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The Status of Jerusalem under international law

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The Status of Jerusalem¹

By M. de Blois and A. Tucker

Introduction

The status of Jerusalem is one of the main legal issues in the debate on Israel and its relationship to the Palestinian Arabs. In order to address misunderstandings and the distortions of the position of Jerusalem, this paper explains the legal aspects of the status of Jerusalem in a historical perspective.

Jerusalem in a Historical Perspective

For the Jewish people, the Old City of Jerusalem is an essential and inexorable part of their identity as Jews. This is clear from many texts in the Tanakh (Old Testament). It was the location of the Binding of Isaac, on Mount Moriah (now the Temple Mount). The seat of the Kings of Israel (and later Judea) was there since times of King David (1000 BCE). It was the location of the First Temple, built by King Solomon, and the Second Temple, built after the Babylonian exile. It was the city where the Maccabees restored the Temple service. It is the place where Jews believe the Messiah will come. Since the destruction of Jerusalem in 135 CE, Jews worldwide have been praying daily to return to Jerusalem: This city manifests the essence of the Jewish people. It represents their past, their present and their future as a people.

For Christians, Jerusalem will always be associated with the teaching, crucifixion, death and resurrection of Jesus as recorded in the Gospels, and it is the city from which his apostles started their missionary ventures. The Arab/Islamic connection with Jerusalem dates from the Arab conquest of Palestine in the 7th century CE. The keys of Jerusalem were handed by the Christian patriarch to the Saracen commander in 638. Although not mentioned in the Quran, Jerusalem – called al Quds by the Muslims – is associated with a miraculous nocturnal journey of Muhammed and revered as a holy city.

The history of Jerusalem is complex, and it is certainly not possible to do it justice here. Suffice to say that in the 18 centuries between 135 CE and the fall of the Ottoman Turkish Empire in 1917, Jerusalem was controlled by a series of foreign powers and kingdoms: Romans, Byzantines, Arabs, Crusaders, Mamelukes and Ottomans.² Each empire had a different perspective on the importance and significance of Jerusalem. But, with the exception of the Crusaders' Latin Kingdom of Jerusalem (1099-1291), at no time was Jerusalem the capital of any of those empires. Under the Ottoman Empire (1517-1918), Jerusalem was home to Jews and non-Jews. It went through various fortunes, depending on the Ottoman leadership of the time. In the 16th and 17th centuries, one of the lowest periods in its history, Jerusalem counted only 10,000 inhabitants.³ In the mid-1800s, Palestine (and Jerusalem in particular) started attracting more and more international attention as the European powers (especially Britain, France, Germany and Russia) sought to extend their influence in the area and awaited the collapse of the 'Sick Old Man'. Between 1918 and 1920, Jerusalem was under British occupation, as was all of Palestine.

Anticipating the British Mandate for Palestine entering into force, British occupation in 1920 was replaced by a civil administration. From 1923 to 1948, Jerusalem was part of the Mandate for Palestine. Jerusalem has always had a mixed population and has never been an ‘Arab’ city. In 1881, Jews constituted 52 percent of the population of Jerusalem. In 1914, Jews constituted 42 percent of the population of Jerusalem, which, by then, had extended beyond the Old City walls. In 1948, there were 100,000 Jews in the whole of Jerusalem, and 65,000 Arabs. In 2011, the population of Jerusalem was composed of 497,000 Jews, 281,000 Muslims, 14,000 Christians and 9,000 people without stated religious affiliation.⁴

Jerusalem as Part of the Territory of the State of Israel

Jerusalem as a whole is part of the territory of the State of Israel. This contested statement will be defended here. In order to substantiate this claim, we will investigate the legal aspects of the existence of Israel in historical perspective.

The Balfour Declaration

It makes sense to start the survey with the *Balfour Declaration* of 1917. This unilateral declaration of the British Government paved the way for the legal developments that resulted in the establishment of Israel as a sovereign state. It declares that the British Government favours the establishment of a Jewish national home in Palestine. Whatever the debate on the borders of the Mandate territory, it is beyond any doubt that the city of Jerusalem as a whole belongs to the territory destined for the Jewish national home. It can be argued that the Balfour Declaration itself as a unilateral declaration of a sovereign state has created a binding obligation for the British Government. But the most important role of the Balfour Declaration in legal and political terms is without a doubt its influence on subsequent legal instruments, dating from the years after the First World War. The San Remo Resolution and the Mandate for Palestine both paved the road to the establishment of the State of Israel.

