series of acts, among other documents adopted by the UNESCO organs, stress these characteristics. One such instance is resolution 15C/3.343 of the Records of the General Conference, which expresses concern over the

¹³⁵ *Ibid.*

preservation of the cultural property of Jerusalem. The document underlines the "exceptional importance of the cultural property in the Old City of Jerusalem, particularly the Holy Places, not only to the States directly concerned, but to all humanity, on account of their artistic, historical and religious value."¹³⁶

Further reference is made to the preservation of Jerusalem by the 113 Session of the Executive Board of UNESCO in Paris on 27 October 1981, which recognized the recommendations made by the World Cultural and Natural Heritage Committee of one month earlier. The committee placed the Old City of Jerusalem with "its walls" on the list of world cultural places that were deemed necessary for preservation.¹³⁷

The jurisprudence of the Israeli Supreme Court witnesses that in this area "the situation is unique, probably without parallels in the history of this territory or in the whole world."¹³⁸ Judge Witkon, in the quoted decision "Nationalist Groups against the Ministry of Police" used the quoted expressions to define in particular the area of the Noble Sanctuary/Temple Mount of Jerusalem, the most sacred area of Jerusalem for both Jews and Muslims.

The Israeli Attorney General has quoted such expressions also in the "Guidelines on the observation of the law on planning and building on the antiquities in the area of the Temple Mount,"¹³⁹ written on 18 September 1988.

A possible conflict between the principle of freedom of worship, in the broader context of freedom of religion, and the Status Quo legal regime could occur, should one not take into account these unique characteristics of the Holy Places of Jerusalem. While the basis for the former, as men-

¹³⁶ Part A, Section II, Paragraph 3.343 UNESCO (1968) "Records of the General Conference, 15th session"

¹³⁷ See Report of UNESCO Executive Board (1981).

¹³⁸ "Nationalist Groups against the Ministry of Police Israeli High Court of Justice" 222/68, 24(2) P.D., 141, p168. The phrase is reproduced in Lapidoth & Hirsch (eds.) (1994) *The Jerusalem Question and its Resolution. Selected Documents*, p. 471.

¹³⁹ *Attorney General Guidelines* (1998) reproduced in Lapidoth & Hirsch (eds.) (1994) *The Jerusalem Question and its Resolution. Selected Documents*, p. 471.

tioned above, is the universal principle of non-discrimination, the Status Quo regime, on the contrary, is discriminatory by definition.

One of the Status Quo principles mentioned above¹⁴⁰ implies that only the recognized bodies of selected communities have the right to worship and possession in the Holy Places. This excludes any community or religious sect unrecognized under the Status Quo regime from exercising freely such rights.

The application of the Status Quo regime does not allow either the recognized communities to exercise unlimited freedom of worship. For example, according to the Status Quo, members of the Jewish community, while allowed to visit the Noble Sanctuary/Temple Mount Compound, would not be permitted to pray in the area. From the point of view of universal human rights such a prohibition may amount to a violation of the non-discrimination principle.

The aforementioned definition of the Status Quo regime as a *lex specialis* – or special legal arrangement - may help explain this apparent legal contradiction. The general principles of freedom of worship and non-discrimination in any case remain relevant applicable criteria, should controversies on the interpretation of some of the Status Quo principles arise.

¹⁴⁰ See, for instance, n1 & n3 of the list of Status Quo principles listed *supra*, in this section.

III. CREATIVE PROPOSALS FOR THE NEGOTIATORS

III.1 The Model of Exclusive 'Sovereignty' of the State Within its Territorial Boundaries and its Practical Distinction to the Three Different Aspects: Authority, Title, and Independence

Given the potentially misleading effects of the term 'sovereignty,'¹ the distinction between its different meanings may help clarify the debate over the complex negotiations on Jerusalem.

The negotiators may consider the possibility of drawing special arrangements between the parties, each of whom may exercise governmental powers in areas under territorial jurisdiction by the other. Saint Peter's Square in Rome - where the Holy See owns the area under international law, with Italy exercising various governmental powers - is an example from a contemporary standpoint. Each of the two parties to the negotiations on Jerusalem may establish part of their capital *abroad*, namely in an area under the territorial jurisdiction of the other party.

This example of the exercise of governmental powers abroad is an expression of the utility of recognizing the distinctions between the *three main meanings of sovereignty as independence, authority, or title*. Section 2 clarifies the different meanings of these three terms. It is important to take into account how these distinctions apply to the Jerusalem question.

In relation to Jerusalem the parties are free to separate the discussion in regards to the actual exercise of *authority* in the city apart from the *title*

¹ Brownlie (1998) *Principles of Public International Law*, p. 106; Henkin (1989) *International Law: Politics, Values and Functions. General Course on Public International Law*, pp. 24-25; Maritain (1969) "The Concept of Sovereignty," pp. 61-64. On the distinction, see also Molinaro (2002) "Alternative Definitions of Sovereignty: an Analysis of Coexisting National and Religious Identities in Jerusalem", where, in the section entitled "Potential perspectives for the peace negotiations on the city" (pp 123-128) the threefold delimitation of jurisdiction is applied to recent proposals for the peace negotiations on Jerusalem.

applied to it. One example referred to above is the possible establishment of part of the capital cities in the territorial jurisdiction of the other party, with each retaining personal jurisdiction in regards to its citizens living outside their own territory. Israel and the PLO, in negotiating their rights in Jerusalem, do not need to ascertain in advance to whom the city presently belongs.

The Israeli newspaper *Ha'aretz* has published a EU non-paper prepared by the EU Special Representative to the Middle East Process, Ambassador Moratinos, and his team after consultations with the Israeli and Palestinian sides, present at Taba in January 2001. Although the paper has no official status, according to the newspaper, "it has been acknowledged by the parties as being a relatively fair description of the outcome of the negotiations on the permanent status issues at Taba."²

According to this account, the negotiators have tried to develop an alternative concept to 'sovereignty' "that would relate to the Old City and its surroundings, and the Israeli side put forward several alternative models for discussion."³ "Setting up a mechanism for close coordination and cooperation in the area" or "a special police force regime"⁴ are just two examples of the idea discussed in Taba.

On 9 December 2001, the author received a letter from His Highness Hassan Bin Talal. A learned scholar, as well as member of the Royal Hashemite family of Jordan, he commented on some of the ideas the author had developed in two previous publications, contributing his own remarks and asking specific questions.

The first issue raised by Prince Hassan relates to one of the aspects of 'sovereignty' in international law mentioned above, namely *title*. This refers to whether the governmental powers, or authority, of a specific territory have been acquired legitimately or not, in other words, *why*, or to

² Eldar "EU description of the outcome of permanent status talks at Taba" *Ha'aretz*, 28 February 2002.

³ *Ibid.*

⁴ *Ibid.*

be more precise *on which ground* a specific territorial entity is exercising its authority over the area under its control.

The Prince asks which considerations should prevail in evaluating the conflicting claims over the title on the territory, namely historical, political, religious or national/ethnic considerations. The answer to this question may be particularly interesting. One can consider Jerusalem as a significant case study in international practice.

From this point of view, binding international agreements are certainly relevant. These include, according to the Prince's letter, the Statute of the League of Nations - from which the British Mandate over Palestine takes its international legal nature, the Framework for Peace in the Middle East, signed at Camp David by Egypt and Israel on 17 September 1978, the Peace Treaty signed by Israel and Jordan on 25 October 1994 - particularly Article IX -, the Interim Agreement signed in Washington by Israel and the PLO on 28 September 1995 - particularly Article XVII (Jurisdiction), Paragraph 2, as well as the Basic Agreement signed by the Holy See and the PLO on February 2000. General international customs on the acquisition of territory in international law should also be taken into account.

Other documents, even if they are not directly binding in international law, are important manifestations of the relevant parties' practice and their opinion about international norms and claims. In this respect, the Prince's letter mentions the Ottoman government's Firmans (1517-1917) as well as the Memorandum signed by the Patriarchs and Heads of Christian Communities in Jerusalem on 14 November 1994. This consideration also applies to any non-binding decision of the United Nations organs, such as Security Council's Resolutions 242 and 338.

This important aspect of the question of 'sovereignty' in Jerusalem, however, is not necessarily relevant for the practical purpose of the negotiations over this issue, at least from a strictly legal point of view. Israel and the PLO, in negotiating their rights in Jerusalem, do not need to ascertain in advance to whom the city presently belongs. As to the future, the analysis developed in this work shows that the parties are free to separate the discussion on the actual exercise of authority in the city from the title to it.

The Prince's letter reaches a similar conclusion, suggesting that the term 'sovereignty' (here again in the sense of title) should be left to the historians to "engage, at will, if they wish, in the quest for historical antecedents – no matter how ancient – to prove or disprove conflicting claims" on the city.

Prince Hassan, in the second part of his letter, tackles a different aspect of 'sovereignty,' related to *what* its specific contents and limits might be. This aspect, as explained in the first chapter, may be better defined as *authority*, limited according to the criteria of functional, territorial and personal jurisdiction. The Prince maintains that the negotiators should follow as much as possible a symmetric approach in the distribution of the respective Palestinian and Israeli powers in the area.

Prince Hassan in his letter also raises specific questions about possible future arrangements for Jerusalem. In particular, he asks who should have the role of guaranteeing the unique characteristic of this "multinational and multi-faith city." A similar question may be relevant also for the specific issue for the Settlement of Disputes on the Status Quo of the Holy Places, a topic discussed in other sections of this work.⁵ The basic dilemma, taking into account the general dichotomy described in this work, is whether Palestinians and Israelis alone, following the territorial/national-oriented approach prevailing in Oslo should be entrusted this task. Following the universalist/religious-oriented approach, quoting again the Prince's letter, external actors, such as "the religious world community, or perhaps international organizations such as the UN" may fulfill this extremely sensitive task.

The answer to this essential question may affect, at least symbolically, the general world-views about the debate between the proponents of the two opposite models of identity described in this work. The Jerusalem question, from this point of view, acquires a relevance that goes far beyond its particular local dimension.

⁵ For a discussion of the complex issue of the settlement of disputes on the rights and claims in connection with the Holy Places according to the Mandate's provisions see *supra* section 6.c. for practical proposals on some policy options for the negotiations see *infra*, section 10.b.

