Jerusalem: Legal & (and) Political Dimensions in a Search for Peace

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A NEW ERA of camaraderie has entered the bitter Arab-Israeli conflict as a result of Anwar Sadat's historic visit to Jerusalem and the Camp David Summit. This change in Egyptian attitude marks a hopeful start in future negotiations between Israel and her neighboring countries. Israel and Egypt have been able to come to terms on most issues concerning the Sinai, but have not been able to reach any agreement concerning the city of Jerusalem. When the Peace Treaty was being signed in Washington, D.C., both Anwar Sadat and Menachem Begin made conflicting remarks in their speeches regarding Jerusalem. Anwar Sadat called for the return of East Jerusalem and Arab sovereignty while Menachem Begin spoke of the reunification in 1967 of the Old City (East Jerusalem) with the New City (West Jerusalem).

Jerusalem, a small tract of land situated in the Judean Hills, thirty-five miles from the Mediterranean Sea, is a city which retains an ancient heritage and which has affected the central thought processes of major civilizations for centuries. Within the city, Kings David and Solomon...
reigned over the "Chosen People," the Romans crucified Jesus, and the Prophet Muhammad bore the thoughts of Islam. As a result, the city of Jerusalem has remained central to the cultures of Judaism, Christianity and Islam as a historic and holy city.

In addition to the direct religious connections Jerusalem has with the three monolithic faiths, the city also lies in the forefront of the Arab-Israeli conflict. Israel, Jordan and Arab Palestinians claim sovereignty over the city of Jerusalem, and as a result, none of the parties is willing to negotiate a peace settlement until the status of Jerusalem is resolved. This obstinance, however, is not merely the end result of political hostility; it also reflects a process in which Jews and Arabs have each fused the images of Jerusalem as a holy city and as a national capital into one political concept.

To understand this process, is to realize that Jerusalem is not just a piece of real estate subject to the nationalistic goals of conquest and reconquest. Clearly, nationalism is involved in the Arab-Israeli conflict over Jerusalem, but the struggle is more than pure devotion to one's nation. Religion is an intricate part of their nationalism. As a result, Jerusalem remains central to the relationship of Zionism to Judaism, and Arab nationalism to Islam. To the Jews, Jerusalem represents the core of Eretz Israel. It physically stands as a memory to the divine covenant between God and man as the home of the Holy Temple. To the Arabs, Jerusalem symbolizes the universality of Islam. In it, stands the Dome

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6 Jews consider Jerusalem a holy city because it was their political and religious center in Biblical times. Circa 1000 B.C. King David established Jerusalem as the capital city of the Israelite tribes. King Solomon, David’s son, built the first holy temple of the Jews in the city.

7 Christians recognize Jerusalem as a holy city because Jesus was crucified there and much of his life evolved around the city.


9 See notes 71-73 infra, and accompanying text.

10 Pfaff, supra note 4, at 1020.


12 "Jerusalem is at the center of the land (Eretz) of Israel, the Temple is at the center of Jerusalem, the Holy of Holies is at the center of the Temple, the Ark is at the center of the Holy of Holies and the foundation stone is in front of the Ark, which point is the foundation of the World." Reprinted in A. Hertzberg, JUDAISM (1963).

13 See note 6 supra. The Wailing Wall is what is left of the courtyard wall of the second temple destroyed in 70 AD.

of the Rock on the spot from where Muhammad was believed to have ascended briefly to heaven, immortalizing Jerusalem as the third city sacred to the Muslims.

These different religious formulations are intertwined tightly with the political doctrines of Zionism and Arab nationalism respectively. Consequently, the nationalistic concept of a strong state has been transformed from a secular principle into a sacred one. To be sovereign over Jerusalem is not merely to be in possession of land; to be sovereign over Jerusalem is to own and protect treasures from a period of past religious enlightenment sacred to one's cultural heritage, and concomitantly, to one's national pride. Jerusalem is in the center of the Arab-Israeli conflict, because possession of it symbolizes the success of one national dream and political doctrine, while failure to possess it is evidence of a lost dream and political doctrine destroyed.

The religious-national underpinnings of the quest for the city suggest that the disposition of title to Jerusalem would not guarantee a peaceful settlement. Moreover, it seems probable that the loser in a judicial determination of sovereignty would disregard any judgment that was detrimental to its position. As a result, the importance of the need for sovereignty determination shifts from the position of establishing clear and distinct boundaries resulting in the conclusion of conflict, to the position of establishing for the rightful sovereign of Jerusalem, legal justification for remaining in possession by military strength. This shift in priorities, however, also provides the weaker military opponent with the opportu-

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16 The Dome of the Rock stands near the Wailing Wall. It was built over the rock from which, according to Muslim belief, Muhammad rose to heaven with the angel Gabriel and spoke with God. With God's blessing, Muhammed returned from his night's journey to spread Islam, the new religion. Jews believe that on this rock, Abraham, the leader of the ancient Hebrews, prepared to sacrifice his son, Isaac, at God's command.

17 See note 8 supra.


19 Id. See note 12 supra, and note 117, infra.

20 "The central issue underlying the entire conflict, then, is Zionism versus Arab nationalism. The two doctrines are, in their original form, irreconcilable. . . Arabs and Zionists are suspicious and fearful of each other, and coexistence cannot be envisioned by either as long as such positions are maintained." Bassiouni and Fisher, The Arab-Israeli Conflict: Real and Apparent Issues: An Insight Into Its Future From The Lessons of the Past, 44 St. Johns L. Rev. 399, 409 (1970).

21 Furthermore, the religious and historical claims of sovereignty to Jerusalem suggest that the interested parties consider Jerusalem as a separate tract of land, distinct and unique from the West Bank.

nity to exploit his adversary's military strength to the international community by simultaneously exploiting his position as the underdog. By way of propaganda and international pressure, the weaker military contender can transform his adversary's legal justification for military might into a travesty of abusive military control. The end result of this transformation is that it will undermine the legitimate sovereign of Jerusalem by divesting it of its military strength.

Israel is now in possession of the city of Jerusalem, and although Israel has just formally annexed the city, past Israeli actions suggested otherwise, and have been subject to international debate. The thesis of this note is that Israel is the legitimate sovereign of Jerusalem because the Israeli claim under international law is superior to that of either Jordan or the Palestinian Arabs. This superior claim will establish Israel's legal right to Jerusalem, but it will not establish peace between the adverse parties because of the importance of Jerusalem in the Islamic scheme of nationalism. As a result, only Israel's military superiority will allow Israel to retain sovereignty over Jerusalem. The Palestinian Arabs and Jordan, as the weaker military opponents, will continue to attempt to shift world public opinion against Israel. In doing so they hope to undermine Israel's military superiority and sovereign position in their attempt to satisfy their sacred claim.

If the establishment of amicable bonds between Israel and its neighbors is the ultimate issue in the Middle Eastern conflict, then the end result is that Israel must induce its enemy into negotiation. Legal sovereignty allows Israel to proceed at its own pace. This article will review the legal significance of historical events from the end of the Ottoman control over Palestine in 1917 through the present and will examine the legal criteria needed to formulate claims of sovereignty in international law. It will then proceed to show how the established legal criteria is inapplicable to the status of Jerusalem and will suggest an alternative means of legal interpretation. This article concludes that Israel is sovereign over Jerusalem pursuant to international law, but that its sovereignty will not bring

23 See note 145 infra.
24 See sec. IV infra.
25 See S. HAIM, supra note 18; M. KERR, The Arab Cold War (1971).
26 See A. Gerson, supra note 22.
27 Some will argue that the history of Jerusalem's legal status cannot begin in the early 20th century but must begin by examining its history 4000 years ago. Because Turkey had control over Jerusalem for approximately 400 years and was the last recognized sovereign to control the area before it became subject to a mandate, it is presumed that Turkey had clear legal title to Palestine.

Although Jews and Palestinians claim historical connections to the area dating back to biblical time, these claims are generally asserted to supplement modern claims to the land. For a discussion of history as a source of territorial sovereignty, see 2 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 1224 (1963); N. HILL, CLAIMS TO TERRITORY IN INTERNATIONAL LAW AND RELATIONS 81-90 (1945).
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about an end to hostilities. Sovereignty provides Israel with justification for military force and legitimate grounds to establish a framework for future negotiations for peace to its liking. In conclusion this article provides a framework for future negotiation.

II. History

A historical review of the legal status of Jerusalem can begin with events primarily after World War I. The land known as Palestine, which included the city of Jerusalem, was under the sovereignty of the Ottoman Empire for nearly 400 years, from 1517 to 1917. In October 1914, however, the Turks made the mistake of joining the Central Powers who were defeated in World War I. The Turks lost control of Jerusalem and their vast empire. Turkey officially renounced all of its rights and title to the land of Palestine in the Treaty of Lausanne, to the benefit of the Principal Allied and Associated Powers, who in turn, consented to the League of Nations granting a Mandate over Palestine, with Great Britain as its mandatory power.

A. The League of Nations

Before an examination of the Palestine Mandate, a brief review of three promises made during the War is necessary. In 1915, in order to prevent the Arabs from joining the Turks against the Allied forces, Britain's High Commissioner in Egypt, Sir Henry McMahon, corresponded with Sheriff Hussein of Hejaz in Mecca, promising him Arab independence in return for Arab cooperation. Hussein accepted McMahon's

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27 Before the Palestine Mandate was established, Palestine had no fixed geographical meaning. The political and legal definition for Palestine was fixed by the Palestine Mandate.


29 Great Britain wanted to conquer the Ottoman Empire to gain control over the Suez Canal and to halt any threats to its shipping link with India. F. KHOURI, THE ARAB-ISRAELI DILEMMA 7 (1976).

30 Turkey's empire was carved up into the Mandates of Syria and Lebanon, Mesopotamia, and Palestine. LEAGUE OF NATIONS COVENANT, reprinted in III DOCUMENTS: THE ARAB-ISRAELI CONFLICT 71 (J. Moore ed. 1974) art. 22.

31 Article 16 of the Treaty provides as follows: "Turkey hereby renounces all rights and title whatsoever over or respecting the territories situated outside the frontiers laid down in the present Treaty and the islands other than those over which her sovereignty is recognized by the said Treaty, the future of these territories and islands being settled or to be settled by the parties concerned." Treaty of Lausanne, July 24, 1923, 28 L.N.T.S. 12. See Feinburg, The Arab-Israeli Conflict in International Law, in I THE ARAB-ISRAELI CONFLICT 386, 414 (J. Moore ed. 1974); Feinburg, The Question of Sovereignty Over Palestine, in I THE ARAB-ISRAELI CONFLICT 225, 234 (J. Moore ed. 1974).


33 The pertinent passage of the letter was as follows: "England to acknowledge the in-
promise and declared war on the Turks. These letters are known as the McMahon-Hussein Correspondence.\textsuperscript{55}

In May, 1916, Britain made another promise and signed the secret Sykes-Picot agreement\textsuperscript{56} with France which seemingly abrogated the McMahon promise. France was to be given the Mediterranean coast north of Haifa, which was the area known as Celicia (Syria and Lebanon). Britain was to get Mesopotamia, (Iraq), while the future of Palestine was to be determined by Britain, France and Russia.\textsuperscript{57}

As a result of these conflicting promises, Great Britain set the stage for the future battle over Palestine. The Arabs contended at the Paris Peace Conference,\textsuperscript{58} that Palestine was promised to them in the McMahon-Hussein Correspondence. Britain, however, represented by Sir Winston Churchill, officially rejected that view and contended that "[Sir McMahon's] promise was given subject to a reservation made\textsuperscript{39} which excluded from its scope . . . the portion of Syria lying to the west of the district of Damascus. This reservation has always been regarded by his Majesty's Government as covering the vilayet of Beirut and the Independent Sanjak of Jerusalem. The whole of Palestine west of the Jordan was thus excluded from Sir H. McMahon's pledge."\textsuperscript{40} King Faisal, son of Sheriff Hussein, was willing to recognize the Balfour Declaration and the Zionist interest in Palestine, as long as he could have an independent state in Damascus.\textsuperscript{41} Yet, France, which was not bound by the McMahon

dependence of the Arab countries bounded on the North by Mersina and Adana up to the 37 of latitude . . . ." And in a later letter, "the portions of Syria lying to the west of the Districts of Damascus, Homs, Hana, and Aleppo . . . should be excluded from the proposed limits and boundaries." Reprinted in PALESTINE ROYAL COMMISSION REPORT, 17-19 (1973) [hereinafter referred to as COMMISSION REPORT].

\textsuperscript{55} Id. See Bassiouni & Fisher, supra note 20, at 429.

\textsuperscript{56} VI DOCUMENTS ON BRITISH FOREIGN POLICY 1919-1939, 244, 245-47 (First Series 1952).

\textsuperscript{57} COMMISSION REPORT, supra note 34, at 21. See H. Bovis, THE JERUSALEM QUESTION 1-6 (1971).

\textsuperscript{58} "His Majesty's government view with favour the establishment in Palestine of a national home for the Jewish People, and will use their best endeavors to facilitate the achievement of this object, it being clearly understood that nothing shall be done which may 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." The Balfour Declaration, Nov. 2, 1917, reprinted in, III DOCUMENTS: THE ARAB-ISRAELI CONFLICT 32 (J. Moore ed. 1974). See also COMMISSION REPORT, supra note 34, at 22.

\textsuperscript{59} Id.

\textsuperscript{60} Id. at 20 (emphasis added).