The San Remo Resolution

The *San Remo Resolution* was adopted by the Supreme Council of the Principal Allied and Associated Powers⁵ (Britain, France, Italy, Japan and the USA) in April 1920. Their purpose was to deliberate on the future of those territories that had been captured from the Ottoman Empire at the end of the World War I. As victors, the Allies had gained, in conformity with the standards of international law at that time, extensive rights and powers over these territories.⁶ The Resolution includes the substance of the Balfour Declaration, quoting it almost literally. Therefore, we can safely assume that the Allies meant for Jerusalem to be part of the area where the Jewish national home should be established.

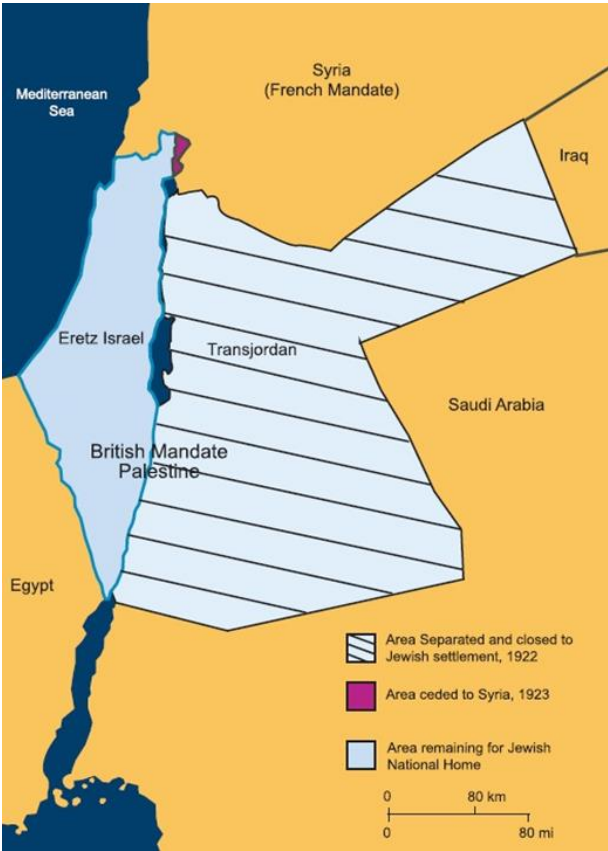
The Mandate for Palestine

The next step is the *Mandate for Palestine*, the most elaborate incorporation of the Balfour Declaration. The Mandate was adopted by the Council of the League of Nations on 24 July 1922 and entered into force on 29 September 1923.⁷ It demonstrates the acceptance of the principle, initially adopted by the British Government and subsequently by their allies, by the then-existing international community as a whole. Article 2, the central provision of the Mandate, states:

‘The Mandatory shall be responsible for placing the country under such political, administrative and economic conditions as will secure the establishment of the Jewish national home, as laid down in the preamble, and the development of self-governing institutions, and also for safeguarding the civil and religious rights of all the inhabitants of Palestine, irrespective of race and religion.’

The Mandate, as with the preceding texts, does not mention Jerusalem, although it is obviously included in the reference to the territory of Palestine. But even more can be said. The Preamble of the Mandate gives a rationale for the decision to bestow the obligation on the Mandatory to establish the Jewish national home in Palestine. It is ‘the historical connection of the Jewish people with Palestine and ... the grounds for reconstituting their national home in that country.’ This gives international legal effect to both the close relationship that the Jewish people has with the land from Biblical times, as well as to the urgency for granting them a national home

arising from the centuries of persecution in the Diaspora. There is maybe no place in the country that is so evidently connected to the history of the Jewish people as Jerusalem, the location of the First and the Second Temple and the seat of the kings of Israel and Judea. According to the Mandate, the national home that had existed in Biblical times was to be restored. As it was in Biblical times, Jerusalem could become again the centre of the national home. Is it no surprise that the Mandate includes a specific provision on the Holy Places, the most prominent of which are located in Jerusalem. Article 13 provides that the Mandatory is obliged to respect existing rights and ensure free access to these places. Additionally, Article 6, which provides for a right of immigration and settlement for Jews in the Mandate territory, is relevant in connection to Jerusalem. Under the Mandate, Jews could immigrate to and settle down in Jerusalem.