The Prince's letter concludes that only a thorough discussion of the economic aspects of the issue - a complex problem that would deserve a separate study - may "highlight the need for continuity and sustainability of any possible solution."

The model of exclusive 'sovereignty,' as stated earlier, potentially clashes with the opposite universalist/religious model. The following section discusses possible practical solutions to issues related to the latter dimension of the Jerusalem Question.

III.2 The Status Quo of the Holy Places: Suggesting Technical Solutions

The aforementioned *Ha'aretz* account refers that during the Taba talks

"(t)he Israeli side expressed its interest and raised its concern regarding the area conceptualized as the Holy Basin (which includes the Jewish Cemetery on the Mount of Olives, the City of David and Kidron Valley)."⁶

The Palestinian side, while willing to "take into account Israeli interests and concerns" claimed 'sovereignty' over these places.

"Another option for the Holy Basin, suggested informally by the Israeli side, was to create a special regime or to suggest some form of internationalization for the entire area or a joint regime with special cooperation and coordination."⁷

According to the same account, "(b)oth parties have accepted the principle of respective control over each side's respective holy sites (religious control and management)."⁸ The parties had considered "practical arrangements regarding evacuations, building and public order in the area of the [Noble Sanctuary/Temple Mount] compound" for

⁶ *Ibid*

⁷ *Ibid*

⁸ *Ibid*

“an agreed period such as three years. During this period, the compound should have been ‘under international sovereignty’ of the five permanent members of the Security Council of the United Nations, plus Morocco (or other Islamic presence) whereby the Palestinians would be the “Guardian/Custodians.”⁹

The account adds that “(a)t the end of this period, either the parties would agree on a new solution or agree to extend the existing arrangement.”¹⁰

As a practical proposal, it may be useful to hold a series of meetings between specialists, focus on the following two issues:

1. A definition of the ‘Status Quo’ regime in the Holy Places of Jerusalem in view of the Israeli-Palestinian negotiations;
2. Suggested policy options to settle potential disputes between the religious communities on the interpretation and the implementation of the ‘Status Quo’ principles:
 - Ordinary judicial jurisdiction;
 - Political settlement;
 - A special body in charge of such disputes, namely a body that is recognized by the concerned parties as being able to take decisions independently from the interests of the parties, while at the same time taking them into due account.

The possibility of inviting religious experts or authorities to the suggested meetings should be considered. These meetings would produce optimal results if they were informal, confidential, and based on a legal/practical-oriented approach rather than a purely political or religious one.

These meetings would be held under the auspices of a third party. Naturally, this third party’s desire to be involved would be a reflection of their interests in both establishing a lasting peace in the region and a satisfac-

⁹ *Ibid.*

¹⁰ *Ibid.*

tory outcome regarding the Holy Places. However, these interests must also combine with the more elusive talent of being seen by both local parties as unbiased – a difficult combination. Due to both the international nature and long time frame of the Israeli-Palestinian conflict, many outside parties have attempted to actively intervene or – at the very least – have offered their opinions on the matter. Of course, that done, it takes no time at all for either one or the other of the local communities to label the outsider as ‘pro-Israeli’ or ‘pro-Palestinian’. Thus, the difficult task in deciding the chair of future meetings is not so much who would be interested, or even who might – in the end – be fair but rather, who is seen by both Palestinians and Israelis as unbiased.

A possible solution is to find an individual representative of their country’s interests in the region, but not necessarily representing their country per se.

a. The Status Quo System of Law

As mentioned above, it may be useful for a group of experts from different fields (law, history, comparative religions, etc.), specializing in the subject of the Status Quo, to meet. The purpose of such meetings would be to determine the general features of a legal regime that, although ancient and established, has never been formally clarified in a complete and generally recognized framework. If one should summarize the main general principles characterizing the Status Quo system of law, one may try to list the following guidelines:

1. Requirement of the consent of the representative bodies of the communities with a recognized vested interest in the Holy Places for any change in the Status Quo, the legal regime dividing space and time for the use (for religious purposes) of those places and possession of those places. Different interpretations may arise regarding the nature of the body entitled to represent the various communities. A broad consensus, however, seems to exist on this sensitive issue.
2. From the point of view of the recognized communities, the arrangement reached between them or the decisions imposed by the territorial power are temporary in nature and should not prejudice or preempt their respective rights on the permanent status of the Holy Places.

3. The territorial power's authority over public order, safety, and decorum in the Holy Places and its obligation of non-interference in the internal matters of the aforementioned communities. These communities (with a recognized vested interest in the sites) are the only bodies authorized to manage the Holy Places. Different interpretations may arise also about who is entitled to represent the territorial power's authority. The above principle, however, applies regardless of the answer that the negotiations on Jerusalem may give to this question.
4. Need for continuous, uninterrupted exercise of existing rights in the Holy Places for their maintenance.
5. Possibility to separate the different aspects of access, possession and worship, which may belong to different representative bodies of the communities.
6. Immunity from ordinary judicial jurisdiction over the settlement of disputes between the representative bodies of the communities on the Status Quo in the Holy Places in the narrow sense described above. This includes the possibility of setting up a special body competent in dealing with this category of disputes..

b. Policy Options for the Settlement of Disputes

The topic of the settlement of disputes in the Holy Places has rarely been dealt with in scholarly literature,¹¹ partly due to the extreme complexity of the issues. Research in this field requires in-depth knowledge and familiarity with several subjects, each with a distinct methodology, scholarly fields such as law, history, and political science. In fact, even if we limit our focus to the legal aspects of the issue at stake, an exhaustive study of the topic would require mastery of the details of municipal law

¹¹ The following have mentioned - but not developed a full analysis of - the issue: Zander (1971) *Israel and the Holy Places of Christendom*; Zander (1973) "On the Settlement of Disputes about the Christian Holy Places"; Zander (1982) "Jurisdiction and Holiness: Reflections on the Coptic-Ethiopian Case"; Berkovitz (1978) "The Legal Status of the Holy Places in Israel" (in Hebrew); Berkovitz (1997) *The Legal Status of the Holy Places in Jerusalem* (in Hebrew); Berkovitz (2000) *Conflicts on the Holy Places* (in Hebrew); and Claude Klein (1971) "The Temple Mount Case."

(procedural, criminal, civil, and constitutional), comparative law, international law, and the laws of recognized religious communities (such as canon law for the Catholic Church).

The issue of the jurisdiction over the settlement of disputes on this sensitive subject is not limited only to the Christian Holy Places, but also includes the Muslim and Jewish Holy Places,¹² as various decisions by the Israeli Supreme Court have demonstrated.

Among the several questions to be answered are: How should the current practice of judicial jurisdiction over the settlement of disputes concerning the Holy Places be interpreted? Is jurisdiction on the substance of the disputes suspended or in abeyance?¹³

The main question refers to what extent the ordinary courts have competence in deciding these matters? A possible alternative is that either the territorial government or a neutral third body should decide disputes on substantive rights and claims in the Holy Places.

If existing principles require the appointment of such a special body, its nature and composition have to be determined, along with who should have the power to appoint its members. Similarly, it has to be decided how this neutral body should be organized, whether it should consult with representatives of the recognized religious communities, and what should be the procedure for this consultation.

An additional question is whether this special body should be permanent or temporary, and in what kinds of disputes it would be called in?

Separate considerations may determine the answer to the procedural question of "who should decide when such disputes require this third-

¹² See *supra*, section 6 b.

¹³ The Israeli Government submitted a draft resolution to the General Assembly of the United Nations on 25 November 1949, dealing with some of the issues discussed in this section. For the text of the draft, see Annex 4. If future negotiations on the permanent status of Jerusalem give part of the responsibility in the Holy Places to the Palestinian side, the principles suggested in the draft resolution may still be relevant. One should replace, when needed, the word 'Israel' with 'Palestine'.

party intervention?" One of the most sensitive, from the political point of view, is the question of "who should have the duty and power to implement the decisions of such a body?"

The questions listed above help to simplify and clarify the complexity of the issue, as well as the extreme sensitivity of the topic. For this reason it is necessary to focus on the following two issues.

First, what would be the respective roles of ordinary courts, the territorial government, and a third-party ad hoc body in the settlement of Holy Places disputes? And second, how could a body be appointed whose authority would be recognized by the relevant parties in any dispute, and could it decide independently while taking the interests of these parties into account?

Because of the complex nature of the issues involved, the approach to the topic should be, by necessity, multidisciplinary. An additional example of the described complexity emerges from considering terminological issues related to the very definition of such controversial concepts described above as 'Holy Place,' 'Status Quo,' 'Religious Community.'

Clear answers emerging from the described analysis may have practical implications. A solution acceptable to all of the parties involved in the issue of the Holy Places of Jerusalem may bring about positive long term consequences, encouraging a new way of thinking by a future generation of leaders on both sides.

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ANNEXES

ANNEX 1
The Terms of Mandate for Palestine [Excerpts],
July 24, 1922

Contents [excerpts]

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Preamble

The Council of the League of Nations

Whereas the Principal Allied Powers have agreed, for the purpose of giving effect to the provisions of Article 22 of the Covenant of the League of Nations, to entrust to a Mandatory selected by the said Powers the administration of the territory of Palestine, which formerly belonged to the Turkish Empire, within such boundaries as may be fixed by them; and

Whereas the Principal Allied Powers have also agreed that the Mandatory should be responsible for putting into effect the declaration originally made on November 2nd, 1917, by the Government of His Britannic Majesty, and adopted by the said Powers, in favour of the establishment in Palestine of a national home for the Jewish people, it being clearly understood that nothing should be done which might prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country.

Whereas recognition that has thereby been given to the historical connection of the Jewish people with Palestine and to the grounds for reconstituting their national home in that country. (...)

Whereas the Principal Allied Powers have selected His Britannic Majesty as the Mandatory for Palestine; and

Whereas the mandate in respect of Palestine has been formulated in the following terms and submitted to the Council of the League for approval; and

Whereas His Britannic Majesty has accepted the mandate in respect of Palestine and undertaken to exercise it on behalf of the League of Nations in conformity with the following provisions; and

Whereas by the afore-mentioned Article 22 (paragraph 8), it is provided that the degree of authority, control or administration to be exercised by the Mandatory, not having been previously agreed upon by the Members of the League, shall be explicitly defined by the Council of the League of Nations;

Confirming the said mandate, defines its terms as follows:

Article 8

The privileges and immunities of foreigners, including the benefits of consular jurisdiction and protection as formerly enjoyed by Capitulation or usage in the Ottoman Empire, shall not be applicable in Palestine.