\textsuperscript{41} On January 3, 1919, Faisal entered into an accord with Chaim Weizmann, President of the World Zionists officially acknowledging the Balfour Declaration and agreed that "[a]ll necessary measures shall be taken to encourage and stimulate immigration of Jews into Palestine on a large scale, and as quickly as possible to settle Jewish immigrants upon the land through closer settlement and intensive cultivation of the soil . . . ." The Faisal-Weizmann
Promise, opposed King Faisal's proposal and expelled him from Syria. This expulsion led to a Palestinian rejection of the Balfour Declaration.

The Arab-Palestinians argued in their attempt to establish exclusive claim to Palestine, that "at no time did the British Government as the author of such declaration possess any right of sovereignty over Palestine, whether on the date on which the Balfour Declaration was made or at any time thereafter," which could have enabled it to recognize any rights of the Jewish People in or over Palestine. The same argument, however, can be attributed to the McMahon-Hussein Correspondence which was made while Turkey still possessed title in Palestine. Furthermore, the argument is specious because it was neither the Balfour Declaration nor the Hussein-McMahon Correspondence that became the effective legal instrument in determining the future of Palestine; the Mandate for Palestine, which incorporated the Balfour Declaration, became the effective legal instrument. The Palestine Mandate, created “for the purpose of giving effect to the provisions of Article 22" of the Covenant of the League of Nations.”

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43 After Turkey ceded her title rights to Britain as an Allied Power, arguably Britain could have ceded her territory to anyone of her choice subject to the approval of the rest of the Allied Powers.


45 All of Britain's Agreements were entered into pendent bello. Britain could not act on any promise she made until Turkey ceded her rights. Turkey did so on July 24, 1923 in the Treaty of Lausanne, supra note 32. See Note, Jurisdiction over Palestine—An analysis of the Conflicting Arab-Israeli Claims of Legal Title, 11 VAND. J. TRANSNAT'L L. 271, 273 (1978).


47 “According to Article 22, the Mandate System consisted of three different types of Mandate, covering 'certain communities belonging to the Turkish Empire.' Although certain territories are specifically referred to in Article 22 paragraphs defining the different types of Mandate, Palestine is not included in any of the paragraphs. [P]alestine . . . therefore did not fall within the guidelines of any of the three enumerated types of mandate (and so) the Palestine Mandate would not have the same legal effect as a qualified mandate under the Mandate System.” Note, supra note 44, at 288. See, Comment, International Law—Trusteeship Compared with Mandate, 49 Mich. L. Rev. 1199, 1199, n.2 (1951). But see H. CATTAN, PALESTINE AND INTERNATIONAL LAW 26 (1973). Cattan supports the Arab contention that Palestine was one of the countries whose independence was “provisionally recognized” and therefore, under the provisions of a class A Mandate which was subject only to the administrative advice and assistance of the Mandatory. See also, Palestine Mandate, art. 1, giving the Mandatory “full powers of legislation and of administration.” Palestine Mandate, Terms of League of Nations Mandate, U.N. Doc. A/70, 2-7 (Oct. 1946), reprinted in III DOCUMENTS: THE ARAB-ISRAELI CONFLICT 75-84 (J. Moore ed. 1974). Class B Mandates were created for Central African territories. They covered territories at that stage of civilization where the “Mandatory must be responsible for administration of the territory subject to
reads in pertinent part:

[T]he 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 . . . [and recognition should be given] to the historical connection of the Jewish people with Palestine and . . . [f]or reconstituting their national home in that country. [N]othing should be done which might prejudice the civil and religious rights of existing non-Jewish communities in Palestine.49

Great Britain, resigned to comply with its mandated duty, tried to balance its relationship with both Arabs and Jews and strained to maintain Jewish and Arab rights in Palestine. Britain’s administrative attempts were self-defeating. It was responsible for the existing enigma in Palestine and was obliged to suffer for this political shortsightedness during the war throughout the period of mandate. England became the target of animosity as the inter-ethnic struggle erupted between the Arabs and the Jews for control over Palestine and Jerusalem.

B. The United Nations50

At the conclusion of World War II, the United Nations was formed and the League of Nations terminated.51 The League did not officially convey its mandatory rights and powers to the United Nations but adopted a resolution at its final session which noted the dissolution of its mandatory functions. The resolution did, however, state that Chapter XI, XII and XIII of the Charter of the United Nations corresponded to the principles embodied in Article 22 of the League’s Covenant and that it was the League’s intention that the administering countries continue certain conditions. . . .” LEAGUE OF NATIONS COVENANT, supra note 31, art. 22, para. 5. Class C Mandates of South-West Africa were administered by the Mandatory power as integral parts of its territory subject only to certain safeguards for the indigenous population. Id. para. 6.

47 LEAGUE OF NATIONS COVENANT, supra note 31, art. 22. See also L. SOHN, BASIC DOCUMENTS OF THE UNITED NATIONS 295, 301-02 (2d ed. 1968).

48 “Reconstituting” implies the Jews had a biblical right to the land of Palestine. For the effect of historical claims in international law see 2 M. WHITEMAN, supra note 2 at 1224-29; N. HILL, supra note 27.

49 Palestine Mandate, supra note 46, at 75. It is to be noted that in accordance with Article 25 of the Mandate for Palestine, England removed, with the League’s approval, the areas of Trans-Jordan from the area open to the Jews, establishing Faisal’s brother Abdul-lah as its Emir. Terms of League of Nations Mandates, supra note 46 at 2-7. Cf. note 114 infra.

50 The legal competence of the United Nations to determine the future of Palestine is discussed infra at sec. IV(C).

51 See note 191 infra.
their mandated function "until other arrangements have been agreed between the United Nations and the respective mandatory powers."\(^{62}\)

Great Britain, however, no longer able to deal with the growing dissonance between the Arabs and the Jews, submitted the problem of Palestine to the United Nations in 1947.\(^{63}\)

C. The Partition Plan\(^{54}\)

The United Nations, faced with an arduous problem as to the arrangements over Palestine, considered numerous proposals in its attempt to be just.\(^{59}\) On November 29, 1947, the General Assembly approved\(^{56}\) a resolution to partition Palestine.\(^{67}\) The plan called for: a termination of the Mandate by August 1, 1948; a division of Palestine into an Arab state and a Jewish state delineated by the boundaries in the resolution; economic union between the two states; and the internationalization of the

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\(^{54}\) The binding effect of the Partition Plan on all interested parties is discussed infra at sec. IV(D).

\(^{55}\) The United Nations accepted the Partition Plan developed by its Special Committee on Palestine (UNISCOP). Delegates from Australia, Canada, Czechoslovakia, Guatemala, India, Iran, the Netherlands, Peru, Sweden, Uruguay, and Yugoslavia constituted the UNISCOP Commission. UNISCOP actually proposed two plans to the General Assembly. The minority plan of August 31, 1947, provided that Palestine be transformed into an independent federal state composed of a Jewish province and an Arab province within a three year transition period. Jerusalem was to become the federal capital divided into two separate municipalities. The Jewish municipality would predominantly include West Jerusalem, and the Arab municipality, predominantly East Jerusalem. The Holy Places in the city were to be governed by a permanent international body. The plan was rejected by the Jewish Agency which favored the majority plan calling for the partition of Palestine into an Arab state and a Jewish state with a corpus separatum administered by the United Nations over Jerusalem. The Arabs were only interested in an Arab state over all of Palestine and rejected both plans. H. Bovis, supra note 37, at 41-48.

\(^{56}\) In favor: Australia, Belgium, Bolivia, Brazil, Belorussia, Canada, Costa Rica, Czechoslovakia, Denmark, Dominican Republic, Ecuador, France, Guatemala, Haiti, Iceland, South Africa, Sweden, the Ukraine, the U.S.S.R., the United States, Uruguay, Venezuela. Against: Afghanistan, Cuba, Egypt, Greece, India, Iran, Iraq, Lebanon, Pakistan, Saudi Arabia, Syria, Turkey, Yemen. Abstention: Argentina, Chile, China, Columbia, El Salvador, Ethiopia, Honduras, Mexico, The United Kingdom, Yugoslavia.

city of Jerusalem. The Jewish Agency agreed to the resolution; the Palestinians rejected it. The Palestinians were of the opinion that their rights to self-determination were denied.

D. After Partition

Consequently, on May 14, 1948, when the Palestinian Mandate was terminated and Israel simultaneously declared its state of independence, five Arab countries invaded, "with the declared purpose of liquidating the newly-born Jewish state." By way of the 1948 Arab incursion, Jor-

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53 Id. The internationalization of the city of Jerusalem is discussed at length infra at sec. IV(G).

54 The Jewish Agency was "recognized as a public body for the purpose of advising and cooperating with the Administration of Palestine in such economic, social and other matters as may affect the Jewish national home and the interests of Jewish population in Palestine." The Palestine Mandate, supra note 46, art. 4. The Jews were not entirely content with the Partition Plan especially as to the internationalization of Jerusalem. Internationalization, however, was considered a better alternative than continued fighting in the city. Moreover, because the draft proposal of the Partition Plan authorized a referendum to change the status of Jerusalem in ten years, the Jews believed that Jerusalem, would be internationalized entity only for that stated period. M. BENVENISTI, supra note 5, at 4.

55 The principle of self-determination and its validity as a legal argument against the United Nations Partition Plan is discussed at length infra at sec. IV(B).


57 The countries were Egypt, Iraq, Jordan, Lebanon, and Syria. According to Yehuda Blum, these same countries "had actively supported, trained, financed, and equipped the Arab guerrilla forces operating in Palestine, with a view to frustrating the United Nations partition plan (in fact, a large proportion of the persons engaged in those guerilla activities had been of non-Palestinian stock) . . . ." Y. BLUM, THE JURIDICAL STATUS OF JERUSALEM 10-11 (Jerusalem Papers on Peace Problems, 1974). When Egypt, Jordan, Syria, Iraq, and Lebanon attacked the new Israeli state Bernadotte proposed that the original Palestine Mandate of Trans-Jordan and Palestine, be transformed into a union of two members, one Arab and one Jewish. The Arabs would control the Negev while the Galilee would be a part of the Jewish territory. As for Jerusalem, it would be under Arab control subject to municipal autonomy for the Jewish community. The Israeli Provisional Government rejected the plan as did the Arab League. Jordan, however, favored it. In September 1948, Bernadotte tried again with a revised plan. This time he called for maximum local autonomy by the Jewish and Arab communities, and for the city of Jerusalem, to be under the control of the United Nations. Both the Arabs and Israel rejected the plan. As a result, the First Committee of the United Nations General Assembly ignored the proposal. See Progress Report of the United Nations Mediator on Palestine Submitted to the Secretary-General for Transmission to the Members of the U.N., 3 U.N. GAOR, Supp. (No. 11), U.N. Doc. A/648 (1948); Palestine-Progress Report of the United Nations Mediator, G.A. Res. 194(III), 3 U.N. GAOR 21-25, U.N. Doc. A/807 (1948). See H. BOVIS, supra note 37, at 59-60; BENVENISTI, supra note 5, at 5.

58 Y. BLUM, supra note 62. On April 22, 1948, King Abdullah of Trans-Jordan called on "all Arab countries to join my armies in a movement to Palestine to return the Arab character of that country when the British end their Mandatory rule on 15 May." Reprinted in J. MARLOWE, THE SEAT OF PILATE: AN ACCOUNT OF THE PALESTINE MANDATE 246 (1959).
dan seized the west bank of the Jordan River and Eastern Jerusalem, while Israeli forces moved beyond the boundaries of the partition resolution in order to protect their newly established state and the existing Jewish communities in Jerusalem. On August 2, 1948, the Israeli Provisional Government declared Western Jerusalem to be Israeli-occupied territory.66

On April 3, 1949, Israel and Jordan signed an armistice agreement.67 Article II(2) of that agreement provides that "no provision . . . shall in any way prejudice the rights, claims, and positions of either Party hereto in the ultimate peaceful settlement of the Palestine question, the provisions of this agreement being dictated exclusively by military considerations."68 The effect of the agreement was to freeze the rights and claims of the concerned parties—Jordan and Israel. On April 24, 1950, however, Jordan annexed East Jerusalem and the West Bank.69

Jerusalem, a divided city for seventeen years, was reunited in 1967 when war exploded in the Middle East once again. After Egypt attacked Israel, Israel advised Jordan not to enter the war, and stated that if her request were honored, Israel would not initiate any fighting against Jordan. Jordan, however, joined the war on June 5, 1967.70 Within seven days, Israel had captured all of Jerusalem.