The British Mandate (Source: YESHA Council)

The Legal Relevance of the Mandate

To conclude the remarks on the Mandate, we observe that the rights of the Jewish people created by the Mandate are still relevant in legal terms, even after the League of Nations was dissolved in 1946 and the mandate system had come to an end. That relevance is ensured by Article 80 of the Charter of the United Nations which provides that: ‘Except as may be agreed upon in individual trusteeship agreements, made under Articles 77, 79, and 81, placing each territory under the trusteeship system, and until such agreements have been concluded, nothing in this Chapter shall be construed in or of itself to alter in any manner the rights whatsoever of any states or any *peoples* or the terms of existing international instruments to which Members of the United Nations may respectively be parties.’⁸

This provision constitutes part of the transitional arrangements from the system of Mandates under the League of Nations to the system of Trusteeships under the UN Charter. No attempt was made to place Palestine under the Trusteeship system: A Trusteeship Agreement for Palestine was never created.⁹ Article 80 of the UN Charter is often referred to as the Palestine Article or the Palestine Clause. This indicates that it was drafted with the Palestine Mandate in mind.¹⁰ All of this is of legal relevance when it comes to the status of the ‘disputed territories’, including ‘East Jerusalem’ and not to forget the rights of the Jewish settlers who live in areas that are part of the original Mandate territory, such as ‘East Jerusalem’. In addition, we should point at the principle of *uti possidetis juris*, determining that the



The Partition Plan (1947)

(Source: YESHA Council)

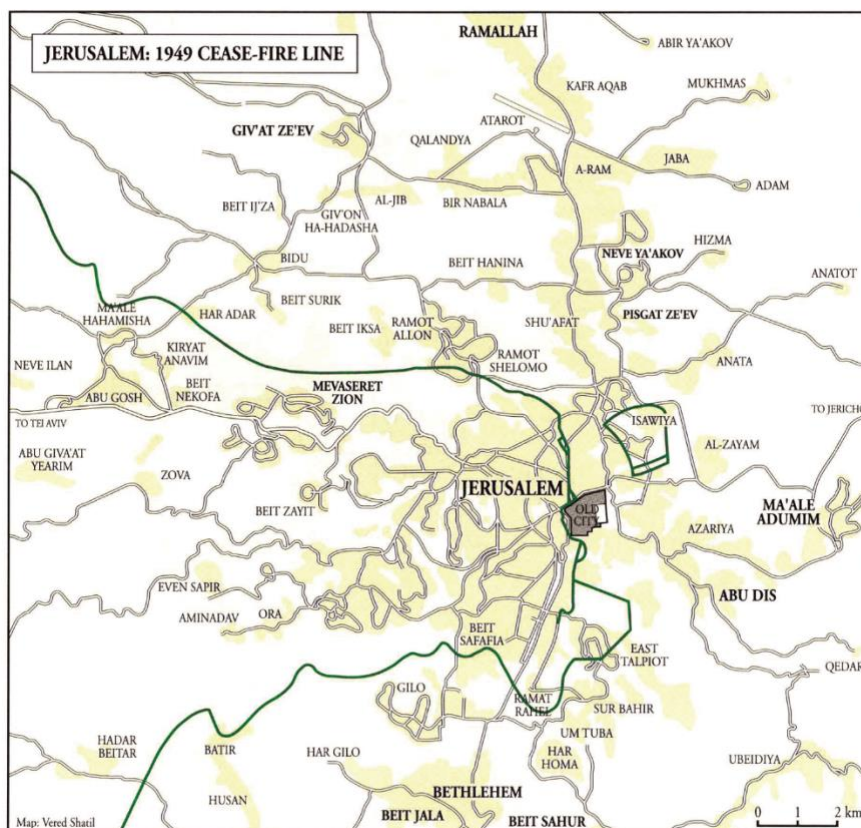
borders of a new State on becoming independent are the pre-existing administrative borders. As a consequence, the entire Mandate territory, including Jerusalem as a whole, became the territory of Israel.¹¹