Unless the Powers whose nationals enjoyed the afore-mentioned privileges and immunities on August 1st, 1914, shall have previously renounced the right to their re-establishment, or shall have agreed to their non-application for a specified period, these privileges and immunities shall, at the expiration of the mandate, be immediately re-established in their entirety or with such modifications as may have been agreed upon between the Powers concerned.

Article 9

The Mandatory shall be responsible for seeing that the judicial system established in Palestine shall assure to foreigners, as well as to natives, a complete guarantee of their rights.

Respect for the personal status of the various peoples and communities and for their religious interests shall be fully guaranteed. In particular, the control and administration of Waqfs shall be exercised in accordance with religious law and the dispositions of the founders.

Article 12

The Mandatory shall be entrusted with the control of the foreign relations of Palestine and the right to issue exequaturs to consuls appointed by foreign Powers. He shall also be entitled to afford diplomatic and consular protection to citizens of Palestine when outside its territorial limits.

Article 13

All responsibility in connection with the Holy Places and religious buildings or sites in Palestine, including that of preserving existing rights and of securing free access to the Holy Places, religious buildings and sites and the free exercise of worship, while ensuring the requirements of public order and decorum, is assumed by the Mandatory, who shall be responsible solely to the League of Nations in all matters connected herewith, provided that nothing in this article shall prevent the Mandatory from entering into such arrangements as he may deem reasonable with the Administration for the purpose of carrying the provisions of this article into effect; and provided also that nothing in this mandate shall be construed as conferring upon the Mandatory authority to interfere with the fabric or the management of purely Moslem sacred shrines, the immunities of which are guaranteed.

Article 14

A special Commission shall be appointed by the Mandatory to study, define and determine the rights and claims in connection with the Holy Places and the rights and claims relating to the different religious communities in Palestine. The method of nomination, the composition and the functions of this Commission shall be submitted to the Council of the League for its approval, and the Commission shall not be appointed or enter upon its functions without the approval of the Council.

Article 15

The Mandatory shall see that complete freedom of conscience and the free exercise of all forms of worship, subject only to the maintenance of public order and morals, are ensured to all. No discrimination of any kind shall be made between the inhabitants of Palestine on the ground of race, religion or language. No person shall be excluded from Palestine on the sole ground of his religious belief.

The right of each community to maintain its own schools for the education of its own members in its own language, while conforming to such educational requirements of a general nature as the Administration may impose, shall not be denied or impaired.

Article 16

The Mandatory shall be responsible for exercising such supervision over religious or eleemosynary bodies of all faiths in Palestine as may be required for the maintenance of public order and good government. Subject to such supervision, no measures shall be taken in Palestine to obstruct or interfere with the enterprise of such bodies or to discriminate against any representative or member of them on the ground of his religion or nationality.

Article 21

The Mandatory shall secure the enactment within twelve months from this date, and shall ensure the execution of a Law of Antiquities based on the following rules. This law shall ensure equality of treatment in the matter of excavations and archaeological research to the nations of all States Members of the League of Nations.

- (1) 'Antiquity' means any construction or any product of human activity earlier than the year A.D. 1700.
- (2) The law for the protection of antiquities shall proceed by encouragement rather than by threat. Any person who, having discovered an antiquity without being furnished with the authorisation referred to in paragraph 5, reports the same to an official of the competent Department, shall be rewarded according to the value of the discovery.
- (3) No antiquity may be disposed of except to the competent Department, unless this Department renounces the acquisition of any such antiquity. No antiquity may leave the country without an export licence from the said Department.
- (4) Any person who maliciously or negligently destroys or damages an antiquity shall be liable to a penalty to be fixed.

- (5) No clearing of ground or digging with the object of finding antiquities shall be permitted, under penalty of fine, except to persons authorised by the competent Department.
- (6) Equitable terms shall be fixed for expropriation, temporary or permanent, of lands, which might be of historical or archaeological interest.
- (7) Authorisation to excavate shall only be granted to persons who show sufficient guarantees of archaeological experience. The Administration of Palestine shall not, in granting these authorisations, act in such a way as to exclude scholars of any nation without good grounds.
- (8) The proceeds of excavations may be divided between the excavator and the competent Department in a proportion fixed by that Department. If division seems impossible for scientific reasons, the excavator shall receive a fair indemnity in lieu of a part of the find.

Article 23

The Administration of Palestine shall recognize the holy days of the respective communities in Palestine as legal days of rest for the members of such communities.

Article 24

The Mandatory shall make to the Council of the League of Nations an annual report to the satisfaction of the Council as to the measures taken during the year to carry out the provisions of the mandate. Copies of all laws and regulations promulgated or issued during the year shall be communicated with the report.

Article 25

In the territories lying between the Jordan and the eastern boundary of Palestine as ultimately determined, the Mandatory shall be entitled, with the consent of the Council of the League of Nations, to postpone or withhold application of such provisions of this mandate as he may consider inapplicable to the existing local conditions, and to make such provision for the administration of the territories as he may consider suitable to those conditions, provided that no action shall be taken which is inconsistent with the provisions of Articles 15, 16 and 18¹.

Article 28

In the event of the termination of the mandate hereby conferred upon the Mandatory, the Council of the League of Nations shall make such arrangements as may be deemed necessary for safeguarding in perpetuity, under guarantee of the League, the rights secured by Articles 13 and 14 (...).

¹ The original version of the Terms of Mandate in Palestine was revised after the adoption of Article 25, according to which the area on the eastern bank of the Jordan River - where eventually the Kingdom of Transjordan, today Jordan, was set up - was separated from the rest of Palestine.

ANNEX 2
The Palestine (Holy Places) Order in Council, 1924

AT THE COURT AT BUCKINGHAM PALACE;

The 25th day of July, 1924.

PRESENT: THE KING'S MOST EXCELLENT MAJESTY IN COUNCIL.

WHEREAS by the Palestine Order in Council, 1922, it is (among other things) provided that the Civil Courts in Palestine shall exercise jurisdiction in all matters and over all persons in Palestine:

AND WHEREAS it is expedient that certain matters shall not be cogniyable by the said Courts:

AND WHEREAS by treaty, capitulation, grant, usage, sufferance and other lawful means His Majesty has power and jurisdiction within Palestine:

NOW, THEREFORE, His Majesty, by virtue and in exercise of the powers in this behalf by the Foreign Jurisdiction Act, 1890, or otherwise, in His Majesty vested, is pleased, by and with the advise of His Privy Council, to order, and it is hereby ordered, as follows: -

1. This order may be cited as "The Palestine (Holy Places) Order in Council, 1924."
2. Notwithstanding anything to the contrary in the Palestine Order-in-Council 1922, or in any Ordinance or Law in Palestine, no cause or matter in connection with the Holy Places or religious buildings or sites or the rights or claims relating to the different religious communities in Palestine shall be heard or determined by any Court in Palestine.
Provided that nothing herein contained shall affect or limit the exercise by the Religious Courts of the jurisdiction conferred upon them by, or pursuant to, the said Palestine Order in Council.
3. If any question arises whether any cause or matter comes within the terms of the preceding Article hereof, such question shall, pending the constitution of a Commission charged with jurisdiction over the matters set out in the said Article, be referred to the High Commissioner, who shall decide the question after making due enquiry into the matter in accordance with such instructions as he may receive from one of His Majesty's Principal Secretaries of State.
The decision of the High Commissioner shall be final and binding on all parties.
4. His Majesty, His Heirs and Successors in Council, may at any time revoke, alter or amend this Order.

AND the Right Honourable James Henry Thomas, one of His Majesty's Principal Secretaries of State, is to give the necessary directions herein accordingly.

ANNEX 3
The Status Quo in the Holy Places, [Excerpts]
By L.G. Cust

Confidential.

Note. – The accounts of practice given in this Print are not to be taken as necessarily having official authority.

THE STATUS QUO
IN THE HOLY PLACES

By

L.G. Cust,

formerly District Officer, Jerusalem.

With an Annex on
The Status Quo in the Church of the Nativity,
Bethlehem,
by Abdullah Effendi Kardus, M.B.E.,
formerly District Officer, Bethlehem Sub-District.

Printed for the Government of Palestine
by his Majesty's Stationery Office.

INTRODUCTORY NOTE.

It is probably true to say that no question mere constantly exercised the Moslem rulers of Palestine and took up mere of their time than the ever recurring difficulties and disputes arising out of the circumstance that the Christian Holy Places in Jerusalem and Bethlehem were not in one ownership but were shared and served by several communities. In this respect the experience of the British Mandatory Government has not differed greatly from that of their Ottoman predecessor. As the several ecclesiastical communities represented in the Holy Places waxed or waned in influence or even (as in the case of the Georgians) lost all representation in the Holy Land, so their shares in the sanctuaries fluctuated and their boundaries within the shrines tended to depend upon the numbers, wealth, and even strong right arm, of the parties concerned and upon the favour of the Sultan. And that the latter was sometimes a precarious asset is shown by the circumstance that between the years 1630 to 1637 – a particularly important period in the history of the Holy Places – the right of pre-eminence (*praedominium*) in the Church of the Holy Sepulchre, the Church of the Virgin near Gethsemane, and the Basilica of the Nativity at Bethlehem, alternated no fewer than six times, at the caprice of Sultan Murad IV, between the two principal shareholders, the Orthodox and the Roman Catholics.

Article LXII of the Treaty of Berlin proclaims the inviolability of the *status quo* of the Holy Places and the phrase status quo has thus assumed a wide significance in this connexion, since it is to it that appeal is made in all questions which arise within these sacred and much contested walls. Not only Orthodox and Latins, but Armenians, Copts, Jacobites and Abyssinians have still their shares in the Holy Places; and, owing to the complexity of the shares, to the frequent absence of authoritative rulings, and to contradictory decisions given in the past, the *status quo* is often difficult to define.