Since the reunification of Jerusalem in 1967, Israel has had control over West Jerusalem as well as East Jerusalem. Protection of the Holy

4 In 1949 the Hashemite Kingdom of Trans-Jordan was changed to the Hashemite Kingdom of Jordan to reflect the merger of Trans-Jordan and the West Bank. 2 M. WHITEMAN, supra note 27, at 1165.
68 Id. at 306.
69 2 M. WHITEMAN supra note 27, at 1165. The issue of Jordan's annexation of East Jerusalem is discussed at length infra at sec. III(B) and IV(F).
70 According to General Odd Bull, Chief of Staff of the United Nations Truce Supervision Organization, on the morning of June 5, 1967, the following occurred: "I was summoned to the Israeli Foreign Ministry and on arrival at about 9 a.m., I was asked to convey a message to King Hussein and the Jordanian Government. It amounted to the following: if Jordan remained passive during the war, Israel would do nothing. On the other hand, if Jordan joined Egypt, Israel would use all means in its power to fight Jordan. The message was conveyed through our cease-fire apparatus. As far as I can understand, it reached King Hussein at 10:30 a.m. and the exchange of fire in Jerusalem started about an hour later." Reprinted in Y. BLUM, supra note 62 at 19 n.54; Jordan argues that it entered the war as an ally to Egypt and was justified in doing so because Jordan and Egypt were acting in collective self defense pursuant to Article 51 of the United Nations Charter. For an assessment of Jordanian claims see Gerson, Trustee-Occupant: The Legal Status of Israel's Presence in the West Bank, 14 HARV. INT'L L.J. 1, 15 (1973).
Places has been guaranteed by the State of Israel,\(^7\) and the Israeli government has continued to endorse a policy that the Holy Places in Jerusalem belong to those who hold them sacred. Jordan, however, had refused to negotiate with the State of Israel until Israel returns to pre-1967 borders.\(^2\) The Palestinians refuse to even recognize the existence of the State of Israel.\(^7\)

### III. METHODS OF ACQUISITION OF TERRITORY IN INTERNATIONAL LAW

To establish the necessary link between historical facts and international law in determining the legal status of Jerusalem, general methods of acquisition of territory must be examined.\(^4\) The international law concept of territorial sovereignty\(^5\) anticipates that territory may be acquired by traceable claims of title alone or by other recognized means, such as

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\(^7\) The Protection of Holy Places Law of 1967, provides that Holy Places shall be protected from desecration, harm or violation and from anything likely to violate the freedom of access of the members of the different religions to the places sacred to them or their feelings with regard to those places. Any desecration or violation renders the offender liable to imprisonment for a term of seven years. Any violation of the freedom of access of the members of the different religions to the places sacred to them or their feelings with regard to those places shall render the offender liable to imprisonment for a term of five years. Law of June 27, 1967, [5727-1967] Knesset no. 26 (Israel). 21 Laws of the State of Israel.

\(^2\) Jordan interprets U.N. Resolution 242 to mean that Israel must return Jerusalem to Jordan. In 1974, King Hussein stated: “There can be no compromise. The return of Arab sovereignty over the Arab city of Jerusalem, over the Arab section of Jerusalem which was conquered in 1967, is a basic requirement. There can be no peace so long as the Israelis are in control of the whole of Jerusalem.” Reprinted in, Benvenisti, supra note 5, at 362.

\(^4\) For a general discussion of sovereignty claims see 2 M. Whiteman, supra note 27, at 1028; G. Hackworth, Digest of International Law 398 (1940); G. Schwarzenberger, supra note 33, at 64-78. Cf., Note, supra note 44, at 274-78; Note, Israel: Conqueror, Liberator or Occupier Within the Context of International Law, 7 Sw. U.L. Rev. 206, 207-16 (1975).

\(^5\) Because sovereignty is a vague term in international law many have tried to define its meaning. For the purpose of this note, sovereignty will be considered the most absolute power of control given to a state. The term sovereignty includes a concept of defined territory which allows state control over specific territory, and the juristic concept which allows a state to determine the limits of its jurisdiction and the power to promulgate its laws.

Sovereignty may change as a result of a change in territorial control. This note concentrates primarily on the concept of territorial change in sovereignty and the power that flows to a sovereignty holder. Although similar, the term title here should be equated with the concept of territorial sovereignty rather than the domestic concept of deity title in property law. See generally W. Friedmann, The Changing Structure of International Law 81-96 (1964); 1 Oppenheim, International Law 119 (8th ed. H. Lauterpacht 1955). “[A]ll that can be required of a state is that it should not overstep the limits which international law places upon its jurisdiction; within those limits, its title to exercise jurisdiction rests upon its sovereignty.” The S.S. Lotus [1927] P.C.I.J., ser. A., No. 10 at 19.
prescription, cession, conquest, occupation and annexation. These methods are explored below.

Prescription is the process whereby one legal sovereign loses claim to its territory by the territorial occupation of another sovereign when protest against the presence of the occupying state is not made within a reasonable period of time. The occupying state will gain title to the territory in question if its possession was of sufficient duration, undisturbed, open and sufficiently active. As a result, the issues generally arising under a claim of prescription are factual ones. For example, whether the legal sovereign protested the presence of an occupying state within a reasonable time; or whether the occupying state's possession of territory was long and uninterrupted.

Cession is the process in which a present sovereign transfers its territorial title to a new sovereign pursuant to an agreement between the two states. Generally, cession will occur after a war where the victor pressures the losing state to legalize the outcome of the war by entering into an agreement of cession with the victor. A legitimate cession will be recognized when the ceding state had clear title and apparent authority to effect a transfer.

Conquest is the process in which one state takes the territory of another state by force. To achieve title, however, "debellatio plus subjugation traditionally exercised through annexation" is required. Although different interpretations exist as to the exact requirements of debellatio, transfer of title will occur "if the conquered territory is effectively reduced to possession and annexed by the conquering state." This method...
of acquiring territorial sovereignty, however, remains suspect today, because it is in direct violation of Article 2(4) of the United Nations Charter and the equitable principle in international law of *ex injuria jus non oritur*.

Occupation is the process in which a state acquires title by occupying a *res nullius*. Land may be considered *res nullius* "either because no one has ever appropriated it—as in the case of newly found land—or because, though once appropriated, it has subsequently been abandoned." Examples of *territoria nullius* include "(1) uninhabited lands . . . . (2) lands inhabited by individuals who are not permanently united for political action. (3) lands which have been abandoned by their former occupants. (4) lands which have been forfeited because they have not been occupied effectively." Whether the land is in fact *res nullius* or whether an acquiring state has in fact established an effective occupation, are issues which often arise in this area. "The inability of the former power to exercise sovereignty over the area in question and the effectiveness of control exercised by the occupying power" are factors that will aid in the determination of these issues.

The occupying power will generally annex the territory in question by incorporating it in its jurisdictional scope. Annexation is the process by which an occupying power makes a unilateral declaration that it considers the occupied territory its own, because all rights of sovereignty have been transferred to it. Accordingly, an annexation will generally be recognized if the occupying state establishes that its occupancy is legitimate because the land it occupies is *res nullius*, or because its conquest is *debellatio*.

Another method of acquisition entitled to international recognition is

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87 Article 2(4) of the United Nations Charter states that "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations." *United Nations Charter*, art. 2(4).

88 The principle forbids states from acquiring legal rights from unilateral acts not recognized in international law. "[W]hen the act alleged to be creative of a new right is in violation of an existing rule of customary or conventional International Law . . . the act in question is tainted with invalidity and incapable of producing legal results beneficial to the wrongdoer in the form of new title or otherwise." 1 *Oppenheim*, *supra* note 75, at 141-42. See Gerson *supra* note 70, at 5.

89 2 *M. Whiteman*, *supra* note 27, at 1030.

90 *Id.* *Res nullius* means "[t]he property of nobody. A thing which has no owner, either because a former owner has finally abandoned it, or because it has never been appropriated by any person, or because (in the Roman law) it is not susceptible of private ownership." *Black's Law Dictionary* 1470 (4th ed. 1968); *Note*, *supra* note 74, at 208.

91 1 *G. Hackworth*, *supra* note 74, at 396-97.

92 *Note*, *supra* note 74, at 209.

93 2 *M. Whiteman*, *supra* note 27, at 1162.
belligerent occupation. A belligerent occupant acquires control over foreign territory as the consequence of war, but is not automatically vested with sovereignty. His occupation is legally valid until a peace treaty is signed with the ousted sovereign. The belligerent occupant, however, can acquire sovereign rights to the land he occupies if such rights are ceded to him by way of the peace treaty; or if a peace treaty does not materialize, he can acquire sovereignty to the land he occupies if he can effect debellatio or prescription. Until a belligerent occupation formally ceases to exist, the belligerent occupant is obligated to retain the ousted sovereign's laws pursuant with Article 43 of the Hague Regulations and Article 47 of the 1949 Geneva Convention.

All of these methods of acquisition of territory and sovereignty are relevant to the present examination of the legal status of Jerusalem because of the nature of the Palestinian, Jordanian and Israeli claims to Palestine. Each claim finds support in the analysis used to interpret the League of Nations Mandate System and the effect it had in establishing rights of sovereignty. Whether historical events succeeding the initiation of the Mandate in Palestine are relevant in effecting a legal determination of the status of Jerusalem, depends upon the original interpretation used to define the scope of rights delegated by the Palestine Mandate.

A. The Palestinian Position

The Palestinians' primary argument for the right to control Jerusalem...
lem is that the city is geographically located within the province of Palestine. As the original inhabitants of Palestine—as it existed before Turkey ceded it to the Principal Allied Powers in World War I—the Palestinians claim exclusive sovereignty to all of Palestine. Support for their claim, however, did not emanate from the traditional methods of acquiring territory and title recognized in customary international law, but rather developed as an outgrowth of President Wilson's principles of non-annexation and self-determination. The Palestinians argued that

the Palestinian people. See Time, Nov. 11, 1974, at 27. Moreover, in 1974, the General Assembly invited the PLO to participate in Middle East debates, and in January 1976, the Security Council allowed the seating of the PLO, as if a representative of a state, despite United States objection. See, A. Gerson, Israel, the West Bank and International Law 207 (1978); H. Cattan, Palestine and International Law 36-37 (2d ed. 1976).

Although the PLO has gained considerable support as the bargaining agent for the Palestinian people in the last few years, it is important to understand that the PLO is not a "monolithic body speaking with one voice. It is rather an umbrella organization composed of groups, factions and personalities representing a range of views. . . ."

With the PLO there are nearly a dozen political parties each with its own armed unit. Arafat, leader of Al Fatah, which he founded in 1965, is Chairman of the PLO's governing Fifteen-man executive committee. The executive committee was elected from the 300 member Palestine National Council, a body that convenes annually. The executive is dominated by Fatah. Very generally, the remainder of the PLO can be divided into groups that support Fatah's leadership and the 'reactionists' who since 1974, have opposed what they claim is Arafat's eagerness to settle for half of Palestine. Led by Dr. George Habash's Popular Front for the Liberation of Palestine (P.F.L.P.) the rejectionist bloc has gained in political influence since Anwar Sadat's November 1977 visit to Jerusalem. Garbus, The Politics of the PLO, The Nation, Nov. 3, 1979, at 427.

Israel, however, has never recognized the PLO as representatives of the Palestinians because the organization denies Israel's right to exist. See The Palestinian National Charter of 1968, arts. 9, 19, 22, reprinted in S. Kadi, Basic Political Documents of the Armed Palestinian Resistance Movement, No. 27 (Palestine Books, 1969). Accordingly, although the PLO may represent the Palestinians, it does not mean necessarily the Israel will negotiate with the PLO. It is possible that a faction of Palestinians not affiliated with any party in the PLO could represent the Palestinian interest in possible future negotiations with Israel. Cf. Hakabi, The Position of the Palestinians in the Israeli-Arab Conflict and their National Covenant (1968), in I The Arab-Israeli Conflict 518 (J. Moore ed. 1974).

See H. Cattan, supra note 99, at 11. The Jews argue that they are the original inhabitants of Palestine. See Feinberg, The Arab-Israeli Conflict in International Law, supra note 32, at 406. For the Arab historical claim see H. Cattan, supra note 99, at 3-12.

Some Palestinians argue that Turkey could not cede to the Allied Powers that which did not belong to them. They argue that the Turkish empire was governed by both Palestinians and Turks and that when Palestine was occupied by the British Army in 1917, sovereignty vested in the Palestinians. See Cattan, Sovereignty Over Palestine, in I The Arab-Israeli Conflict 191, 193 (J. Moore ed. 1974). But see Feinberg, The Question of Sovereignty, supra note 32, at 231.

H. Cattan, supra note 46, at 65-68.

See sec. III supra.

R. Baker, Woodrow Wilson and the World Settlement (1922). "To the Arabs,
those principles were implicitly incorporated in the League of Nations and Mandate System, requiring, therefore, that any interpretation of the Palestine Mandate be within the overall spirit of that system. Thus, the only legitimate interpretation of the Palestine Mandate that could effectuate that spirit was that the sovereign right to Palestine be vested exclusively in the Palestinian people, subject to the temporary administrative advice and assistance of the Mandatory Power and the League of Nations. Any provisions in the Mandate, that recognized a Jewish property interest in the land of Palestine, would be in direct violation of Article 22 and therefore void. Moreover, the Palestinians believed that the advice of the Mandatory Power ceased to be a limitation on their sovereign right to Palestine when the League of Nations became a defunct organization, and when the Mandatory Power relinquished its administrative duties to the United Nations. Accordingly, the Palestinians rejected the United Nations' competence to legally determine the future government of Palestine, and as a result refused to recognize the validity of the Partition Plan. Their contention was that the United Nations effectively denied them the right of self-determination by acknowledging the existence of a Jewish interest in Palestine and by recognizing the State of Israel as the culminating effect of that interest. The Palestinians continue to deny the State of Israel any legal or historical right to exist.

Alternatively, the Palestinians argue that even if they were to recognize the State of Israel in the future, they will not acknowledge that Israel has any territorial claim to the West Bank or the city of Jerusalem. They will only recognize the territorial allotment provided to the Jewish state in the United Nations Partition Plan.

the Mandate System was to be an attempt at a partial fulfillment of Allied, and especially Wilsonian promises that an Allied victory would foster the principles of independence, self-determination, and democracy based upon the will of the people. To the Arabs, all these principles supported the cause of the majority—namely themselves in Palestine.” F. Khouri, The Arab-Israeli Dilemma 12-13 (1976). See also Pomerance, The United States and Self-Determination: Perspectives on the Wilsonian Conception 70 AM. J. INT’L L. 1 (1976).