Jerusalem and the Partition Plan

In 1947, the British administration finally announced its intention to terminate Britain’s responsibilities under the Mandate. As we have seen already, no Trusteeship regime was ever established under the UN Charter. The United Kingdom simply requested the UN General Assembly (GA) to put Palestine on its agenda and to make recommendations with regard to the future administration of Palestine. A UN Special Committee on Palestine (UNSCOP) was set up, and its work resulted in a proposal for a resolution.¹² On 29 November 1947, its proposal was adopted by the GA: thirty-three votes in favor, thirteen

against, and ten abstentions. In this Resolution 181(II), the GA made a non-binding recommendation to implement a Partition Plan for Palestine. This plan envisioned the creation of two states – one Jewish and the other Arab – while Jerusalem was to be ‘internationalized’. No consensus was reached about what this internationalization should consist of. The Vatican¹³ and others insisted on *territorial* internationalization of the Old City, whereby the Old City would become legally unique, a *corpus separatum*. Others, such as the United States,¹⁴ while not recognizing Israel’s or Jordan’s claims to sovereignty, favoured functional internationalization of Jerusalem. The United States submitted proposals granting a significant level of administrative autonomy over the Old City for Israel and Jordan. Under enormous pressure to find an immediate solution for the (approximately) 150,000 European Jewish survivors of the *Shoah*, the Jewish Agency accepted the Partition Plan. The Arabs immediately rejected the Partition Plan, arguing that the GA was not authorized to make such a recommendation and that it was in breach of the rights of the Arab residents of Palestine to determine their own political future.¹⁵ The Arabs did not accept the presence of a Jewish state on what they apparently considered to be Arab territory, which had been under Islamic dominion.

In December 1949, the GA adopted Resolution 303(IV), which contemplated the establishment of an international regime over the Jerusalem area, and called for the Trusteeship Council to draft a statute for Jerusalem. A draft resolution along these lines was presented to the GA in December 1950, but it proved



impossible to find a two-thirds majority supporting the proposal. Gradually, it became clear that the UN was unable to create an international regime for Jerusalem, whether territorial or functional. The whole

idea was abandoned in early 1952, when Resolution 512 (VI) was adopted, urging Jordan and Israel to ‘take appropriate steps’ to resolve their differences. No reference more was made to the internationalization of Jerusalem. The whole idea of establishing a *corpus separatum* for Jerusalem was thereafter ‘allowed quietly to drop’.¹⁶

Jerusalem and the Establishment of the State of Israel

When the British Government relinquished its responsibilities under the Mandate in 1948, the Jewish leadership proclaimed the independence of the State of Israel. Not surprisingly, the *Declaration of the Establishment of the State of Israel*, of 14 May 1948, refers to the Balfour Declaration and the Mandate of the League of Nations ‘which, in particular, gave international sanction to the historic connection between the Jewish people and Eretz-Israel and to the right of the Jewish people to rebuild its National Home.’ So, even if Jerusalem is not explicitly mentioned in the *Declaration of the Establishment of the State of Israel*, there is no doubt that it belongs to *Eretz-Israel*, which is mentioned several times as the territorial substratum of the new State. Immediately after Israel proclaimed its independence, it was attacked by five Arab States, including (Trans-)Jordan, which captured the eastern part of Jerusalem, including the Old City. It expelled all Jews and destroyed the synagogues. Pursuant to the Armistice Agreement between Israel and (Trans-)Jordan (1949), the City was divided in West-Jerusalem, under Israeli control and East Jerusalem, including the Old City, under (Trans-)Jordanian control. From Article II of the Agreement it can be clearly inferred that the demarcation line was never meant to be an international border. Contrary to Article VIII, after the cessation of hostilities, Jews were not allowed to pray at the Western Wall (*Kotel*) in the Old City.