On this account the Paper prepared by Mr. L.G.A. Cust, who has had several years of experience in the Jerusalem District Administration, supplemented by a detailed description of the complicated practice at Bethlehem by Abdullah Effendi Kardus, M.V.E., District Officer of the Bethlehem Sub-District, will be of practical value to the officers of the Government of Palestine who have to administer and give decisions upon the interpretation of the *status quo*. While it does not attempt the vast task of examining and sifting all the rulings of the Mamluk and early Ottoman rulers of Palestine, it gives a succinct account of modern practice; and it is the only collection extant of the rulings and decisions taken since 1918. As such it cannot fail to be a valuable vade mecum to those charged with the delicate duty of applying one of the most fluid and imprecise codes in the world.

H.C. Luke,
Chief Secretary to the Government of Palestine
Jerusalem,
September, 1929

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Negotiating Jerusalem

Confidential.

"The Status Quo in the Holy Places," by Mr. L.G.A. Cust.

Corrigenda and Addendum.

The following alterations should be made in the Section relative to the
"Wailing Wall" commencing on page 43².
(...) March, 1930.

² The author has moved the alterations listed by Cust to the corresponding footnotes in the text below.

INTRODUCTION

Article 13 of the Mandate for Palestine lays on the Mandatory Power the responsibility of preserving existing rights in the Holy Places.

Article 14 provides for the constitution of a special Commission to study, define and determine the rights and claims in connexion with the Holy Places. The Commission has never yet been formed, and in consequence, the Government of Palestine is still under the obligation to maintain the Status Quo in every respect.

Although the arguments of the various claimants in the question of the Holy Places have been set out at length, there has hitherto been no attempt made to discover and codify as far as is possible what *is* the practice at the present time, and, irrespective of what is claimed, what *are* the existing rights that thus the Palestine Government is bound to preserve.

The experience of nearly five years as an administrative officer in Jerusalem is embodied in the following pages. But the Status Quo is not a growth of recent date; it is an evolution that traces its beginning to the early centuries of the history of the Church. Consequently, to obtain a proper perspective and to be able to appreciate what is the true meaning and import of occurrences that appear at first sight to be trivial, it is essential to comprehend how the position arose. A description is therefore given of the origin and history of the conflicts and rivalries in the Holy Places that culminated in the declaration of the Status Quo by the Sultan in the middle of the last century. The prejudice, it should however be realized, of the various authorities, as well as the valuelessness of firmans and other documents which often are directly contradictory, makes the study of this problem very difficult except when guided by actual experience.

It cannot be denied that the moment is opportune for an attempt to arrive at a solution of the question of the Holy Places. The most important external influences have disappeared forever, and largely on this account, despite occasional setbacks, a new spirit of accommodation is increasingly evident among the representatives of the various rites that live together in these sacred surroundings. I is most sincerely hoped that the information collected in these pages may be of assistance to this end.

Reports drawn by Bishara Effendi Habib, who was for over thirty years in the political office of the Mutessarif of Jerusalem, and has always shown himself ready to put his wide experience at the disposal of the Government, have been of the greatest service. A very complete and painstaking memorandum written by Abdullah Effendi Kardus, M.B.E., who was for many years District Officer, Bethlehem Sub-District, is given as well in full.

Certain appendices are added, including a detailed description of the ceremony of the Holy Fire, which was drawn up originally for the guidance of the District Governor's office.

L.G.A.C.

Jerusalem, July, 1929.

The peacemakers saw an exceptional opportunity to find a solution for the question of the Holy Places which had been shelved on so many previous occasions. Following on a provision to that effect in the Peace Treaty with Turkey, a clause was inserted in the Mandate for Palestine providing for the constitution of a Holy Places Commission.[†] The composition of the Commission has, however, been a stumbling block that has up to date proved insurmountable. In 1922 the British Government formulated certain proposals in this regard, but, owing to the difficulties raised by the Roman Catholic Powers, withdrew them shortly afterwards and adopted the attitude of taking no further action until these Powers had reached agreement among themselves, when it would re-examine the question and attempt to find a solution satisfactory to all parties.

In 1923 a proposal was put forward by the Secretary of State that, pending the constitution of the Holy Places Commission, a special Commission of Inquiry composed of one or more British judges not residing in Palestine should be appointed *ad hoc* to deal with any disputes arising with regard to the Holy Places that would come under the jurisdiction of the Holy Places Commission, were it in existence. The Foreign Office expressed their concurrence and the Government of Palestine accepted the proposal. The matter has not, however, been proceeded with, and any dispute that now arises is submitted to Government. If the Government decision is not accepted, a formal protest is made and the fact is recorded that no change in the Status Quo is held to have occurred.[†]

The present position therefore is that the arrangements existing in 1852 which corresponded to the Status Quo of 1757 as to the rights and privileges of the Christian communities officiating in the Holy Places have to be meticulously observed, and what each rite practiced at that time in the way of public worship, decorations of altars and shrines, use of lamps, candelabra, tapestry and pictures, and in the exercise of the most minute acts of ownership and usage has to remain unaltered. Moreover, the Status Quo applies also to the nature of the officiants.

Holy Places affected by the *Status quo* and its general principles

The Holy Sepulchre with all its dependencies.

The Deir al Sultan.

The Sanctuary of the Ascension.

The Tomb of the Virgin (near Gethsemane).

The Church of the Nativity.

‡ Appendix A.

* See Secretary of State's Despatch, No. 332, of 15 March, 1923, and High Commissioner's reply, Despatch No. 314, of 5 April, 1928.

† The Palestine (Holy Places) Order-in-Council, 1924, ousts all matters connected with the Holy Places and religious buildings and sites or with the rights and claims of the different religious communities from the jurisdiction of the Civil Courts, and provides furthermore that the High Commissioner is to decide finally if a question arises whether any cause or matter comes within this prescription. See Appendix B.

The Grotto of the Milk and the Shepherds' Field near Bethlehem are also in general subject of the Status Quo, but in this connection there is nothing on record concerning these two sites.

The Wailing Wall and Rachel's Tomb, of which the ownership is in dispute between the Moslems and the Jews, are similarly subject to the Status Quo.

In all matters of principle relating to the Status Quo in the Christian Holy Places, only the Orthodox, Latin, and Armenian Orthodox rites are considered. This follows the arrangement under the Turkish Government, corresponding to the Administrative Organization of the "Rayahs," i.e., the non-Moslem Ottomans, into "millets" or "nations" of these denominations, the other Orthodox Eastern rites being grouped with the Armenians.

By the Latin rite is invariably meant the Roman Catholic Church of the Latin rite as distinct from the Uniates, and moreover as regards the Holy Places, the Franciscan Fraternity of the Custodia di Terra Santa.

Certain fixed principles are followed in the administration of the Status Quo. Thus, authority to repair a roof or floor implies the right to an exclusive possession on the part of the restorers. Again, the right to hang a lamp or picture or to change a lamp or picture is a recognition of exclusive possession of a pillar or wall. The right of other communities to cense at a chapel implies that the proprietorship is not absolute.

For the purpose of defining the Status Quo, the Holy Places and their component parts may be divided into certain categories: -

- (1) The parts that are accepted to be the common property of the three rites in equal shares;
- (2) The parts claimed by one rite as under its exclusive jurisdiction, but in which the other rites claim joint proprietorship;
- (3) The parts of which the ownership is disputed between two rites;
- (4) The parts of which one rite has the exclusive use, but qualified by the right of the others to cense and visit it during their offices;
- (5) The parts which are in the exclusive jurisdiction of one rite, but are comprised within the ensemble of the Holy Places.

In all these cases the application of the Status Quo varies in the way of innovation or repair by any party. In the case of an urgent matter the work has to be carried out by the Government or the local authority, and the question of payment is left in suspense. The government in this respect are equally bound by the Status Quo. It may be possible, however, to make an arrangement whereby the Community that desires to carry out work in a locality in dispute may be permitted to do so, provided the other rites are allowed to carry out equivalent work in places where they maintain a similar claim.

In other instances it is usually sufficient for the rite in occupation to give formal notice of intended work, but any fundamental innovation would have to be the subject of special arrangement. (...)

The Wailing Wall

(...) The Jewish custom of praying here is of considerable antiquity, being mentioned by Rabbi Benjamin of Tudela and has now become an established right.

This right³ to pray has, however, become linked with the claim to the actual ownership of the Wall. The Moslems resist this on the ground that the Wall is an integral part of the enclosure wall of the Haram al Sharif, and that the space in front of it is a public way, and part of the premises of the Abu Midian Waqf. (...) ⁴

The matter again became acute in connexion with incidents which occurred at the Wall on the Day of Atonement in September, 1928, and the question was raised not only locally, but in the House of Commons. The Secretary of State for the Colonies issued a White Paper on the subject in November, 1928, printed as Cmd. 3229.

³ Corrigenda and Addendum: "In certain Jewish circles, however, this right to pray has been."

⁴ Corrigenda and Addendum: "After the disturbances of August, 1929, the High Commissioner issued provisional instructions, in the interests of order and decorum, for the observances at the Wall. (...) These instructions were to be effective only until the rights at the Wall of the two Communities should have been defined by an authoritative body.

A public announcement was made by the High Commissioner on the 23rd January, 1930, to the effect that the Council of the League of Nations, having agreed that the question of the rights and claims of Jews and Moslems with regard to the Wailing Wall urgently called for final settlement, had decided that the settlement should be entrusted to Commission to consist of here members appointed by the Mandatory and approved by the Council of the League, who should not be of British nationality and at least one of whom should be a person of eminence qualified for the purpose by the judicial functions he has performed.

Steps are now being taken to appoint this Commission."

ANNEX 4
Israel's Draft Resolution on Jerusalem,
Submitted to the General Assembly of the United Nations
on 25 November 1949

The General Assembly,

1. *Recalling* its successive resolutions which expressed the concern of the United Nations in Jerusalem by reason of the presence therein of Holy Places, religious buildings and sites;
2. *Noting* that the Declaration of Independence of Israel of 14 May 1948, provides for the protection of the Holy Places of all religions;
3. *Desiring* to maintain the existing rights in the Holy Places, and in particular those rights and practices in force 14 May 1948, and thus to give effective and practical expression to that concern,
4. *Resolves therefore:*
 - (a) To authorize the Secretary-General to sign on behalf of the United Nations an agreement (as attached) with the State of Israel relating to the supervision and protection of the Holy Places in Jerusalem;
 - (b) To request the Secretary-General to report to the fifth regular session on progress made with respect to the signature and implementation of this agreement.