Note, however, that Article 1 of the Palestine Mandate extended the Mandatory's role in Palestine beyond “administrative advice and assistance.” See note 46 supra.

H. Cattan, supra note 46, at 65.

Id.

Id. at 69-69.

Id. at 69-69.

Id. at 69-69.

The Partition of Palestine in 1947 and the establishment of the state of Israel are entirely illegal, regardless of the passage of time, because they were contrary to the will of the Palestinian people and to their natural right in their homeland, and inconsistent with the principles embodied in the Charter of the United Nations, particularly the right of self-determination.” The Palestinian National Charter of 1968, art. 19, supra note 99.

H. Cattan, supra note 46, at 92.

The PLO has recently indicated that they might recognize the State of Israel if
B. The Jordanian Position

The Jordanian claim to Jerusalem and the West Bank emanates from its act of annexing the land after joining the Palestinians in 1948 in their collective effort to thwart the existence of the State of Israel. Because Jordan did not acquire any legal interest in any section of Palestine by way of the Palestine Mandate, it could only acquire legal sovereignty from the preceding sovereignty holder in a manner similar to traditional modes applicable to sovereign states—prescription, cession, conquest or occupation.

Jordan adopts a three step analysis in fixing its sovereignty to the West Bank and Jerusalem. First, Jordan recognized the Palestinian claim of an exclusive right of sovereignty in Palestine, as the legitimate one. This is supported by the fact that in 1948, after the establishment of the State of Israel, Jordan came to the aid of the Palestinians and proclaimed that the object of its intervention was to prevent Israel from usurping Palestinian territory and abusing Palestinian rights. Second, the Palesti-
tinians ceded to Jordan their exclusive sovereignty to the land that they were jointly able to keep from the Israeli fighting force in the 1948 war. Jordan supports its claim of succession by virtue of three events: (a) the West Bank Palestinians wanted to merge their territory with that of Jordan and expressed that desire in a resolution drawn at the 1948 Jericho Convention;\(^{118}\) (b) seventy percent of eligible West Bank voters participated in the 1950 general elections calling for a joint parliament to represent Jordan and the West Bank;\(^{119}\) (c) the fact that Jordan's presence in the West Bank was peaceful and uninterrupted for the entire period of its occupation.\(^{120}\) Third, Israel, as an aggressor-occupant\(^{121}\) in the 1967 war did not acquire any title right in the West Bank and Jerusalem and therefore must return the land to its rightful sovereign, Jordan.\(^{122}\)

An anomaly does exist, however, in the fact that Jordan can circumvent the first step of its legal argument and still have a legitimate claim to the West Bank. This circumvention allows Jordan the political mobility to change its hard line position not to recognize the State of Israel, to a more moderate position in order to adapt if necessary, to the changing political realities of Middle Eastern affairs encouraged by Anwar Sadat.\(^{123}\) As a result, Jordan can opt to recognize the State of Israel without clouding Jordanian sovereignty claims and undermining the call for the return of the West Bank to its sovereignty.\(^{124}\)

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\(^{118}\) See 2 M. WHITEMAN, supra note 27, at 1165, Gerson, supra note 70, at 9.

\(^{119}\) Id.

\(^{120}\) Id. Jordan's latter claim seems to be more relevant to Prescription rather than cession. See sec. III supra.

\(^{121}\) An aggressor occupant is one who violates article 2(4) of the United Nations Charter and the customary international law principle of *ex injuria jus non oritur*. See Gerson, supra note 70, at 3-7. See also notes 87-88 supra & 213 infra.

\(^{122}\) Dr. Blum argues that Jordan has no reversionary interest in the West Bank and Jerusalem and prefers to call them by their historical names: Judea and Samaria. See Blum, *The Missing Reversioner: Reflections on the Status of Judea and Samaria*, 3 ISRAEL L. REV. 279 (1968).

\(^{123}\) Jordan may find it to her advantage to recognize Israel. Israel has made it clear that it will not withdraw from the West Bank if complete control is given to the PLO. Israel's position is that a Palestinian state already exists under the name of Jordan and any determinations of boundaries pursuant to Res. 242 and 338 must occur between Israel and Jordan. A. GERSON, supra note 99 at 207.

\(^{124}\) It is not entirely clear that King Hussein has relinquished all of his territorial claims to the PLO even through Jordan voted in favor of the PLO representing the Palestinians at the Arab Summit meeting at Rabat. See note 99, supra. "Jordan's statements regarding relinquishment of title to the West Bank appear to be rhetorical, their value limited to a display of pan-Arabic unity. By all diplomatic reports, Jordan retains a genuine interest in
Jordan's argument would remain a three step process in establishing its right to the West Bank except that the first step would be replaced with a different premise. Jordan would take the position that the Palestine Mandate granted mutual rights in Palestine to the Palestinians and Jews, rather than exclusive rights to the Palestinians and contrary to the Palestinian position, Jordan would further assert that the United Nations General Assembly had the legal authority to implement its Partition Plan. As a result, the Palestinians acquired a sovereignty right to the West Bank and Jerusalem that could be ceded to Jordan, except that it acquired it through the Partition Plan, rather than through the Palestine Mandate. Accordingly, the Palestinians no longer could have any separate legal claim to Palestine because the territory known as Palestine would no longer exist. The Palestinians, in effect, would not be refugees from Palestine but Jordanian citizens. The West Bank would revert back to the ousted legitimate sovereign, Jordan, because Israel's action in 1967 was unlawful and not an act of self defense.

C. The Israeli Position

Aside from Israel's historical links to Palestine, Israeli sovereignty regaining the West Bank.” A. Gerson, supra note 99, at 207. “In a dramatic challenge to the Camp David peace process, Jordan's King Hussein and the PLO have revived the idea of reuniting the Israeli occupied West Bank with Jordan proper. . . . The major significance of Hussein's forthcoming initiative is that it retreats from the often stated Arab goal of creating an independent Palestinian state on the West Bank. . . .” Newsweek, Sept. 17, 1979, at 27.

125 See sec. III(A), supra. See also sec IV(C) and IV(D) infra.

126 The only claim the Palestinians have according to this theory, is against Jordan for usurping the Arab state which was given to them by the United Nations Partition Plan. See sec. IV(D) infra.

127 On April 13, 1950, the Council of the Arab League concluded that any Arab nation which was to annex Arab Palestine would be subject to sanctions by the League. On May 15, 1950, the Political Committee of the Arab League agreed that Jordan's action of annexing Arab Palestine was in violation of the Council's resolution of April 13, 1950. 2 M. Wurthman, supra note 27, at 1166-67. The other Arab states criticized Jordan because the union with Arab Palestine, in effect, recognized the United Nations Partition Plan. Comment, The Arab-Israeli War and International Law, 9 Harv. Int'l L.J. 232, 238 (1968). But see, A. Gerson, supra note 99, at 208-09. “It would seem that . . . the views of the West Bank's traditional leadership continue to prevail and that . . . the realpolitik of the West Bank's position prevents any real break with Hussein and meaningful collaboration with the PLO.” Id.

128 See note 70 supra. See also King Hussein's statement to the United Nations asking for swift condemnation of Israel as the aggressor in the 1967 war. 22 U.N. GAOR, 5th emergency special session, (158th plen. mtg.), U.N. Doc. A/PV. 1586 (1967). But see Shapira, supra note 65. “Substantial majorities of the Security Council, as well as of the General Assembly, rejected all proposals designed to brand Israel as the aggressor and to order the withdrawal of its forces back to the armistice demarcation lines.” Id. at 79.

129 See note 101 supra.
claims stem from the Palestine Mandate. Israel's argument is based on the premise that the Palestine Mandate afforded mutual rights to both the Palestinians and the Jews. Israel supports this contention with the historical fact that the United Nations succeeded the League of Nations, adopted the Partition Plan, and had the legal authority to implement it. As a result, the State of Israel rightfully declared its independence.

Israel's argument for occupying West Jerusalem in 1948 is “that the United Nations had failed to provide a legal framework for Jerusalem and that the action of the [Israeli] Provisional Government was designed to fill this gap for the portion under Jewish control.” Although Israel has justified its occupation of West Jerusalem, Israel has never officially explained its sovereignty claim in terms of international law because Israeli sovereignty over West Jerusalem is rarely challenged. Some have suggested that Israel might argue that West Jerusalem was open to occupation because the Arab Palestinians rejected the Partition Plan in 1948. Because “sovereignty over a mandated territory is in abeyance,” it remains suspended until a state can acquire it through legal means. As a result, Israel acquired West Jerusalem in 1948 while acting in self defense

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130 See note 49 supra and accompanying text.

131 It is relevant to note Britain's policy in Palestine in light of the Palestine Mandate, the legal instrument that set forth the rights of the parties concerned: “When it is asked what is meant by the development of the Jewish National Home in Palestine, it may be answered that it is not the imposition of a Jewish nationality upon the inhabitants of Palestine as a whole, but the further development of the existing Jewish community. . . . But in order that this community should have the best prospect of free development . . . it is essential that it should know that it is in Palestine as of right and not sufferance.” Reprinted in Commission Report, supra note 34 at 33 (emphasis added). See sec. IV(B) infra.

132 See sec. IV(B) infra. But see note 111 supra and accompanying text.

133 See note 111 supra.

134 E. Lauterpacht argues that Israel did not rely upon the Partition Plan as a legal basis for the creation of the State of Israel but mentioned it only as a relevant historic element. Lauterpacht, supra note 29, at 943. See, The Declaration of the Establishment of Israel, reprinted in, III Documents: The Arab-Israeli Conflict 348 (J. Moore ed. 1974). Although Israel may not have relied upon the partition plan as a legal basis, sovereignty could not vest in Israel but for the partition plan. See sec. IV(D) infra.

135 H. Bovis, supra note 37, at 63.

136 Lauterpacht, supra note 29, at 961.

137 Lauterpacht argues that the Partition Plan did not have any legal effect with respect to the Arab state because they rejected it. The land was, therefore, open to be occupied by Israel if it could acquire it through legal means because sovereignty was suspended. He applies his theory to the West Bank and East Jerusalem as well. Lauterpacht, supra note 29, at 960-73. But see Cattan, Sovereignty Over Jerusalem, supra note 43, at 219. “Such an attitude is tantamount to a denial by Israel of its birth certificate.” Id. See sec. IV(D) infra. (supporting a different theory).

to Jordan's invasion. Accordingly, Israel could annex it because Israel acquired it through legal means.

Israel's position regarding the nature of its presence in the West Bank and East Jerusalem since 1967, can be best explained by looking at the administration of both territories. Israel has administered East Jerusalem and the West Bank differently.

On June 27, 1967, the Israeli Parliament passed the Law and Administration Ordinance Law, which provided that "the law, jurisdiction and administration of the state shall extend to any area of Eretz Israel designated by the Government by order." The following day, the Parliament declared new boundaries for the city of Jerusalem. Israel although never formally annexing East Jerusalem, has incorporated it within its civil jurisdiction.

With respect to the West Bank, however, Israel has only claimed the rights of a belligerent occupant. Jordanian law has remained in force subject only to the security needs of Israel, as belligerent occupant.

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139 See note 65 supra. It is possible that Israel could argue a strategic claim which is based on the necessity of acquiring territory in order to establish an effective self-defense system for existing sovereign territory. See N. Hill, supra note 27 at 65. Cf. Lauterpacht, supra note 29, at 969.

140 See note 138 supra.

141 See Gerson supra note 70 at 10-14.


143 Id.

144 But see Gerson, supra note 70, at 11. See, Lauterpacht, supra note 29, at 973-75.

145 "Extension of full civilian government to occupied territory is in fact, annexation." Gerson, supra, note 70 at 12 & n.33; The United Nations General Assembly has called upon Israel "to rescind all measures already taken and desist from taking any action which will alter the status of Jerusalem." G.A. Res. 2254, 22 U.N. GAOR. (6th emergency Special Sess.) Supp. (No. 1), U.N. Doc. A/6798 (1967). See U.N. Docs. S/Res/252 (1968), S/Res/267 (1969), S/Res/271 (1969). Israel's reaction was that it did not take any action to alter the status of Jerusalem. Its position was that "the measures adopted related to the integration of Jerusalem in the administrative spheres, and furnish a legal basis for the protection of the Holy Places in Jerusalem." U.N. Docs. A/6753; S/8052 (1967). See Stone, No Peace-No War in the Middle East, in II ARAB-ISRAELI CONFLICT 141, 148-149 (J. Moore ed. 1974). "[I]f the Secretary-General's Representative was right in September to think that the substantial purpose of these measures was to upgrade the services for the Old City's inhabitants to equal those for West Jerusalem's inhabitants, then the effect of rescission would be to downgrade them back to inequality, Or, . . . the resolutions would be suggesting that it is unlawful for an occupying authority to treat the local inhabitants more favorably than at a minimum standard set by international law." Id.

146 Gerson supra note 70 at 12. See sec. IV(E) infra.

147 Israel Defense Forces Proclamation No. 2, I PROCLAMATIONS, ORDERS & APPOINTMENTS 1 (1967). "[T]he law which existed in the region as of June 7, 1967, shall remain in force insofar as it is not repugnant to this Proclamation or to any proclamation or order which will be issued by [the military commander] or to the changes resulting from the establishment of the rule of the Israel Defence Forces in the Region." Id.