On 5 December 1949, the Israeli Cabinet declared that Jerusalem was the capital of Israel.¹⁷ This was confirmed by the Israeli Parliament, the Knesset, on 23 January 1950.¹⁸ Less than a month earlier, the Knesset had moved permanently to Jerusalem. Subsequently, in 1950, Jerusalem was annexed by (Trans-)Jordan, in violation of international law.¹⁹ The capital of what now was called Jordan remained Amman. In 1953, however, King Hussein declared ‘East Jerusalem’ to be ‘the alternative capital of the Hashemite Kingdom’.²⁰

Jerusalem after the Six-Day War

As the outcome of the Six-Day War in 1967, when Jordan had attacked Israel again, Israel reunified Jerusalem, restoring the situation as it existed under the Mandate. The Knesset adopted legislation, the *Law and Administration Ordinance (Amendment No. 11) Law, 1967*, to ensure the application of Israeli law in both parts of the City. In addition, it amended the *Municipalities Ordinance* to make it possible to extend the boundaries of a municipality in case it had been decided to bring an area under Israeli jurisdiction. This obviously also regarded the municipality of Jerusalem. Also in 1967, the Knesset adopted the *Holy Places Law, 1967*, to ensure the protection of the holy places and the free access thereto.²¹ Since 1967, the free access to the holy places of Jews, Christians and Muslims in Jerusalem is

guaranteed by Israel. After the reunification of Jerusalem, Israeli citizenship was not imposed on the residents of East-Jerusalem. They do have, however, the option to apply for it, a choice that has not been made by many.²² Those who are not citizens are permanent residents of Israel.²³ While the Israeli government did not use the term ‘annexation’,²⁴ it can safely be assumed that the legal measures taken by Israel made it clear that it considered Jerusalem to be part of the State of Israel.²⁵ As we have seen, this position is completely in conformity with international law. However, UN Resolutions since 1967 have consistently condemned Israel’s exercise of control over East Jerusalem (including the Old City) as in breach of international law. On 4 July 1967, the GA adopted a Pakistani draft on the situation in Jerusalem.²⁶ Resolution 2253 (ES-V)

declared that the GA, ‘deeply concerned at the situation prevailing in Jerusalem as a result of the measures taken by Israel to change the status of the City,

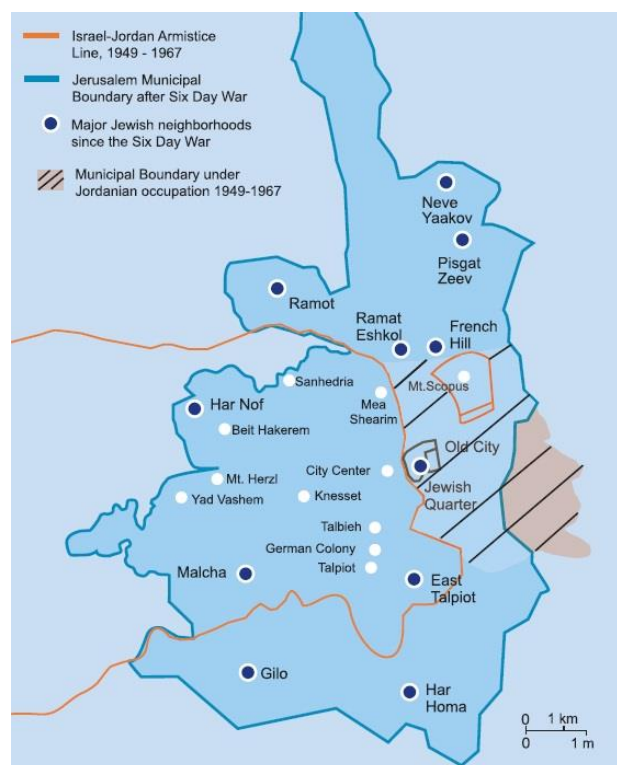
1. considers that these measures are invalid,
2. calls upon Israel to rescind all measures already taken and to desist forthwith from any action which would alter the status of Jerusalem,
3. *Requests* the Secretary-General to report to the General Assembly and the Security Council on the situation and on the implementation of the present resolution not later than one week from its adoption.’