ANNEX

Text of draft agreement between the United Nations and Israel

Article I

Definitions

Section I

In this Agreement:

- (a) The expression "The Holy Places" means those places, buildings and sites in Jerusalem which were recognized on 14 May 1948 as Holy Places and any other places, buildings or sites which may subsequently be considered as such by agreement between the parties;
- (b) The expression "United Nations" the international organization established by the Charter of the United Nations;
- (c) The expression "Secretary-General" means the Secretary-General of the United Nations;
- (d) The expression "Jerusalem" means the part of Jerusalem now under Israeli control.

Section 2

The parties shall establish by mutual agreement a detailed list indicating what were the Holy Places in Jerusalem on 14 May 1948 for the purposes of this Agreement, and in the same way may amend such list by additions or by deletions.

Article 2

Maintenance of existing rights

Section 3

The free exercise in Jerusalem of all forms of worship in accordance with the rights in force on 14 May 1948, subject to the maintenance of public order and decorum, shall be guaranteed by law and effectively secured by administrative practice in conformity with the Declaration of Independence of Israel.

Article 3

Preservation of the Holy Places

Section 4

The Holy Places in Jerusalem shall be preserved, and no act shall be permitted which may in any way impair their sacred character. If at any time it appears to the Government of Israel that any Holy Place, religious building or site is in need of urgent repairs, it may call upon the religious community or communities concerned to carry out such repairs. The Government may carry out such repairs itself at the expense of the religious community or communities concerned, if no action is taken within a reasonable time.

Section 5

The Government of Israel shall take all reasonable steps to ensure that the amenities of the Holy Places in Jerusalem and their immediate precincts are not prejudiced.

Article 4

Access to the Holy Places

Section 6

No form of racial or religious discrimination shall be permitted with respect to the rights of visit and access to any of the Holy Places, except in so far as the performance of certain religious rites and ceremonies may require the exclusion from them of the adherents of other faiths during the performance of such religious rites and ceremonies.

Section 7

Subject only to requirements of national security, public order and decorum, health, liberty of access, visit and transit to the Holy Places in Jerusalem shall be accorded to all persons without distinction in respect of nationality in conformity with the rights in force on 14 May 1948.

Section 8

The Secretary-General and the Government of Israel shall, at the request of either of them, consult as to methods of facilitating entrance into Israel, and the use of available means of transportation, by persons coming from abroad who wish to visit the Holy Places. This shall not prevent the Government of Israel from making suitable arrangements directly or with other States for any of these purposes.

Section 9

Nothing in this Agreement shall affect in any way the application of laws and regulations from time to time in force in Israel regarding the entry of aliens, or to confer any right of entry into Israel otherwise than in accordance with such laws and regulations, or any modifications hereof, and with the terms of any international obligations assumed by Israel in this regard.

Article 5

Protection of Holy Places

Section 10

- (a) The Government of Israel shall exercise due diligence to ensure that the sacred character of the Holy Places in Jerusalem is not disturbed by the unauthorized entry of groups of persons from outside or by disturbances, and shall cause to be provided such police protection as is required for these purposes.
- (b) If the Secretary-General is of the opinion that additional police protection is required for any of the Holy Places in Jerusalem, or for any area of Jerusalem in which a number of Holy Places are situated within a reasonable degree of propinquity, he may request the Government of Israel to increase the number of policemen regularly stationed for the protection of such Holy Places or area.

Article 6

Law and authority in relation to the Holy Places

Section 11

- (a) The law of Israel including regulations and by-laws made by the local authorities shall apply to and within the Holy Places in Jerusalem.
- (b) The Israel Courts shall have jurisdiction over acts done and transactions taking place within the precincts of the Holy Places.

Article 7

Public services

Section 12

The Government of Israel will exercise the powers which it possesses to ensure, at the request of the Secretary-General, that the Holy Places shall be supplied on equitable terms with the necessary public services, including electricity, water, gas, post, telephone, telegraph, transportation, drainage, collection of refuse, fire protection, etc. In case of any interruption of threatened interruption of any such services, the Government of Israel will consider the needs of the Holy Places to the extent practicable, and subject to the requirements of security and the maintenance of essential services and supplies.

Section 13

Nothing in this Agreement shall be interpreted as restricting the rights of the Government of Israel or any local authority, or any of their agencies or sub-divi-

sions, officials or employees, with regard to entry into any Holy Place in Jerusalem for the purpose of enabling them to inspect, repair, maintain, reconstruct and relocate utilities, conduits, mains and sewers, which may run over, through, or under such Holy Place, religious building or site.

Article 8
Exemptions

Section 14

No form of taxation shall be levied in respect of any Holy Place in Jerusalem, which was exempt from such taxation on 14 May 1948. No change in the incidence of any form of taxation shall be made which would discriminate between the owners and occupiers of Holy Places, religious buildings or sites in Jerusalem, or would place such owners and occupiers in a position less favourable in relation to the general incidence of that form of taxation than existed on 14 May 1948.

Article 9
United Nations representative

Section 15

The Secretary-General and the Government of Israel shall settle by agreement the channels through which they will communicate regarding the application of the provisions of this Agreement and other questions affecting the Holy Places in Jerusalem, and may enter into such supplemental agreements as may be necessary to fulfill the purpose of this Agreement.

Section 16

Israel hereby agrees that if the Secretary-General so requests he may appoint and send a representative to Israel to exercise the rights and duties conferred upon the United Nations by this Agreement. In making such appointment the Secretary-General shall have due regard for the accepted international custom relating to the appointment of diplomatic representatives. Such representatives may establish his headquarters in Jerusalem or in some other place agreed between him and by the Government of Israel, and shall be accredited to the President of Israel. For the duration of his mission the Convention on the Privileges and Immunities of the United Nations approved by the General Assembly of the United Nations on 13 February 1946, as acceded to by Israel, shall be applicable to him as well as to his staff and to the buildings he occupies, all as is more particularly laid down in the said Convention on the Privileges and Immunities of the United Nations, it being understood that nothing in this Agreement shall imply the extension of the provisions of the said Convention to any Holy Place.

Section 17

The functions of the representative of the Secretary-General shall be limited to matters pertaining to the application and implementation of this Agreement; in particular it is understood that nothing shall authorize the United Nations or the Secretary-General or his representative, to intervene in matters which are essen-

tially within the domestic jurisdiction of the State of Israel, or shall require the Government of Israel to submit any such matter to settlement under the Charter of the United Nations or under this Agreement.

Article 10
Settlement of disputes

Section 18

Any dispute between the United Nations and Israel concerning the interpretation or application of his Agreement, or of any supplemental agreement, including any dispute as to whether any place in Jerusalem was recognized on 14 May 1948 as a Holy Place which is not settled by negotiation, or other agreed mode of settlement, shall be referred for final decision to a tribunal of three arbitrators, one to be named by the Secretary-General, one to be named by the Minister for Foreign Affairs of Israel, and the third to be chosen by the two, or if they should fail to agree upon a third, then by the President of the International Court of Justice.

Section 19

Subject to the provisions of section 10, where any dispute concerning a Holy Place, religious building or site in Jerusalem arises between two or more religious communities, or sections of communities, such dispute shall, in the first instance, be referred to the Government of Israel which may, in reaching its decision, seek the guidance of the United Nations. If the decision of the Government of Israel does not settle the dispute, then either Israel or the Secretary-General may refer the matter to the General Assembly.

Article 11
Final provision

Section 20

This Agreement shall be construed in the light of its primary purpose to ensure protection of the Holy Places in Jerusalem, which is desirable, in view of the special character of Jerusalem, whose soil is consecrated by the prayers and pilgrimages of the adherents of three great religions.

Section 21

This Agreement shall be brought into effect by an exchange of notes between the Secretary-General, duly authorized pursuant to a resolution of the General Assembly of the United Nations, and the appropriate executive officer of Israel, duly authorized pursuant to appropriate action of the Knesset.

In witness whereof the respective representatives have signed this Agreement and have affixed their seals hereunto.

Done in duplicate, in the English, French, Hebrew and Spanish languages, all authentic, at Lake Success, this ... day of ... in the year one thousand nine hundred and ...

ANNEX 5
Memorandum of Their Beatitudes the Patriarchs and of the
Heads of the Christian Communities
in Jerusalem on the Significance
of Jerusalem for Christians, November 14, 1994

Preamble 1

On Monday, the 14th of November 1994, the heads of the Christian Communities in Jerusalem met in solemn conclave to discuss the status of the holy city and the situation of Christians there, at the conclusion of which, they issued the following declaration:

Jerusalem, Holy City

2. Jerusalem is a holy city for the people of the three monotheistic religions: Judaism, Christianity and Islam. Its unique nature of sanctity endows it with a special vocation: calling for reconciliation and harmony among people, whether citizens, pilgrims or visitors. And because of its symbolic and emotive value, Jerusalem has been a rallying cry for different revived nationalistic and fundamentalist stirrings in the region and elsewhere. And, unfortunately, the city has become a source of conflict and disharmony. It is at the heart of the Israeli-Palestinian and Israeli-Arab disputes. While the mystical call of the city attracts believers, its present unenviable situation scandalizes many.

The Peace Process

3. The current Arab-Israeli peace process is on its way toward resolution of the Middle East conflict. Some new facts have already been established, some concrete signs posted. But in the process Jerusalem has again been side-stepped, because of its status, and especially sovereignty over the city, are the most difficult questions to resolve in future negotiations. Nevertheless, one must already begin to reflect on the questions and do whatever is necessary to be able to approach them in the most favorable conditions when the moment arrives.

Present Positions

4. When the different sides involved now speak of Jerusalem, they often assume exclusivist positions. Their claims are very divergent, indeed conflicting. The Israeli position is that Jerusalem should remain the unified and eternal capital of the State of Israel, under the absolute sovereignty of Israel alone. The Palestinians, on the other hand, insist that Jerusalem should become the capital of a future State of Palestine, although they do not lay claim to the entire modern city but envisage only the eastern, Arab part.