148 See Blum, supra note 122 at 295-97.
Yet, although Israel claims the rights of a belligerent occupant and retains Jordanian Law in the area, Israel does not necessarily acknowledge that Jordan is the legitimate sovereign in the West Bank. An Israeli recognition of the legitimate sovereign of the West Bank is not required to support Israel's claim of belligerent occupancy, as long as it continues to recognize that some ousted legitimate sovereign possesses reversionary rights in the occupied area. Israel's policy as to the proper sovereign in the West Bank will depend on political motivation and its changing relationship with the Palestinians and the Kingdom of Jordan.

IV. An Assessment of the Competing Claims to Determine the Legal Status of Jerusalem.

To determine the legal status of Jerusalem, as assessment of the competing claims must address the following: First, the vesting of sovereignty following Turkish rule; second, the Palestine Mandate and Palestinian self-determination; third, U.N. competency to review the Palestine issue; fourth, Israel's and Jordan's claims to Jerusalem; fifth, Palestine's alleged cession of rights in the West Bank to Jordan; sixth, the Jordan-Israel Armistice Agreement; seventh, Israel's claims to sovereignty based on the 1967 war.

A. Vesting of Sovereignty Following Turkish Rule

Turkey ceded sovereignty to Palestine to the Principal Allied and Associated Powers. The Allied and Associated Powers, however, did not officially annex Palestine. They agreed to give Palestine to the League of Nations, in order that it, as a world body, could determine the future of Palestine. The League of Nations created its Mandate System specifically to prevent the victors of World War I from annexing the conquered territory and thereby assure that "the well being and development" of the inhabitants of the territory could be advanced as a "sacred trust of civilization," to serve the "interest . . . of humanity in general." Yet, with the League of Nations Mandate System replacing the traditional methods of acquisition of territory recognized in customary international law, the

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149 Gerson, supra note 70, at 14.
150 See sec. IV(D) infra. But see Blum, supra note 122. If Israel were to decide to annex the West Bank, Israel would have to prove that it acquired sovereignty by way of prescription or cession.
151 Israel's legal policy in reference to the West Bank presumably will depend upon what is best for it politically. See note 123 supra.
152 See e.g., Palestine Mandate, preamble, supra note 46 at 75.
legal perceptions of the transfer of sovereignty became confused.¹⁵⁴

Five entities have generally been recognized¹⁵⁵ as possible sovereignty holders while the Mandate System existed: (1) the Principal Allied and Associated Powers; (2) the Mandatory Power; (3) the League of Nations; (4) the people of mandate territories; and (5) combinations of the above.

Many arguments have been cited for the benefit of one entity to the detriment of another in an attempt to establish the proper sovereign at that time.¹⁶⁶ The choices presented, however, are not satisfactory, because they are based on a misconceived premise that the Mandate System had to be specifically translated into the traditional modes of sovereignty. On the contrary, the Mandate System was created primarily because the former methods of acquisition of territory could not adequately satisfy the intentions of the League of Nations.¹⁵⁷

The best approach to follow is that of Judge McNair, where he held in his separate opinion in the Advisory Opinion of the International Court of Justice on the International Status of South West Africa, that “[s]overeignty over a mandated territory is in abeyance; if and when the inhabitants of the territory obtain recognition as an independent state

¹⁵⁴ See e.g., R. Chowdhuri, INTERNATIONAL MANDATES & TRUSTEESHIP SYSTEMS, 229-36 (1955); Comment supra note 46; Sayre, Legal Problems Arising from the United Nations Trusteeship System, 42 AM. J. INT'L L. 268-72 (1948).

¹⁵⁵ Sayre, supra note 154; Gerson, supra note 70, at 24.

¹⁶⁶ For an excellent discussion concerning the rationale used behind each choice see Gerson, supra note 70, at 24-27; Comment, supra note 46 at 1205; Note, supra note 44, at 286-89. E. Lauterpacht suggests that sovereignty was divided between the League and the Mandatory. Lauterpacht, supra note 29 at 964. See Note, supra note 74, at 226 (supporting notion that sovereignty was in the Mandatory Power). See 1 Oppenheim, supra note 75, at 222 n.5 (summary statement of different views).

¹⁵⁷ “[T]he mandate system . . . is a new institution—a new relationship between a territory and its inhabitants on the one hand and the government which represents them internationally on the other—a new species of international government, which does not fit into the old conception of sovereignty and which is alien to it. The doctrine of sovereignty has no application to this new system.” The Advisory Opinion on International Status of South West Africa, [1950] I.C.J. 128, 150 (Lord Arnold McNair, separate opinion). “Under the provisions of Article 96 of the Charter of the United Nations and Article 65 of the Statute of the International Court of Justice, the court is empowered to give an advisory opinion on ‘any legal question.’ The Charter provides that the request for an advisory opinion may be made by the General Assembly, the Security Council and such other organs of the United Nations and specialized agencies as may be authorized by the General Assembly.” N. Leech, C. Oliver & O. Sweeney, CASES & MATERIALS, THE INTERNATIONAL LEGAL SYSTEM 60-61 (1973).

In accordance with Article 57 of the Statute for the I.C.J., if the judgment does not represent in whole or in part the unanimous opinion of the Judges, and Judge shall be entitled to deliver a separate opinion. For an excellent book on the effect of a judgment by the International Court of Justice, see II S. Rosenne, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT 596 (1965).
... sovereignty will revive and vest in the new state."\textsuperscript{158} In other words, sovereignty is not vested in any particular entity but remains suspended until a state can acquire it through legal means. Accordingly, because the Mandate System forces an abeyance of sovereignty, and inevitably a suspension of traditional customary international law methods of acquisition of title, only each specific Mandate could establish the rules and regulations needed to ultimately acquire sovereign rights. Therefore, only the Palestine Mandate could, as the governing body of law over Palestine and the culmination of the explicit intent of the League of Nations, establish and define the scope of any legal interest in Palestine and their respective relationships to the creation of a sovereign.\textsuperscript{169}

The governing principle of the Palestine Mandate, as well as the entire Mandate System was that "[t]he well being and development of such people form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in the Covenant."\textsuperscript{160} Although an analogy has been made between mandates and common law trusts,\textsuperscript{161} it should be clarified that such an analogy should not allow a translation of the Mandate System into terms of trust, for such an approach shades the true intent of the League of Nations and presumes that common law interpretation is compatible with international actions.\textsuperscript{162} Nowhere in Article 22 of the League of Nations Covenant or in the Palestine Mandate did the League of Nation's offer language that would suggest their intent to divide sovereignty into legal and equitable rights. Moreover, the Mandate System was not created to enrich the League of Nations or Britain with any title interest in Palestine, but rather was created to benefit the people who were allowed to reside in Palestine.\textsuperscript{163}

It is best to interpret the term, trust, as a reflection of the intent of the League of Nations to establish its role, as well as the role of the Mandatory, Great Britain, as overseer, "entrusted" with a capacity to supervise and advise\textsuperscript{164} and to guarantee the rights established in the Palestine Mandate.\textsuperscript{165} With such an interpretation, Judge McNair's theory that

\begin{footnotes}
\footnote{158}{The International Status of South West Africa [1950] I.C.J. 128.}
\footnote{159}{See \textit{League of Nations Covenant}, art. 22, \textit{supra} note 31; Palestine Mandate, \textit{supra} note 46.}
\footnote{160}{\textit{League of Nations Covenant}, art. 22, \textit{supra} note 31.}
\footnote{161}{H. Lauterpacht, \textit{Private Law Sources and Analogies of International Law} 194-98 (1927).}
\footnote{162}{"It does not follow, however, that a state holding a territory in trusteeship is vested with title to it because a trustee is usually vested with title to the trust at common law." N. Leech, C. Oliver \& J. Sweeney, \textit{supra} note 157, at 766.}
\footnote{163}{\textit{Id}.}
\footnote{164}{"[N]o technical significance can be attached to the words 'sacred trust of civilization.' " International Status of South West Africa [1950] I.C.J. 128, 148 (Lord Arnold McNair, separate opinion).}
\footnote{165}{See note 46 \textit{supra}.}
\end{footnotes}
sovereignty in Palestine remained in abeyance—can be seen as compatible with the fact that the League and Britain were entrusted with the responsibility of terminating their role as overseers when the beneficiaries of the Mandate were “able to stand alone.”

B. The Palestinian Mandate and Palestinian Self-Determination

The Palestine Mandate did not deny the Palestinians their right to self-determination for the following reasons. First, it is generally accepted that after World War I, when the Mandate System was initiated, and until the United Nations was created, the idea of self-determination was only a political principle and not a legal one recognized in international law. Second, any attempt to try to apply retroactively the contemporary legal principle of self-determination to the situation in Palestine after World War I, is to deny the fact that the Palestine Mandate was sui generis. Third, the Permanent Court of International Justice implicitly ruled in favor of the validity of the Palestine Mandate. The ultimate

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166 LEAGUE OF NATIONS COVENANT, supra note 31, at art. 22, para. 4.
167 See note 60 supra and accompanying text.
168 See Feinberg, The Arab-Israeli Conflict in International Law, supra note 32, at 423-34; J. STONE, SELF DETERMINATION AND THE PALESTINIAN ARABS (1970); D. NINCI, THE PROBLEM OF SOVEREIGNTY IN THE CHARTER AND PRACTICE OF THE UNITED NATIONS 219-59 (1970). E. Lauterpacht argues that the Arabs were not denied their right of self-determination. He cites Togoland and the Cameroons as examples of single territories that have been divided on the basis of self-determination, and contends, that the principle of self-determination need not only apply to a single territorial unit. The Jews were not to decide for the Arabs, nor were the Arabs to decide for the Jews. “[T]he decision of the United Nations to recommend the partition of Palestine, far from being a denial of the right of self-determination, was in fact, a direct application of the principle.” Lauterpacht, supra note 29 at 942; See League of Nations, Report of the Commission of Rapporteurs on the Aaland Islands, April 16, 1921, L.N. Doc. B.7 21/68/106. (This was the only formal report on self-determination before World War II). “Although the principle of self-determination of peoples plays an important part in modern political thought, especially since the Great War, it must be pointed out that there is no mention of it in the Covenant of the League of Nations. The recognition of this principle in a certain number of international treaties cannot be considered as sufficient to put it upon the same footing as a positive rule of the Law of Nations. . . .” Id. But see, Bassioni & Fisher supra note 20, at 448-52. According to Julius Stone, Professor of International Law at the University of Sydney, “[t]he Palestinian Arabs were merely a peripheral rather than a distinctive segment whose interests as such were taken into account. Consequently, to present a Palestinian ‘entity,’ and people presumably emergent in the 1960’s . . . is an unwarranted and dubious game with history.” Stone, Peace and the Palestinians, 3 N.Y.U.J. Int’l L. & Pol. 247, 250 (1970). Cf. “The acceptance of self-determination as a legal principle by the various instruments of the United Nations Charter . . . would . . . have no bearing on the validity of the rights of the parties as they existed under the Palestine Mandate.” Gerson, supra note 70, at 28, n.88.
169 Id. at 27, n.23. Cf. note 131 supra.
effect of that ruling, therefore, was to recognize that mutual rights were established by the Palestine Mandate acknowledging that the Palestinians could not have the exclusive right of self-determination in all of Palestine. Fourth, the fact that the Principal Allied and Associated Powers did not automatically cede Palestine to the Palestinians, but instead, supported the incorporation of the Balfour Declaration into the Palestinian Mandate, and accepted the entire Mandate System, suggests that the Principal Allied and Associated Powers would have annexed Palestine for themselves, if the intent of the League of Nations had been to grant exclusive sovereignty rights to the Palestinians.\footnote{7}

The Palestine Mandate was \textit{sui generis} among Mandated territories because it afforded special rights to a minority people to establish a homeland in Palestine.\footnote{172} These rights were specifically articulated and incorporated in the Preamble and Articles 2, 4, 6, and 22 of the Palestine Mandate. Article 2, for example, required the Mandatory to “secure the establishment of the Jewish National Home,”\footnote{173} in Palestine while Article 22 made Hebrew as well as Arabic and English, an official language of the mandated territory.\footnote{174} Although the Mandate granted Jews rights in Palestine which could not be interfered with by the Palestinians, it did not, however, grant the Jews exclusive right to the territory of Palestine. In fact, the Mandate also provided “that nothing should be done which might prejudice the civil and religious rights of existing non-Jewish communities in Palestine.”\footnote{175} Thus, the Palestinians as well as the Jews were the beneficiary people of the Palestine Mandate. Each had the opportunity to acquire sovereignty rights in Palestine. Sovereignty, however, would remain in abeyance until either the Palestinians or the Jews or both were able to demonstrate a self-government that would be acceptable to the League of Nations and the Mandatory as a prelude to a viable state.\footnote{176}

Unfortunately, “[n]either Arab nor Jew ha[d] any sense of service to a single state.”\footnote{177} The continuing Arab demand for exclusive rule in Palestine denied any Jewish interest in a national homeland while the Jewish demand refused to acknowledge exclusive Palestinian rule. As a result, the idea of a bi-national state in Palestine deteriorated quickly as violence and terrorism amongst the Arabs and the Jews replaced verbal threats. Although Great Britain recognized as early as 1937, the impracti-
callities of a bi-national state in Palestine, Britain rejected a partition plan proposal from the Royal Commission and opted instead to reaffirm its controlling power in Palestine. It was not until 1947, that Great Britain realized that it should no longer control the escalating violence between the Arabs and the Jews. That realization, coupled with international protest against British restrictive Jewish immigration policies in light of the Nazi Holocaust, forced Britain to renounce its role as Mandatory and submit the Palestine issue to the United Nations.179

C. The Competency of the United Nations to Review the Palestine Issue

When Britain submitted the question of Palestine to the General Assembly, and the Assembly passed its Palestine Partition Resolution, the Palestinians immediately rejected the binding effect of that resolution. They argued that (1) the Resolution denied them their right to self-determination; (2) the resolution was contrary to the requirements of the Palestine Mandate and (3) the Resolution exceeded the power granted to the Assembly by the Charter of the United Nations.180 The Jewish position, however, was that “[o]nly the United Nations is competent to determine the future of the territory, and its decisions, therefore, ha[d] a binding force.”181 The Palestinian arguments on self-determination and breach of Mandate must fail for the same reasons they failed when the

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The following year, the Woodhead Commission, set up by England to review the possibility of partition of Palestine, rejected a Jewish proposal which endorsed partition but suggested that the new city of Jerusalem and Mount Scopus be included in the Jewish State. By 1939, Great Britain was disillusioned with the idea of partition and announced in the McDonald White Paper its intention to establish an Arab majority in an independent Palestinian State with Jerusalem as its capital. The League of Nations rejected the proposal because it violated the obligation of the Mandate. See The British White Paper of May 17, 1939, COMMAND PAPERS 6019 (1939), reprinted in III DOCUMENTS: THE ARAB-ISRAELI CONFLICT (J. Moore ed. 1974).