Ten days later, on 14 July 1967, Resolution 2254 (ES-V) was adopted along similar lines:

‘Having received the report submitted by the Secretary-General, taking note with the deepest regret and concern of the non-compliance by Israel with resolution 2253 (ES-V), the General Assembly reiterates its call to Israel in that resolution to rescind all measures already taken and to desist forthwith from taking any action which would alter the status of Jerusalem.’

The Security Council (SC) followed suit less than a year later, on 21 May 1968, with Resolution 252 (1968), in which it:

‘... 2. *Considers* that all legislative and administrative measures and actions taken by Israel, including expropriation of land and properties thereon, which tend to change the legal status of Jerusalem are invalid and cannot change that status;’ and



Jerusalem Municipal Boundary (after the Six-Day War)
(Source: YESHA Council)

‘3. *Urgently calls* upon Israel to rescind all such measures already taken and to desist forthwith from taking any further action which tends to change the status of Jerusalem;...’

This Resolution was adopted with 13 votes in favour, while Canada and the United States abstained. The United States, while refusing to acknowledge the legitimacy of Israel’s extension of law to East Jerusalem, did not vote in favour of this resolution condemning Israel.

About a year later, on 3 July 1969, the SC used even stronger language in a similar resolution on Jerusalem. In this Resolution 267 (1969) the SC said that it:

‘... 3. *Censures* in the strongest terms all measures taken to change the status of the City of Jerusalem;...’

This time, the Resolution was adopted unanimously. From what has been explained above, there are good reasons to conclude that both the GA and the SC have adopted resolutions at variance with international law.

United Jerusalem as the Capital of Israel

As was related above, on 5 December 1949, Jerusalem was declared to be the capital of Israel by the Israeli Cabinet.²⁷ This was confirmed by the Knesset on 23 January 1950.²⁸ Thirty years later, after the Six-Day War and the reunification of Jerusalem, the Israeli Parliament saw reason to address the position of its capital again.

Basic Law: Jerusalem the Capital of Israel

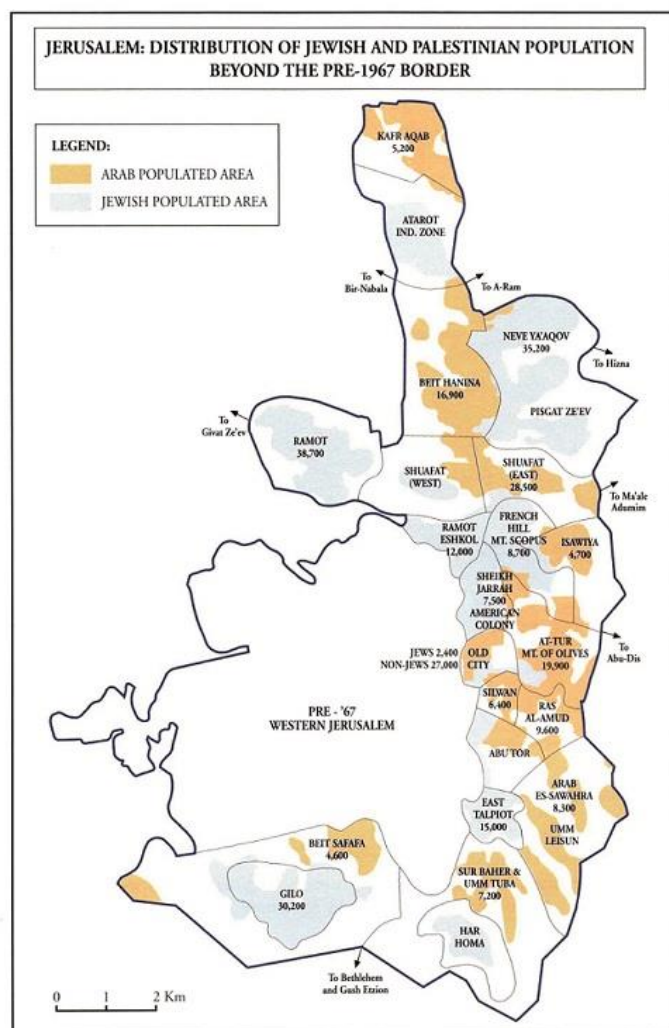
On 30 July 1980, the Knesset passed a law (known as the ‘Basic Law: Jerusalem the Capital of Israel (5740-1980)’) establishing Jerusalem as the undivided capital of Israel. It declares in section 1 ‘Jerusalem, complete and united’ to be ‘the capital of Israel’. It determines further, in section 2, that ‘Jerusalem is the seat of the President of the State, the Knesset, the Government and the Supreme Court.’ In section 3, it guarantees the protection of the Holy Places from desecration and from the violation of the freedom of access of the members of the different religions. The Basic Law also contains a provision on the governmental support of the development and prosperity of Jerusalem (section 4). This Basic Law was amended in 2000 by defining the limits of Jerusalem as determined after the Six-Day War on 28 June 1967. The amendment also provides that no powers concerning these limits shall be transferred to a foreign power. Both provisions had been entrenched in the sense that they only could be changed by a majority of the members of the Knesset (instead of the majority of the votes cast). On 2 January 2018, the Knesset again amended the Basic Law: Jerusalem the Capital of Israel, by introducing an ‘at first sight’ stronger entrenchment. It provides that the giving up of the sovereignty of Israel over any part of Jerusalem requires the support of 80 out of the 120 members of the Knesset. However, a simple majority suffices to repeal the requirement of this two-third majority. So, maybe the change is primarily symbolic. The new amendment also introduced the possibility to change Jerusalem’s municipal borders,