Lesson of History

5. Jerusalem has had a long, eventful history. It has known numerous wars and conquests, has been destroyed time and again, only to be reborn anew and rise from its ashes, like the mythical Phoenix. Religious motivation has always gone hand in hand with political and cultural aspirations, and has often played a preponderant role. This motivation has often led to exclusivism or at least to the supremacy of one people over the others. But every exclusivity or every human supremacy is against the prophetic character of Jerusalem. Its universal vocation and appeal is to be a city of peace and harmony among all who dwell therein. Jerusalem, like the entire Holy land, has witnessed throughout its history the successive advent of numerous peoples: they came from the desert, from the sea, from the north, from the east. Most often the newcomers were gradually integrated into the local population. This was a rather constant characteristic. But when the newcomers tried to claim exclusive possession of the city and the land, or refused to integrate themselves, then the others rejected them. Indeed, the experience of history teaches us that in order for Jerusalem to be a city of peace, no longer lusted after from the outside and thus a bone of contention between warring sides, it cannot belong exclusively to one people or to only one religion. Jerusalem should be open to all, shared by all. Those who govern the city should make it "the capital of humankind." This universal vision of Jerusalem would help those who exercise power there to open it to others who also are fondly attached to it and to accept sharing it with them.

The Christian Vision of Jerusalem

6. Through a prayerful reading of the Bible, Christians recognize in faith that the long history of the people of God, with Jerusalem at its center; is the history of salvation which fulfils God's design in and through Jesus of Nazareth, the Christ. The one God has chosen Jerusalem to be the place where His name alone will dwell in the midst of His people so that they may offer to Him acceptable worship. The prophets look up to Jerusalem, especially after the purification of the exile: Jerusalem will be called "the city of justice, faithful city (Is 1,26,27) where the Lord dwells in holiness as in Sinai (cf PS 68,18). The Lord will place the city in the middle of the nations (Ez 5,5), where the Second Temple will become a house of prayer for all peoples (Is 2,2, 56,6-7). Jerusalem, aglow with the presence of God (Is 60,1), ought to be a city whose gates are always open (Is, 11), with Peace as magistrate and Justice as government. (Is, 17).

In the vision of their faith, Christians believe the Jerusalem of the Prophets to be the foreseen place of the salvation in and through Jesus Christ. In the Gospels, Jerusalem rejects the Sent-One, the Savior; and He weeps over it because this city of the prophets that is also the city of the essential salvific events - the death and resurrection of Jesus - has completely lost sight of the path to peace (cf Lk 19,42).

In the Acts of the Apostles, Jerusalem is the place of the gift of the Spirit, of the birth of the Church (2), the community of the disciples of Jesus who are to be His witnesses not only in Jerusalem but even the ends of the earth (1,8). In Jerusalem,

the first Christian community incarnated the ecclesiastical ideal, and thus it remains a continuing reference point. The Book of Revelations proclaims the anticipation of the new heavenly Jerusalem (3.12, 21,2 cf Gal 4,26: Heb 12,22). This holy city is the image of the new creation and the aspirations of all peoples, where God will wipe away all tears, and "them shall be no more death or mourning, crying out or pain, for the former world has passed away" (21,4).

7. The earthly Jerusalem, in the Christian tradition, prefigures the heavenly Jerusalem as "the vision of peace." In the Liturgy, the Church itself receives the name of Jerusalem and relives all of that city's anguish, joys and hopes. Furthermore, during the first centuries the liturgy of Jerusalem became the foundation of all liturgies everywhere, and later deeply influence the development of diverse liturgical traditions, because of the many pilgrimages to Jerusalem and of the symbolic meaning of the Holy City.

8. The pilgrimages slowly developed an understanding of the need to unify the sanctification of space through celebrations at the Holy Place with the sanctification in time through the calendared celebrations of the holy events of salvation (Egeria, Cyril of Jerusalem). Jerusalem soon occupied a unique place in the heart of Christianity everywhere. A theology and spirituality of pilgrimage developed. It was an ascetic time of biblical refreshment at the sources, a time of testing during which Christians recalled that they were strangers and pilgrims on earth (cf Heb. 11,13), and that their personal and community vocation always and everywhere, is to take up the cross and follow Jesus.

The Continuing Presence of a Christian Community

9. For Christianity, Jerusalem is the place of roots, ever living and nourishing. In Jerusalem is born every Christian. To be in Jerusalem is for every Christian to be at home. For almost two thousand years, through so many hardships and the succession of so many powers, the local Church with its faithful has always been actively present in Jerusalem. Across the centuries, the local Church has been witnessing to the life and preaching, the death and resurrection of Jesus Christ upon the same Holy places, and its faithful have been receiving other brothers and sisters in the faith, as pilgrims, resident or in transit, inviting them to be re-immersed into the refreshing, ever living ecclesiastical sources. That continuing presence of a living Christian community is inseparable from the historical sites. Through the "living stones" the holy archaeological sites lake on "life."

10. **The significance of Jerusalem for Christians** thus has two inseparable fundamental dimensions:

- 1) a Holy City with holy places most precious to Christians because of their link with the history of salvation fulfilled in and through Jesus Christ;
- 2) a city with a community of Christians which as been living continual there since its origins. Thus for the local Christians, as well as for local Jews and Moslems, Jerusalem is not only a Holy City; but also their native city where

they live, whence their right to continue to live there freely, with all the rights which obtain from that.

Legitimate Demands of Christians for Jerusalem

11. In so far as Jerusalem is the quintessential Holy City it above all ought to enjoy full freedom of access to its holy places, and freedom of worship. *Those rights of property ownership, custody and worship which the different Churches have acquired throughout history should continue to be retained by the same communities. These rights which are already protected in the Status Quo of the Holy Places according to historical "firman's" and other documents, should continue to be recognized and respected.* The Christians of the entire world, Western or Eastern, should have the right to come in pilgrimage to Jerusalem. They ought to be able to find there all that is necessary to carry out their pilgrimage in the spirit of their authentic tradition: freedom to visit and to move around, to pray at holy sites, to embark into spiritual attendance and respectful practice of their faith, to enjoy the possibility of a prolonged stay and the benefits of hospitality and dignified lodgings.

12. **The local Christian communities** should enjoy all those rights to enable them to continue their active presence in freedom and to fulfill their responsibilities towards both their own local members and towards the Christian pilgrims throughout the world. Local Christians, not only in their capacity as Christians per se, but like all other citizens, religious or not, should enjoy the same fundamental rights for all: social, cultural, political and national. Among these rights are:

- a- the human right of freedom of worship and of conscience, both as individuals and as religious communities,
- b- civil and historical rights which allow them to carry out their religious, educational, medical and other duties of charity,
- c- the right to have their own institutions, such as hospices for pilgrims, institutes for the study of the Bible and the Traditions, centers for encounters with believers of other religions, monasteries, churches, cemeteries, and so forth, and the right to have their own personnel man and run these institutions.

13. In claiming these rights for themselves, Christians recognize and respect similar and parallel rights of Jewish and Muslim believers and their communities. Christians declare themselves disposed to search with Jews and Muslims for a mutually respectful application of these rights and for a harmonious coexistence, in the perspective of the universal spiritual vocation of Jerusalem.

Special Stature for Jerusalem

14. All this presupposes a special judicial and political stature for Jerusalem which reflects the universal importance and significance of the city.

Negotiating Jerusalem

- (1) In order to satisfy the national aspirations of all its inhabitants, and in order that Jews, Christians and Muslims can be "at home" in Jerusalem and at peace with one another, representatives from the three monotheistic religions, in addition to local political powers, ought to be associated in the elaboration and application of such a special statute.
- (2) Because of the universal significance of Jerusalem, the international community ought to be engaged in the stability and permanence of this statute. Jerusalem is too precious to be dependent solely on municipal or national political authorities, whoever they may be. Experience shows that an international guarantee is necessary.

Experience shows that such local authorities, for political reasons or the claims of security, sometimes are required to violate the rights of free access to the Holy Places. Therefore it is necessary to accord Jerusalem a special statute which will allow Jerusalem not to be victimized by laws imposed as a result of hostilities or wars but to be an open city which transcends local, regional or world political troubles. This statute, established in common by local political and religious authorities, should also be guaranteed by the international community

Conclusion

Jerusalem is a symbol and a promise of the presence of God, of fraternity and peace for humankind, in particular for the children of Abraham: Jews, Christians and Muslims. We call upon all parties concerned to comprehend and accept the nature and deep significance of Jerusalem, the City of God. None can appropriate it in exclusivist ways. We invite each party to go beyond all exclusivist visions or actions, and without discrimination, to consider the religious and national aspirations of others, in order to give back to Jerusalem its true universal character and to make of the city a holy place of reconciliation for humankind.

Signed by *Greek Orthodox Patriarch, Latin Patriarch, Armenian Patriarch, Custos of the Holy Land, Coptic Archbishop, Syriac Archbishop, Ethiopian Archbishop, Anglican Bishop, Greek-Cath. Patriarc. Vicar, Lutheran Bishop, Maronite Patriarchal Vicar, Cath. Syriac Patriarc. Vicar,*

Jerusalem, Nov. 14, 1994

ANNEX 6

Statement of Policy for the Protection of the Cultural/Religious Status Quo

The following Statement of Policy is the result of an analysis of the documents that the parties involved in the Middle East Peace negotiations and the UN issued in regards to the religious and cultural dimension of Jerusalem.

The selected principles apply today, as a sort of broad cultural and religious status quo, to the relationship between the territorial authority, on one hand, and the communities living in Jerusalem on the other.

This author assumes that the parties that have a recognized interest in the Holy Places consider most of the cardinal points quoted below as internationally binding, whose full respect may help preserve a future peaceful and dynamic co-existence between the different collective identities represented in the city. The author has discussed a draft copy of this Statement of Policy at several conferences on Jerusalem (some held behind closed doors) with Palestinian and Israeli participants on an individual basis.

Among them, the conference held in El Escorial (Madrid, Spain, on 5-9 August, 1996 at the Complutense University, the International Colloquium held in Toledo, Spain, on 17-18 March 1998, organized jointly by the Arab Study Society and the Jerusalem Institute for Israel Studies and the International Conference held in Bellagio, Italy, on 13-17 July 1998, organized by the Rockefeller Foundation, with academicians and diplomats from Israel, Egypt, Morocco, Saudi Arabia, the Palestinian Authority, and the Kingdom of Jordan.