The Morrison Grady Plan of 1946, was a proposal that Palestine be transformed into a cantonal state consisting of two autonomous Jewish and Arab Provinces, and two areas, one of which included Jerusalem, to be controlled by a central government. The Jews and the Arabs rejected the plan and the United Nations refused to recognize it. Morrison Plan, COMMAND PAPERS 7044 (1946).

179 A. Gerson, supra note 99, at 47.


Mandate System was originally initiated. The Mandate did not establish exclusive Palestinian rights in Palestine; it established mutual rights for the Palestinians and the Jews. The Mandate never explicitly required that those mutual interests coexist to form one sovereign state. Both interests in Palestine were contingent upon an ability to demonstrate statehood and subject to the approval of the League of Nations and Britain. Without that approval, sovereignty could not vest in either party. Although a bi-national state in Palestine was an impractical expectation, as a result of adverse claims to the territory, the opportunity for each people to acquire sovereignty rights in parts of Palestine, remained a practical approach in administering the Mandate.\(^{183}\) The U.N. Partition Plan did not conflict with the requirements of the Palestine Mandate, nor did it create new legal rights to the detriment of old ones.\(^ {184}\) On the contrary, the United Nations Partition Plan was the only practical way available to administer the Mandate without violating the specificity of the Mandate’s terms.\(^ {185}\)

The United Nations’ competency to review the situation in Palestine was confirmed retroactively in the case of the International Status of South West Africa, an advisory opinion by the International Court of Justice,\(^ {186}\) which expressed the view that the status of a mandated territory could be altered only with the consent of the United Nations. Moreover, the International Court of Justice in the Namibia case\(^ {187}\) recognized that the United Nations General Assembly could make legally binding decisions which went beyond its normal recommendatory role when it acted as a substitute for the defunct League of Nations.

\[\text{[T]o deny to a political organ of the United Nations which is a successor to the League in this respect, the right to act, on the argument that it lacks competence to render what is described as a judicial decision would not only be inconsistent but would amount to a complete denial of remedies available against fundamental breaches of an international taking... (I)nt would not be correct to assume that, because the General Assembly is in principle vested with recommendatory powers, it is debar-}\]

\(^ {183}\) See The Palestine Mandate, supra note 46 at 74. Feinberg, The Arab Israeli Conflict in International Law, supra note 32, at 448-50.

\(^ {184}\) But see, J. CASTANEDA, LEGAL EFFECTS OF UNITED NATIONS RESOLUTIONS 131-35 (1969).

\(^ {185}\) This is so because both the Palestinians and the Jews eagerly wanted their own state and undoubtedly would not accept a United Nations Trusteeship. Because the Palestine Mandate granted mutual rights, the only sensible alternative for the United Nations was to separate Palestine and give both beneficiaries a state.


red from adopting, in specific cases within the framework of its competence, resolutions which make determinations or have operative design.\textsuperscript{188}

No international organization at that time, was better suited than the United Nations to determine the future government of Palestine and to preserve the mutual rights of the people within it. Great Britain as Mandatory could not unilaterally terminate the Mandate, or decide the political future of Palestine, without approval of the League of Nations.\textsuperscript{189} Since Chapter XI of the United Nations Charter corresponds to the principles embodied in Article 22 of the League's Covenant,\textsuperscript{190} the logical replacement for the League of Nations when it became a defunct organization, was the United Nations.\textsuperscript{191}

The United Nations, however, was limited in interpreting its role and its relationship with Palestine and its Mandate, to the terms of its Charter. Pursuant to Article 80, it could not impose a trusteeship over a Mandated territory if it were “to alter in any manner the rights whatsoever of any states or any peoples or the terms of existing international agreements. . . .”\textsuperscript{192} Accordingly, the United Nations could not acquire rights in Palestine that did not belong to the League of Nations, nor could it usurp the rights from the beneficiaries of the Mandate.\textsuperscript{193} Moreover, it could not acquire sovereignty in any part of Palestine. Sovereignty remained in abeyance until the Mandate was terminated and a state would acquire it through legal means. It could only act within the scope of the Palestine Mandate and assume the responsibilities of the League of Nations. It had three choices that would not be repugnant to the Mandate:

\textsuperscript{188} Id. at 49-50.
\textsuperscript{189} Article 27 of the Palestine Mandate provides as follows: “The consent of the Council of the League of Nations is required for any modifications of the terms of this Mandate.” The Palestine Mandate, supra note 46 at 82.
\textsuperscript{190} See note 46 supra and accompanying text.
\textsuperscript{192} U.N. Charter, art. 80.
\textsuperscript{193} “The assembly could not by its resolution give the Jews and the Arabs in Palestine any rights which either did not otherwise possess: nor, correspondingly, could it take away such rights as they did possess.” Lauterpacht, supra note 29, at 940.
(1) terminate the Mandate and place the Mandated territory within the framework of its Trusteeship System; (2) terminate the Mandate and allow sovereignty rights to vest in the Palestinians and Jews in separate states; (3) establish a proposal that combined the best of both choices. Its decision was to endorse a partition plan and a trusteeship over Jerusalem.\textsuperscript{194}

The United Nations Partition Plan was not only legally correct, but politically sound.\textsuperscript{195} It provided for an equitable reconciliation between adverse parties with mutual rights, by allowing each to establish self-government and obtain sovereign control over respective areas. Its decision to make Jerusalem a corpus separatum was also legitimate.\textsuperscript{196} The proposal to internationalize Jerusalem did not violate the requirements of the Palestine Mandate. Although Article 5 of the Mandate prohibited any Palestinian territory from being “ceded or leased . . . or in any other way placed under the control of the Government of any foreign power,”\textsuperscript{197} it did not prohibit “the Mandatory from entering into . . . arrangements as he may deem reasonable . . . with the Administration [of Palestine]” to guarantee and protect the Holy Places and religious buildings in Palestine.\textsuperscript{198} The United Nations’ special objective in internationalizing Jerusalem was “to protect and to preserve the unique spiritual and religious interests located in the city . . . [and] to foster cooperation among all the inhabitants of the city . . .”\textsuperscript{199} Accordingly, its objective was the same as that of the League of Nations. Its solution, however, was different. As long as the United Nations did not usurp from the Palestinians and Jews their potential sovereignty interests in Jerusalem\textsuperscript{200} as a part of Palestine,\textsuperscript{198} the Palestine Mandate, art. 5, supra note 46, at 76.


195 See O. Asamoah, The Legal Significance of the Declarations of the General Assembly of the United Nations 68-75 (1966). But see Cattan, supra note 46, at 42: “Neither the Palestinians nor the Arab states have accepted the resolution for the partition of Palestine. They consider it to be invalid and of no effect. Their attitude is based upon political, historical and judicial considerations.” See note 137 supra.


197 The Palestine Mandate, art. 5, supra note 46, at 76.

198 Id. art. 13, at 78.


200 According to the terms of the United Nations Partition Plan, the Trusteeship Council was required to reexamine the trusteeship over Jerusalem after a ten year period. “The residents of the city shall be then free to express by means of a referendum their wishes as to possible modifications of the regime of the city.” Id. at Part III, D. See note 59, supra. Accordingly, the Palestinians and the Jews had contingency rights to acquiring sovereignty in Jerusalem.
the United Nations could experiment with the solution of internationalizing Jerusalem. By attempting to incorporate Jerusalem within its Trusteeship System, it could theoretically extend the length of the Mandate and prevent sovereignty from vesting until a future date.

D. A Binding Partition Plan

The United Nations Resolution of Partition was legally binding upon all of the parties, even though Israel was the only state to declare its independence after the Partition Plan was approved. As a result, sovereignty rights vested in the Palestinian people in the West Bank, while sovereignty rights vested in the Jews of Israel. Sovereignty in Jerusalem, however, did not vest in either party because it remained in abeyance as a result of the United Nations' intended Trusteeship. Although the Palestinians refused to accept the Partition Plan, they were rejecting it because of its limiting effect; not because they were denying their sovereignty in the West Bank. Moreover, the United Nations imposed its solution on Palestine; Palestinian acceptance was not necessary requirement for its binding effect. In reference to Jerusalem as a corpus separatum, however, the United Nations could not impose the Plan's binding effect on the people of Palestine; the requirements of the Trusteeship System implicitly prevented it. Its plan for internationalizing Jerusalem had to be accepted by the "interested" parties, as well as by the Mandatory pursuant to Article 79 of the Trusteeship System. As a result of the Palestinian refusal to accept the plan to internationalize Jerusalem, Jerusalem could not be immediately held under trusteeship. Moreover, because Jordan and Israel occupied Jerusalem in 1948, the United

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201 Gerson, supra note 70, at 35: "The United Nations resolution must . . . be termed sui generis and . . . legally binding upon the parties."

202 Pursuant to the Palestine Mandate, the League of Nations could define and interpret the terms of the Mandate. The inhabitants had the right to petition a League of Nation's decision but their consent was not needed as long as the League acted within the confines of the Mandate. As substitute for the League, the United Nations arguably did not need any permission from the inhabitants to partition Palestine. They could impose their decision because the Partition Plan was within the confines of the Palestine Mandate. See supra note 46 at 74.

203 Article 79 provides as follows: "The terms of trusteeship for each territory to be placed under the trusteeship system, including any alteration or amendment, shall be agreed upon by the states directly concerned, including the mandatory power in the case of territories under mandate by a member of the United Nations and shall be approved as provided for in Articles 83 & 85." U.N. CHARTER, art. 79. In The International Status of South West Africa [1950] I.C.J. 128,134 the I.C.J. stated that Article 80 "presupposes that the rights of states and peoples shall not lapse automatically on the dissolution of the League of Nations. It obviously was the intention to safeguard the rights of States and peoples under all circumstances and in all respects." Id.
Nations plan was effectively frustrated at the time. Yet, the United Nations prevented either the Jewish or Palestinian State from being vested with title in Jerusalem when it demonstrated its intent to put the city under a trusteeship and to postpone any Jewish or Palestinian sovereignty interest in Jerusalem for at least ten years. Although Jerusalem was not technically under trusteeship, sovereignty could not vest in any party until the United Nations demonstrated its lack of intent to internationalize the city.

Loss of title or acquisition of title to other territory in either the Jewish State or the Palestinian State could only be accomplished by the traditional methods of acquisition of territory recognized in customary international law—prescription, cession or conquest. Title to Jerusalem, however, would remain in abeyance until the United Nations abandoned its intent to internationalize Jerusalem, allowing a recognized state to acquire sovereignty through legitimate means.

E. Israeli and Jordanian Claims to Jerusalem Based on Post-1948 Occupation

Neither Israel nor Jordan was able to acquire sovereignty to Jerusalem in 1948. Jerusalem was not a res nullius vulnerable to being claimed by the first taker. Although the United Nations was unable to implement its plan to internationalize Jerusalem in 1948, it did not demonstrate any relinquishment of its intent to make Jerusalem a corpus separatum. As a result, sovereignty remained in abeyance.

Israel did have the right, however, to occupy West Jerusalem in order to protect its newly established state and the existing Jewish communities in Jerusalem. Although it could not annex West Jerusalem, it was a lawful occupant, nevertheless, because its occupation was in response to an attack by another state. It could not be called a belligerent occupant, however, because an ousted sovereign did not exist. Arguably,

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204 See note 200 supra.
205 See sec. III supra.
206 Only the League of Nations and the Mandatory would determine when their control over the inhabitants of Palestine would end. See note 166 supra. As substitute for the League, the United Nations would be vested with the same power as the League to determine when the Mandate was over.
207 See note 89 supra and accompanying text.
208 See note 158 supra.
209 According to Lauterpacht, supra note 29, at 969: “The Arabs attacking the Jews outside the area of the Jewish state and by forcibly rejecting the internationalization of Jerusalem were themselves responsible for the first Israeli expansion beyond the Partition boundaries.” Note a possible strategic claim by Israel, supra note 139.
210 See note 139 supra.
211 A presupposition of the belligerent occupant is that the ousted sovereign has a re-
Israel could remain in Jerusalem in order to protect it and its future contingent interest in the city, until the United Nations was able to implement its plan, or was able to demonstrate that it had no interest in enforcing its plan at all.

Jordan, however, did not have the right even to occupy East Jerusalem. Its actions were considered unlawful by the majority of the world because Jordanian military intervention in Palestine in 1948 was a violation of Article 2(4) of the United Nations Charter which stipulates that "all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the purposes of the United Nations."2212 Jordan was an aggressor occupant.213 Its actions were not only declared illegal by the majority of nations but also violently opposed by the other Arab states.214

F. Jordanian Claims to the West Bank

Although Jordan illegally entered Palestine in 1948, nothing prevented Jordan from obtaining its sovereignty from the Palestinians, if the Palestinians decided to cede their sovereignty rights. The Partition Plan vested sovereignty in the Palestinians and the Jews in their respective states. Consequently, each could lose sovereignty over territory by prescription and cession—the traditional methods of acquisition of territory recognized in international law. The Palestinians and Jews, however, could transfer only that territory over which they had exclusive sovereignty. The Palestinians did not have sovereignty in East Jerusalem, because as a result of the United Nations' intent to internationalize the city sovereignty remained in abeyance. Although the Palestinians could transfer their sovereignty rights in the West Bank, they could not transfer any part of Jerusalem to Jordan.215

212 U.N. CHARTER, art. 2(4).
213 Gerson supra note 70 at 7. See F. SEYERSTED, UNITED NATIONS FORCE IN THE LAW OF PEACE AND WAR 224 (1966). "It can be no longer maintained that the laws of war apply equally in all respects to the aggressors and the defenders. Basically the aggressor should not derive from his illegal act any rights under the customary rules of war." Id. But see H. KELSEN, supra note 191, at 215-16. "[S]tates are obliged to respect the territorial integrity of other states; but a violation of this obligation does not exclude the change of the legal situation. The principle advocated by some writers—ex injuria jus non oritur . . . — does not, or not without important exceptions, apply in international law." Id. See also J. BRIELEY, THE LAW OF NATIONS 172-73 (1963). "The truth is that international law can no more refuse to recognize that a finally successful conquest does change the title to territory than municipal law can a change of regime brought about by a successful revolution." Id.
214 See note 127 supra.
215 The West Bank, is under the control of the Israeli Government. Discussion of the
In 1949, Israel and Jordan signed an armistice agreement,\(^{216}\) freezing all legal claims to Jerusalem. Neither Israel nor Jordan could make any legal moves to acquire either East Jerusalem or West Jerusalem as long as the armistice remained in effect. Moreover, no party could acquire any type of sovereignty rights in Jerusalem as long as the United Nations had the intent to make it a *corpus separatum*.

Positions of occupation and sovereignty were established at the end of 1948. Israel had sovereignty in Israel proper.\(^{217}\) It did not have sovereignty in West Jerusalem, but was a lawful occupant. The Palestinians had sovereignty in the West Bank proper. Whether they ceded their sovereignty to Jordan remains an open question. The Palestinians could not, however, transfer title to Jerusalem to the Jordanians, because the Palestinians never had sovereignty in Jerusalem in the first place. As long as the United Nations intended to make Jerusalem an international city, sovereignty remained in abeyance. Jordan, was an aggressor occupant. It could not annex East Jerusalem or legally occupy it. Furthermore, the 1949 Armistice Agreement froze all claims to Jerusalem. Jordan’s position in the West Bank, however, would depend on whether the Palestinians ceded their sovereignty rights to it.

G. United Nations Inaction

From 1948 to 1949, the United Nations made a convincing effort to try to implement a *corpus separatum* in Jerusalem. Its Trusteeship Council\(^{218}\) began to prepare a Jerusalem statute.\(^{219}\) Its Palestine Concilia-

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\(^{217}\) Israel proper is that land distributed to it pursuant to the United Nations Partition Plan.

\(^{218}\) In order to facilitate the Trusteeship Council, the Council President, Roger Garreau, developed a preliminary proposal to submit to the Council at its next regular session. Garreau proposed that Jerusalem be divided into three zones: an Israeli zone, a Jordanian zone and an international zone. The Arab League called for full territorial internationalization, and Jordan opposed any form of internationalization. Israel rejected territorial internationalization but was willing to discuss functional internationalization of the Holy Places. The United Nations Trusteeship Council rejected the President’s proposal.

In 1950, the Trusteeship Council invited representatives from Jordan and Israel to appear before the Committee and express their views on the draft Jerusalem statute. The Jordanian representative repeated his government’s position that it would never recognize any international force in Jerusalem. Abba Eban, the Israeli representative, argued that the Council should not support the establishment of Jerusalem as a *corpus separatum* and stressed Jerusalem’s close ties with Israel and with Jewish interests in general. Instead, Eban endorsed a plan for functional internationalization which in effect, would create international supervision over the Holy Places. The Trusteeship Council rejected Eban’s suggestion and in turn approved a statute to provide for the government of Jerusalem as a *corpus*
tion Commission continued to negotiate with the Israel and Arab Governments trying to acquire general acceptance of the idea of an international regime in Jerusalem. In 1949, the Assembly even adopted Resolution 303/IV in which it restated its intention of internationalizing Jerusalem. The Assembly strongly favored an international city.

By 1950, however, a gradual exhaustion of a United Nations interest in internationalizing Jerusalem began to take place. Members of the General Assembly were beginning to doubt the viability of the Jerusalem plan. The Swedish and Netherland representatives introduced a proposal in which Jerusalem would remain divided between Jordan and Israel and that only the Holy Places would be internationalized, with the United Nations Commissioner as supervisor.

The Arab and Jewish States continued to denounce any attempt to internationalize Jerusalem. Both states reiterated that an international Jerusalem would not be acceptable to them. The Armistice Agreement between Jordan and Israel reflected the fact that the parties involved had

separatum. With Jordan and Israel opposing the Jerusalem statute, the Trusteeship Council refused to act until it received instructions from the General Assembly; those instructions never came. H. Bovis, supra note 37, at 76-91.

The statute for Jerusalem had 43 articles defining the scope of the statute and delineating the powers of the United Nations governor and the legislative council. Included within were provisions defining citizenship, the judicial system, access to and immigration into the city, official language and the budget for the city. See U.N. TCOR, Annex 4-24, U.N. Doc. T/118/Rev. 2 (1948). Reprinted in III ARAB-ISRAELI CONFLICT 423 (J. Moore ed. 1974) (Draft Statute for the City of Jerusalem, prepared by the Trusteeship Council, April 21, 1948).


Sweden: Draft Resolution, U.N. Doc. A/AC.38/L.63 (December 5, 1950). In essence this plan was calling for functional internationalization of the city or rather internationalization limited to the holy places in Jerusalem. Israel was willing to accept the plan, but the Arab League demanded full territorial internationalization of the city. Jordan, however, was opposed to any kind of internationalization for its section of the city. H. Bovis, supra note 37, at 78-80.

Id. at 84-85.
no intention of leaving the city. In January, 1952 the Assembly adopted a Resolution that recognized the failure of the Palestine Conciliation Commission to acquire acceptance of the United Nations' plan, and called upon the governments concerned to reach a settlement of their outstanding differences over Jerusalem.\textsuperscript{224} Although the United Nations did not explicitly abandon the idea of internationalization, neither did it explicitly mention its intention to carry out its objective to make Jerusalem an international city. From 1952 to 1967, the United Nations made it apparent that it no longer had the intent to make Jerusalem a \textit{corpus separatum}.\textsuperscript{225} It demonstrated its lack of interest by not discussing its plan for Jerusalem for a period of fifteen years.\textsuperscript{226} This inaction ripened into a new attitude—U.N. acceptance of the historical fact that Jordan occupied East Jerusalem and that Israel occupied West Jerusalem.

\textbf{H. The Legal Status of Jerusalem}

As a result of the United Nations' abandonment of its plans to internationalize Jerusalem, Jerusalem became open territory. Sovereignty would vest in the first state able to effect occupation. It was not, however, a \textit{res nullius}, open to all occupants. An alternative term is needed to better reflect its status. Because no such term exists in international law and because its status is similar to that of a \textit{res nullius}, Jerusalem will be described as a "limited \textit{res nullius}." The city was open to be occupied only by those states that had a contingent interest in Jerusalem. That contingent interest must be defined as a recognized right to be in a position to acquire sovereignty. That position could only be filled by Israel and the Palestinians represented by the Jordanian state.\textsuperscript{227} This is so because Jerusalem was part of the Palestine Mandate. The Mandate System was designed to protect the beneficiaries of the Mandate, and the beneficiaries of the Mandate were the Palestinians and Jews. Each had a con-

\textsuperscript{224} G.A. Res. 512(VI), [1951-52] Y.B.U.N. 308.
\textsuperscript{225} Lauterpacht, \textit{supra} note 29, at 957.
\textsuperscript{226} Id.
\textsuperscript{227} Even if the Palestinians did not cede their sovereignty rights to Jordan, Jordan would still be their representative. Jordan effectively quashed any Palestinian growth or political development. Jordan's ruling Hashemite elite arrested Palestinian nationalists and suppressed Palestinianism. Although it held itself out to the world as the protector of Palestinian interests, its policy was to contain the Palestinians, in order to keep control over all of the territory. Accordingly, it is best to assume that Jordan was the Palestinian representative, in order that the Palestinian contingency interest in Jerusalem was equally capable of vesting into a sovereignty right. If Jordan would have occupied Jerusalem in 1967, arguably, the right to sovereignty would belong to the Palestinians. It would be their obligation, however, to take it away from Jordan in order to prevent other methods of acquisition of territory from becoming operative. Moreover, both Israel and the United Nations considered Jordan the legal representative of any Arab interest in the West Bank or Jerusalem.
tingent interest in Palestine that could have eventually resulted in a sovereign right. As a substitute for the League of Nations, the United Nations allowed those contingent interests to evolve into sovereign rights by creating two states pursuant to its Partition Plan. The United Nations terminated the Palestine Mandate only in respect to the area of Palestine that became Israel and the Arab state. Its intent was to extend the Palestine Mandate over Jerusalem, and it attempted to do so by placing Jerusalem under a new Mandate of Trusteeship. As a result, the Palestinians and Jews still retained contingent rights in Jerusalem. Although the United Nations was unable to effectuate the trusteeship, its future intent to establish Jerusalem as an international city was enough to prevent a suspended sovereignty from vesting in either the Arab or Jewish State. When it abandoned that intent in 1952, there was no further encumbrance on the vesting of sovereignty over Jerusalem. The United Nations, in effect, left it to the two states to determine the future sovereign of Jerusalem.

The Armistice Agreement between Jordan and Israel effectively prevented any vesting of sovereignty rights. Neither Israel nor Jordan could make any legal moves to acquire sovereignty in either East or West Jerusalem as long as the armistice was in effect. The Armistice Agreement lasted for seventeen years, until 1967, when war broke out between Israel and Jordan. Jordan’s initiation of large-scale activities against Israel in 1967\[^{228}\] violated the 1949 armistice agreement and, in effect Jerusalem became an open city to be acquired by Israel or Jordan. Although Jordan breached the Armistice Agreement, it could still acquire sovereignty in Jerusalem, because Jerusalem was a limited res nullius.\[^{229}\] Nonetheless, Jordan could not acquire any legal rights in any part of Israel proper. Israel also was prevented from acquiring any sovereignty right in the West Bank because this land had a previous legitimate sovereign. How-

\[^{228}\] Most international lawyers upheld the defensive character of Israel’s action in 1967. See Shapira, supra note 65. “Even if the United Nations record on this matter falls short of establishing an affirmative finding decisively upholding the lawfulness of Israel’s action, at the very least, it provides solid support for Israel’s claim to have acted in legitimate exercise of its right of self defense.” Id. at 80. See also J. Stone, The Middle East Under Cease-Fire, 7 (1967); Wright, Legal Aspects of the Middle East Situation, 33 L. & CONTEMP. PROP. 5 (1968); Franck, Who killed Article 2(4)? 64 AM. J. INT’L L. 809, 821-22 (1970); Comment, What Weight to Conquest?, 64 AM. J. INT’L L. 344 (1970). Article 51 provides as follows: “Nothing in the present charter shall impair the inherent right of individual or collective self defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self defense shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take any time such action as it deems necessary in order to maintain or restore international peace and security. U.N. CHARTER, art. 51.

\[^{229}\] See Gerson, supra note 70, at 14-23, for an excellent discussion whether Israel or Jordan’s action in 1967 was aggressive.

\[^{230}\] See note 98 supra and accompanying text.
ever, nothing prevented Jordan or Israel from being vested with sovereignty in Jerusalem. All that had to be established was an effective occupation. By the end of the 1967 war, Israel effectively occupied the entire city of Jerusalem. East Jerusalem was reunited with West Jerusalem.

V. THE SERIOUS IMPLICATIONS OF POWER POLITICS

Since 1967, Israel has been in possession of all of Jerusalem. For thirteen years, Israel has administered the city by extending the authority of its civil government over it. The result has been a slow integration of East Jerusalem into Israel proper. Although Israel occupied East Jerusalem and the West Bank at the same time in 1967, Israel’s policies toward each have been different. In the West Bank, Israel acts as a belligerent occupant, applying a mixture of Jordanian law and military rule. In East Jerusalem, Israel acts as though sovereign. Israel’s policy has been to reunite East Jerusalem with West Jerusalem to create a single city. Although Israel has only recently officially declared that it has annexed East Jerusalem, Israel's conduct in East Jerusalem, as well as its political position that Jerusalem is non-negotiable, compel the conclusion that it has long considered itself the sovereign of all of Jerusalem.