Different versions of the Statement of Policy have been published by and reprinted in various journals, among them, the Palestinian weekly, *The Jerusalem Times* (8 November 1996), the *Bulletin of the Christian Information Center* (No. 393, November-December 1966), a newsletter reporting about the major Christian recognized communities present in Jerusalem, *La Nuova Frontiera. International Human Rights and Security Review* (Year IV, n.12, Spring 1998) *Hiwarat* (n. 5, February 1999), monthly newsletter of *Arabroma. Website of the Rome Group for Arab Culture* [www.arabroma.com], and *Nonviolence*, an Internet site linked to the Latin Patriarchate of Jerusalem [www.lpj.org/Nonviolence].

a. Preamble: special objectives of the authorities administering the city

The government/s or administering authority/ies (hereinafter, "the Government") in discharging administrative obligations in Jerusalem shall pursue the following special objectives:

- (a) To protect and to preserve the unique religious and cultural interests of Christians, Jews and Moslems related to the city; to this end, to ensure that order and peace, and especially religious peace, reign in Jerusalem;
- (b) To foster co-operation among all the inhabitants of the city in their own interests, as well as to encourage and support the peaceful development of the

relations between the Arab and Jewish peoples throughout the area under British Palestinian Mandate until 14 May 1948; to promote the security, well-being and any constructive measures of development of the residents, having regard to the special circumstances and customs of the various peoples and communities.

b. Principles applying to the Holy Places, religious buildings and sites

1. Existing rights in respect of the Holy Places and of religious buildings or sites shall not be denied or impaired.

2. Insofar as the Holy Places are concerned, the liberty of access and visits to the city and the Holy Places therein shall be guaranteed, in conformity with existing rights, to the residents of Jerusalem as well as to all other persons, without distinction of nationality, subject to requirements of national security, public order and decorum.

Similarly, freedom of worship shall be guaranteed in conformity with existing rights, subject to the maintenance of public order and decorum.

3. Holy Places and religious buildings or sites shall be preserved. No act shall be permitted which may in any way impair their recognized sacred character. If at any time, it appears to the Government that any particular Holy Place, religious building or site is in need of urgent repair, the Government may call upon the community or communities concerned to carry out such repair. The Government may carry it out itself at the expense of the community or communities concerned if no action is taken within a reasonable time.

4. No taxation shall be levied in respect of any Holy Place, religious building or site that was exempt from taxation on May 14, 1948, date of the termination of the League of Nations Mandate in Palestine.

No change in the incidence of such taxation shall be made which would either discriminate between the owners or occupiers of Holy Places, religious buildings or sites, or would place such owners or occupiers in a position less favorable in relation to general incidence of taxation than existed on May 14, 1948.

c. Religious and cultural rights of the local communities

1. The personal status and family law of the various communities and their religious interests, including endowments, shall be respected.

2. The Government shall ensure adequate primary and secondary education for the Arab and Jewish community, respectively, in its own language and its cultural traditions.

The right of each community to maintain its own schools for the education of its own members in its own language, while conforming to such educational requirements of a general nature as the Government may impose, shall not be denied or impaired. Foreign educational establishments shall continue their activity on the basis of their existing rights.

d. Religious and cultural rights applying to all visitors and residents

1. Freedom of conscience and the free exercise of all forms of worship subject only to the maintenance of public order and decorum shall be ensured to all.
2. No discrimination of any kind shall be made between the inhabitants on the ground of race, religion, language or sex.
3. All persons shall be entitled to an equal protection of the law.
4. Except as may be required for the maintenance of public order and good government, no measure shall be taken to obstruct or interfere with the activities of religious or charitable bodies of all faiths or to discriminate against any representative or member of these bodies on the ground of his religion or nationality.
5. No restriction shall be imposed on the free use of any language in private intercourse, in commerce, in religion, in the Press or in publications of any kind, or at public meetings.

ANNEX 7
Letter Sent on 9 December 2001 by His Highness
Prince Hassan bin Talal to the Author

Royal Palace
Amman - Jordan
9 December 2001

Dear Mr. Molinaro,

May I express my appreciation for your letter and its enclosures, the two eminently imaginative articles on alternative definitions of sovereignty pertaining to Jerusalem, and the coexistence of its national and religious identities, living on its hallowed soil.

I have read both studies with keen interest and focus, as would anyone devoted to Jerusalem all concerned with its future and the fate of its citizens. While lauding the depth of your analysis, your academic objectivity and the creative concepts contained therein, I wish to make the following remarks, in the hope that they may be found useful, as they apply to the existing situation in Jerusalem and the status quo which governs its holy places, for the three great monotheistic religions.

Specific questions, such as the ones below, should be asked, I feel, right at the outset of the article, lending it more coherence. Firstly, on what grounds should the concept of sovereignty over Jerusalem be based? On historical rights, political, religious or national-ethnic rights? Secondly, Should the following legal documents and agreements serve as a legal basis for each of the Palestinians' and the Israelis' claims for legitimacy rights over Jerusalem?

- Ottoman government Firmans (1517 -1917);
- British Mandate statements over Palestine;
- International laws provisions on sovereignty;
- Framework for Peace in the Middle East, signed at Camp David by Egypt and Israel on 17 September 1978;
- Article IX of Peace Treaty between Israel and Jordan, 25 October 1994;
- Patriarchs and the Heads of Christian Communities in Jerusalem, Memorandum, 14 November 1994;
- Article XVII (Jurisdiction), Paragraph '2', Interim Agreement, signed in Washington on 28 September 1995, by Israel and the PLO;
- Vatican Understanding with the PLO in February 2000.

Notwithstanding the point made earlier on the subject, let me start by agreeing with the proposition that unmitigated sovereignty may well be an antiquated relic of the Western European nation-state system, and that a re-conceptualisation of sovereignty may be a tool in tackling the conflicting claims over Jerusalem (and not simply East Jerusalem).

Now, in diluting the concept of sovereignty to facilitate a solution, one must be mindful of an equally pivotal factor, namely, equality of treatment, so to speak, in re-conceptualising the concept of sovereignty in Jerusalem. If territorial sovereignty is important to one side, it should be important in equal measure to the other party. If authority is to be limited according to the criteria of the functional, the territorial and the personal jurisdictions, then the scope of the limitation should be identical across the divide, even though the degree of limitation would be greater in some aspects than in others (the holy places in particular).

What I am trying to stress is that the diffusion of sovereignty must not be used as an avenue to dilute, diminish, let alone banish the natural sovereignty rights of either party, under whatever guise. Spatial division of "sovereignty" must be based on international legitimacy which, in the present context, is embodied in Security Council resolutions (242) and (338), demarcating the boundaries between the two contiguous states. In this sense, sovereignty, at whatever level of magnitude, should be along the vertical and not horizontal lines, with the rarest of exceptions.

Now if Jerusalem - the whole of Jerusalem -were to be a united city, serving as the capital of the two states, then sovereignty may be shared horizontally and not merely vertically. But this approach, with its attendant common structures and functions - a higher municipal council -representing the multitude of counties, from both sides, seems to have been discarded for good or ill. Indeed, as you correctly posit, in the commercial and economic fields, globalization and multi-national corporations as well as transnational communications have challenged the classic abstract model of exclusive territorially-oriented state authority.

Authority in its different functional aspects can be divided between the Palestinians and Israel, as the situation on the ground mandates, (Muslim authority over Al-Haram Al-Shareef, Israeli authority over the Wailing Wall). The term 'sovereignty' in this context becomes irrelevant and redundant. Let us keep such matters in suspended animation, in abeyance, as they have been for generations under a ubiquitous status quo, and let historians engage, at will, if they wish, in the quest for historical antecedents - no matter how ancient - to prove or disprove conflicting claims.

The statement of policy for the national and religious identities existing in Jerusalem is beyond controversy. It is embodied in the UN resolution of November 29, 1947, which recommended internationalization. Perhaps no less importantly, it is engraved in the consciousness of the people of the holy city who, over countless centuries have accepted tolerance, coexistence and friendship as a creed and as a way of life.

Negotiating Jerusalem

Several important questions remain, however: Who should decide on the best formula on which the neutrality of Jerusalem (as a multi-national and multi-faith city) should be based? Is it the Palestinians and Israelis? Is it the religious world community, or perhaps international organizations such as the UN? I believe that such a line of questioning may more effectively provide a framework for what you then attempt to tackle in this regard.

Moreover, an important aspect of the problem - economics - needs more attention in your article. It would be to your thesis' advantage if a more thorough discussion of the economics of the problem were included, in order to highlight the need for continuity and sustainability of any possible solution.

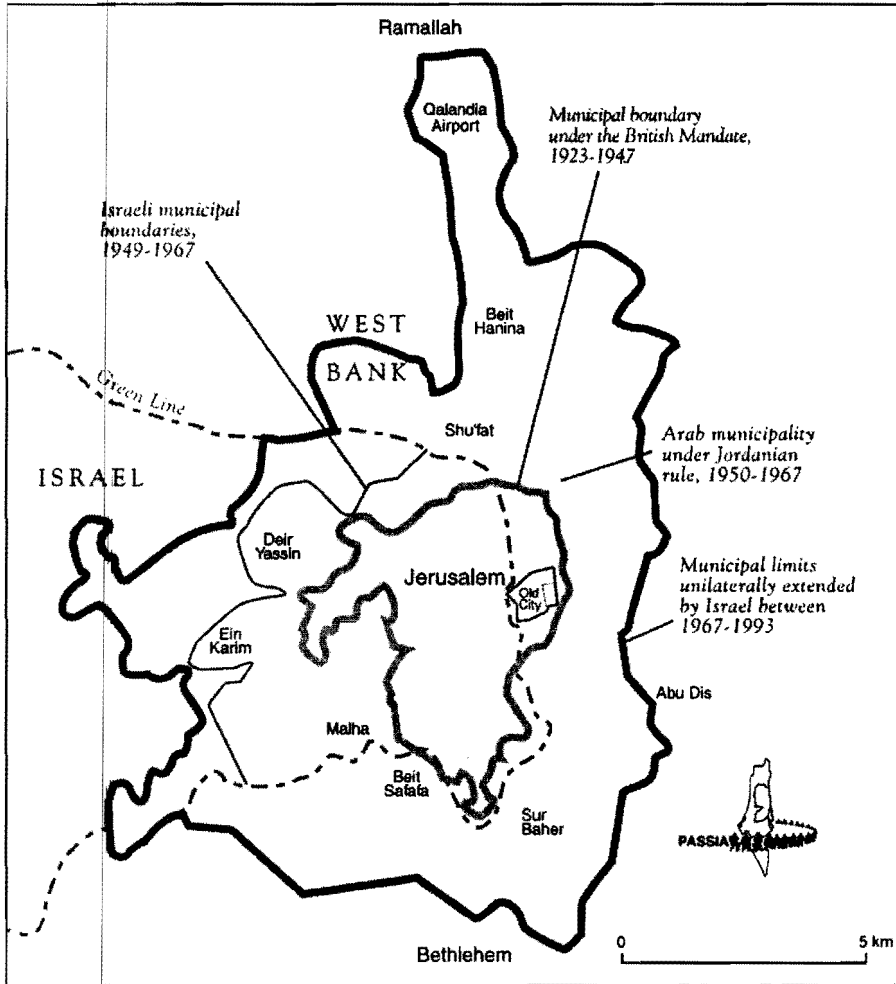
Thanking you again for sharing your thoughts with me. I hope you will find my remarks positive and useful. Please do keep in touch, and please send me further articles you may write on the subject, as well as other areas of interest.

Yours very sincerely,

El Hassan bin Talal

ANNEX 8

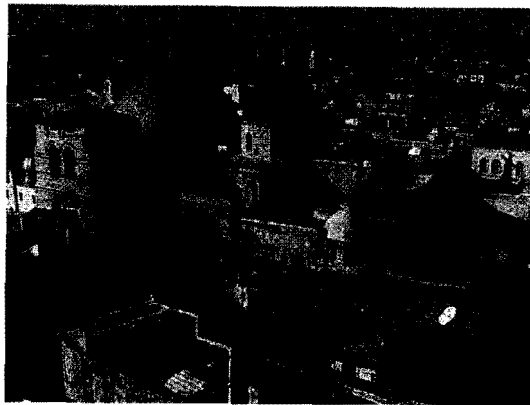
Map of Jerusalem Municipal Boundaries, 1947-2000

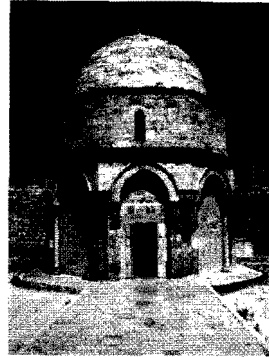
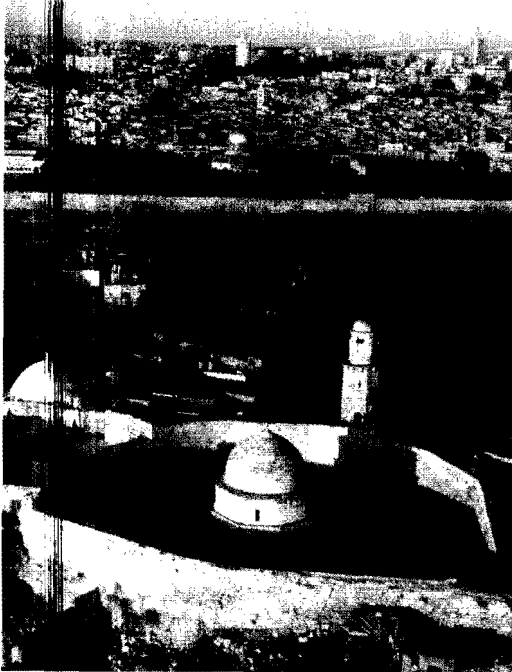


ANNEX 9
Pictures of the Holy Places Affected by the Status Quo
(see ANNEX 3)



Church of the Holy Sepulcher, Old City, Jerusalem





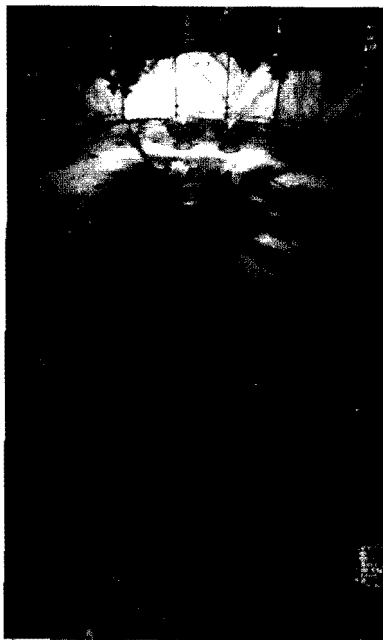
Ascension Church, Mount of Olives, Jerusalem



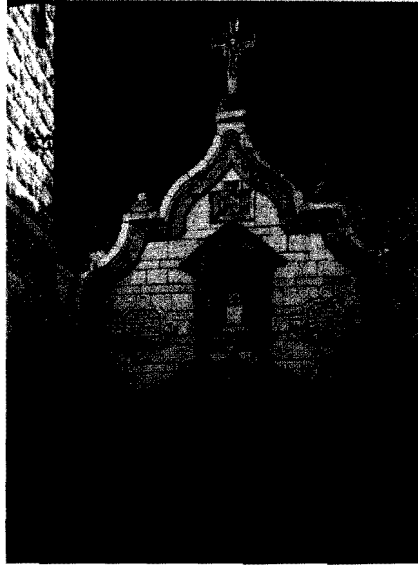
The Church of the Tomb of the Virgin at Gethsemane, , Jerusalem



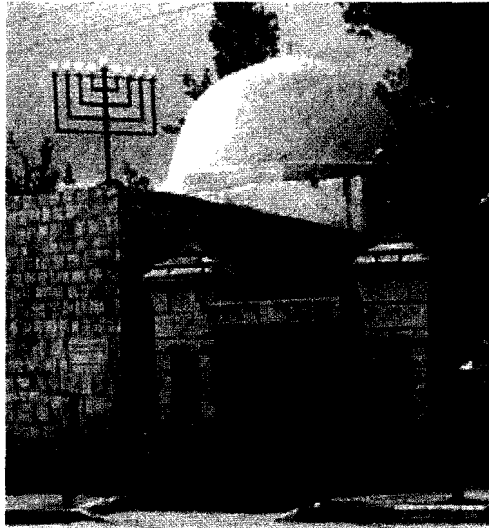
Deir al Sultan, Old City, Jerusalem



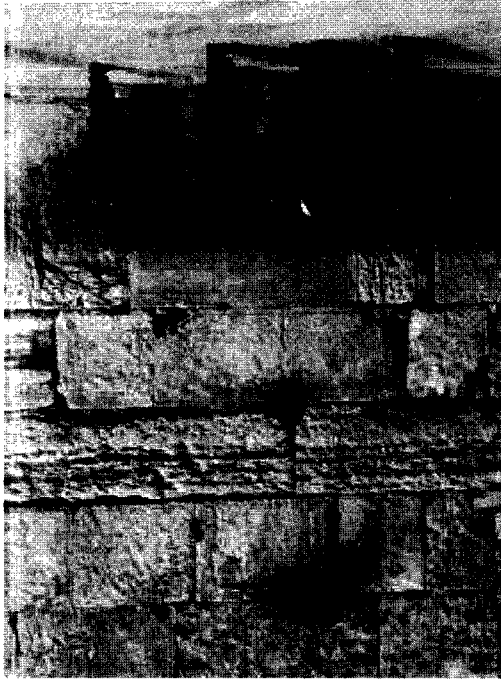
Church of the Nativity, Bethlehem



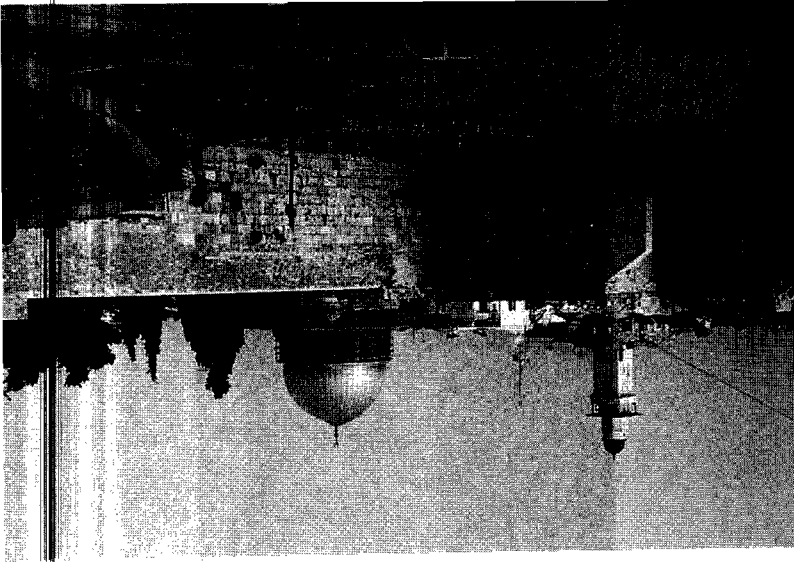
Milk Grotto, Bethlehem



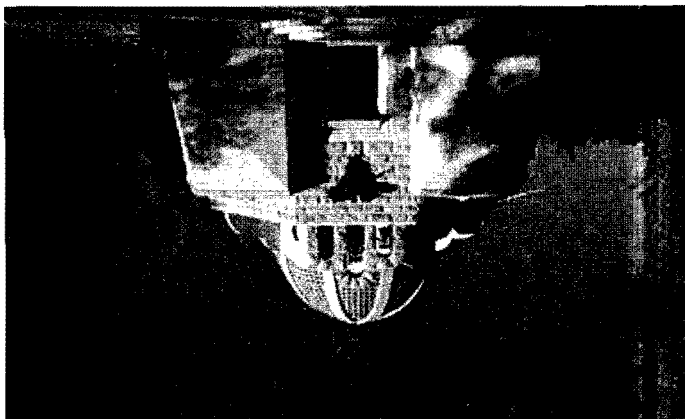
Rachel's Tomb, Bethlehem



Western Wall, Old City, Jerusalem



Negotiating Jerusalem



Shepherds' Field, Bethlehem



1. The first part of the document is a list of names and their corresponding dates. The names are listed in a column on the left, and the dates are listed in a column on the right. The names are: John Doe, Jane Smith, and Bob Johnson. The dates are: 1/1/2020, 2/1/2020, and 3/1/2020.