Unfortunately, however, the determination of the correct sovereign in Jerusalem will not establish peace in the Middle East. It will only establish the justification for Israel to defend its territorial integrity and political freedom by force. International law stands behind the correct sovereign; terrorism, however, undermines its significance. The Palestinians do not accept Israeli sovereignty in Jerusalem and so they wage a war of attrition. They want Jerusalem, because it is essential to their nationality and religion, and because they believe that their claim to Jerusalem is exclusive. As a result, while Israel may have a legal right of sovereignty in Jerusalem, it may be forced by political reality to make concessions. The Russian invasion of Afghanistan, the razing of Cambodia and the Iranian seizure of the American Embassy in Teheran are current world examples.

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231 Some have suggested that Israel has sovereignty over Jerusalem because Israel's claim is superior to any other claim made. "Since . . . no state can make a legal claim to . . . East Jerusalem that is equal to that of Israel, this relative superiority of Israel may be sufficient under international law, to make Israel's possession of those territories virtually indistinguishable from an absolute title to be valid erga omnes." Y. Blum, supra note 62, at 21. "Having regard to the consideration that . . . Israel acting defensively in 1948 and 1967, on the one hand, and her Arab neighbors, acting aggressively in 1948 and 1967, on the other, Israel has better title in the territory of what was Palestine, including the whole of Jerusalem than do Jordan and Egypt." Comment, supra note 228, at 346. See note, supra note 44, for an excellent explanation on how one determines a superior claim to sovereignty pursuant to international law and the International Court of Justice.

232 See note 145 supra and accompanying text.

233 See note 147 supra and accompanying text.

234 See note 142 supra and accompanying text.

235 See note 144 supra and accompanying text.

236 Dinstein, supra note 65; Shapira, supra note 65.
that support this conclusion. Afghanistan, Cambodia, and the United States are all legally correct in their positions of sovereignty, but are all at the mercy of the illegal action of their respective political aggressors.

Although Israel has been able to guarantee its sovereignty in Jerusalem for the last thirteen years, by creating a successful military force, Israel must remain aware of its political vulnerability and the effect it can have on the nation's military strength. Israel must begin to reconsider its political alternatives. Technological advancement, political heroism, and Arab oil can ultimately have a devastating effect on Israel's security as a nation. Israel's policies in international relations and negotiations should begin to include long term objectives to reduce political tension over Palestinian claims. Israel's objectives should entail a basic premise—alleviate mounting political pressure from the Arab world by granting special rights to Palestinians in Jerusalem without transferring territorial sovereignty. Israel should make the following proposals in respect to its sovereignty in Jerusalem.

A. Functional Internationalization

Central to the special problem of Jerusalem is that the city contains some of the most sacred Holy Places to the Muslim, Christian and Jewish religions. For example, the Dome of the Rock, the Church of the Holy Sepulchre, and the Wailing Wall are all within one-half mile radius of each other. In order to alleviate the fear of Israeli interference

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237 As politics change in the Middle East so too can the balance of power. Anwar Sadat's peace initiative with Israel has enabled Egypt to gain U.S. economic and military support. See, *Egypt to Get Best Weapons as U.S. Hunts Arab Support*, The Wash. Post, supra note 1, at A18. As the Middle East becomes increasingly technologically advanced, Israel's security needs may be threatened.

238 Sadat's revolutionary move to Campaign for Peace makes Israel politically vulnerable. Every legitimate hesitance that Israel makes while negotiating with Egypt can be interpreted to show Israel as an uncompromising state. Andrew Young's resignation as the American Ambassador to the United Nations because of his PLO talks, is politically damaging to Israel, as is Prime Minister Joe Clark's political downfall in Canada partly as a result of his pledge to shift Canada's embassy from Tel-Aviv to Jerusalem. See *Newsweek* Feb. 18, 1980, at 64.

239 Arab oil is probably the most serious threat to Israel's security. Because Israel's military strength is completely dependent upon United States support, the Arab oil weapon becomes extremely effective in squeezing the United States into pressuring Israel to move on accepting Arab proposals. See J. STORK, *MIDDLE EAST OIL AND THE ENERGY CRISIS* 210 (1975); M.A. PERSION, *GULF OIL IN MIDDLE EAST AND INTERNATIONAL CONFLICTS* (1976).


241 See note 15 supra.

242 See note 7 supra.

243 See note 6 supra.
with religious freedom and the Holy Places, Israel should continue to endorse the concept of functional internationalization. Functional internationalization differs from full territorial internationalization in that it limits international control to the religious shrines and historical sites. By supporting functional internationalization, Israel in effect limits its exclusive sovereignty over Jerusalem by allowing those who hold the Holy Places sacred to be responsible for their upkeep and protection. As a result, each religious site would be free from municipal or national tax and vested with a qualified diplomatic immunity status. Preservation, maintenance, exemptions and protection of the Holy Places would be issues open to discussion. Moreover, the jurisdictional status of religious courts would have to be clarified. One possibility might be that all religious disputes are to be subject to the jurisdiction of each faith’s religious courts. For example, Koranic law would be applicable for Arab marriage, divorce, blasphemy, etc. If a dispute were to arise between two religious sects, a special court consisting of members of all of the different religious sects could have final jurisdiction.

Although Israel today does not claim exclusive sovereignty in the Holy Places in Jerusalem, and conducts its administrative policies accordingly, Israel must emphasize to the world its willingness to endorse functional internationalization or its equivalent “for working out the status of the Holy Places in a manner conducive to Middle East peace and ecumenical harmony.”

B. Dual Nationality

Israel should grant to all Palestinian Arabs who wish to live in Jeru-

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244 During the critical historical period when the United Nations took control over Palestine after Britain evaded her mandated responsibility, the United Nations was ineffectual in establishing its plan of corpus separatum for Jerusalem. Moreover it was powerless to enforce its entire 1948 Partition Plan, and later, its attempt to adapt the Jerusalem statute was a futile gesture. Accordingly, it now seems impractical to expect Israel to relinquish her control over Jerusalem in order to allow the United Nations an opportunity to establish Jerusalem as an international city.

The United Nations’ original purpose of establishing Jerusalem as a corpus separatum was to guarantee the protection of the Holy Places and to further protect the practice of religious freedom. Israel believes it has accomplished that purpose. See note 71 supra. One other consideration, is that to endorse a proposal for internationalizing Jerusalem today, without a vote of the citizens of Jerusalem, would be a denial of the right of self-determination. Today, that right is a legal right, and not just a political one. See note 168 supra.

245 See note 218 supra.


247 For a general background on dual nationality see 2 M. WHITEMAN, supra note 27 at 64-84. G. SCHWARZENBERGER, supra note 33, at 142-43.
salem, not only municipal rights, but automatic citizenship. Each Palestinian living in Jerusalem would have the same rights as any other Israeli citizen. For example, all Palestinians would have the right to life, liberty and security of person and would be accorded due process of law. No Palestinian would be subject to arbitrary interference with his privacy or attacks upon his reputation. All Palestinians would have freedom of religion, speech, press, and the right to vote in municipal as well as state elections.

Besides granting Palestinian Arabs immediate Israeli citizenship, Israel should support the initiation of a dual nationality system for the future. This suggests that the future representative of the Palestinians, whether it be Jordan, the Palestine Liberation Organization, or some other representative of Arab choosing, should afford the Palestinians in Jerusalem nationality in a Palestinian state. As a result, the Palestinians living in Israel would have a dual nationality. The purpose of dual citizenship for the Palestinians is basically twofold. The first relevant aspect of dual nationality is that the Palestinian Arabs could live peacefully in Jerusalem and have all the rights of Israeli citizens, while having national ties to a Palestinian State. The second and more important aspect of dual citizenship would be that a Palestinian State would have the potential to regulate and protect its citizens living in Jerusalem. To implement this latter arrangement of Palestinian protection, Israel would have to support a limited principle of extraterritorial jurisdiction.

C. Extraterritorial Jurisdiction

The concept of extraterritorial jurisdiction in international law basically allows one state to give another state the right to exercise a certain amount of jurisdiction in its territory with respect to certain persons. Extraterritorial jurisdiction at one time was a "common feature of international relations." It was generally allowed by way of arrangements, called capitulations, and treaties confirming them, giving exclusive jurisdiction to the foreign state over its nationals for civil and criminal acts committed in the resident state.

Extraterritorial jurisdiction was considered "[a]n expedient for the facilitating of contacts and relations between parties and groups whose history, philosophy, political organization, jurisprudence, and administration of justice were widely dissimilar; it was intended to diminish friction, minimize causes of conflict, and contribute to maintenance of conditions of

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248 See notes 99 & 123 supra.
249 See 2 M. WHITEMAN, supra note 27, at 278. (Exemptions from Territorial Jurisdiction).
250 Id.
Moreover, it was generally implemented by Western states because of their distrust of Eastern governments in affording western nationals effective protection. For example, on the basis of treaties between Morocco and the United States, the United States had rights of extraterritorial jurisdiction in Moroccan territory. As a result, American nationals who committed crimes in Morocco were tried, not by the Moroccan courts, but by the American Consul and American law. A defendant could appeal from the consular court to the American Minister in Tangiers.

Although extraterritorial jurisdiction is a disappearing concept in international law, its application to Jerusalem would be appropriate in a limited form. Israel would allow the Consul of the Palestinian State to reside in Jerusalem and exert jurisdiction over its nationals for civil and criminal transgressions. The effect of such an arrangement would be to diminish Israel’s exclusive sovereignty in Jerusalem, by allowing the Palestinian Consul to protect its nationals pursuant to its own laws. The Palestinian Consul’s extraterritorial jurisdiction, however, would be limited by the original choice of the Palestinian defendant. He would have the exclusive right to determine whether he would be tried by the Israeli courts or Palestinian courts. This would be so, because the Palestinian national is also an Israeli citizen and not just an alien.

D. Legislation

Jerusalem cannot be divided into boroughs and be expected to work as a unified city. Nor will allowing the Arab Palestinians a propor-

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252 2 M. WHITEMAN supra note 27, at 275.
253 Id. at 299.
254 See generally 6 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 278 (1963). See also note 1 supra.
255 It would be for Israel to determine how broadly or narrowly to interpret “civil and criminal breaches.”
256 Teddy Kollek, Mayor of Jerusalem, believes Jerusalem should be administered under a form of borough government, modeled after London’s. A large degree of autonomy would be provided to the Arab “borough” through self rule. Mr. Kollek concedes his plan falls considerably short of Arab sovereignty and recognizes that his plan has not won Arab acceptance.

tionate municipal vote in electing a mayor suffice. In order to provide political equality, Israel should implement a plan for the municipal government of Jerusalem which incorporates both equal and proportionate representation for Arabs and Israelis. A bicameral legislature should be established in furtherance of this goal. The first branch should be elected by proportional voting. Jerusalem would be divided by Israeli and Arab districts. The number of representatives to be elected for each district would be determined proportionately by the population. However, the number should be kept small in order to create an effective legislative body. The second branch should be composed of an equal number of elected Palestinians and Jews. The number of representatives in this branch should also be small so that the legislature would be able to work with minimal confusion. The function of the bicameral legislature would be to propose legislation for the city. Proposals for legislation could begin in either branch, but its passing would require a superior vote in its favor from both branches of the legislature. A mayor would have the duty of implementing the legislation. He would be elected to office by a popular vote majority, and would have veto power over the Jerusalem legislature.

Having a unified government in Jerusalem rather than two municipalities will help satisfy an Arab complaint of political inequality and will advance economic growth and the stability of Jerusalem as a single city. The legislature would have the obligation of creating joint Arab-Israeli police, fire and rescue squads, as well as unified water and electrical systems.

VI. CONCLUSION

Israel is the current legal sovereign of Jerusalem. It acquired the city pursuant to international law and as a result, has the right to protect its sovereignty and territory by the use of force. For thirteen years, Israel has been able to maintain its sovereignty in Jerusalem because of superior armies. Presumably, Israel will continue to protect its land in the future in the same manner. Israel's military strength, however, is not exclusively dependent on self-reliance. Israel's security as a sovereign in Jerusalem and ultimately, as a nation, is dependent on international stability and the inability of the Arab world to undermine that stability. This fragile formula, however, should not be relied on by Israel to last forever. Mounting political tensions and international relations are already reflecting a shift against Israel. 287

287 See Oil Pressure, The Wall St. J., Apr. 7, 1980, at 1, 27. Consider President Carter's recent international blunder in supporting Res. 465 which denounced Israel for trying to change the status of Jerusalem. This was the first time the U.S. endorsed such a Security Council announcement since the creation of Israel. Although the U.S. repealed its vote, its original action reflected a potential threat to Israel's security. S/Res. 465 U.N. Doc. S/P.V. 2203 (1980).
The key to the solution is reevaluation. Israel must reevaluate its national policy concerning Jerusalem. Although Israel has the right to be sovereign, it must reconsider long-range goals in guaranteeing that right. Military strength cannot be the sole answer. Israel must defuse Arab pressure and propaganda in the international community by providing a package that will grant the Palestinians sovereign rights in Jerusalem without undermining Israel's territorial sovereignty. The Arab world must reevaluate its approach to Jerusalem and should contemplate a worthy response to an Israeli effort. The international community should encourage both. Jerusalem must once again symbolize to the world a city of coexistence, a city of faith, and above all, a city of peace.