thereby canceling the provision introduced in 2000.²⁹ A final remark is that the Basic Law discussed here is no longer the only Basic Law that defines the status of Jerusalem. In the early hours of 19 July 2018, the Knesset adopted the Basic Law: Israel as the Nation State of the Jewish People. In section 3, it also provides that: ‘Jerusalem, complete and united, is the capital of Israel’.³⁰

International Criticism

The 1980 Basic Law was met with much international criticism. Even before its enactment, the law was condemned by the UN SC in Resolution 476 of 30 June 1980. When it entered into force, it was repudiated again in Resolution 478 of 20 August 1980.³¹ This last Resolution asserted that the Basic Law is in contravention of international law and that it does not prevent the continuing application of the Fourth Geneva Convention to the Palestinian and other Arab territories occupied since June 1967. The Basic Law and all other measures, which seek to alter the status of Jerusalem, were declared to be null and void. They were also considered to be a serious obstruction to achieving a comprehensive, just and lasting peace in the Middle East. Resolution 478 called for all states with diplomatic missions in Jerusalem to withdraw and relocate those missions. Most nations with embassies in Jerusalem relocated their embassies to Tel Aviv following the adoption of Resolution 478. Following the withdrawals of Costa Rica and El Salvador in August 2006, no country maintains its embassy in Jerusalem. Recently however, this situation has changed, as we will see below.

Like the UN, the European Union has also condemned Israel’s ‘annexation’ of the Old City and East Jerusalem as illegal³² and refuses to acknowledge Israeli claims to sovereignty over East Jerusalem. The Council of the EU held: ‘The EU reiterates that it will not recognize any changes to the pre-1967 borders including with regard to Jerusalem, other than those agreed by the parties.’³³ The Council of the EU has its own ideas on Jerusalem as a Capital: ‘The EU reiterates that a way must be found through negotiations to resolve the status of Jerusalem as the



future capital of two states. Until then, the EU calls for an equitable provision of resources and investment to the city's population.'³⁴

More recently, the Basic Law on Jerusalem has again become a stone of contention within the UN. In Resolution 2334 (2016), adopted by the SC on 23 December 2016, the criticism on Israel's position as to the status of Jerusalem is rather implicit. It condemns in its Preamble 'all measures aimed at altering the... status of the Palestinian territory occupied since 1967, including East Jerusalem...'. In its first operative paragraph it reaffirms that the establishment by Israel of settlements in this territory, again 'including East Jerusalem...', has no validity and constitutes a flagrant violation of international law.

Less than a year later, on 30 November 2017, the GA of the UN adopted a resolution on Jerusalem (A/RES/72/15) with the votes of 151 Member States in favour, including all Members of the EU. Only six Member States voted against: Canada, Micronesia, Israel, Marshall Islands, Nauru and the United States. There were nine abstentions. The second preambular paragraph of the Resolution refers explicitly to the Basic Law on Jerusalem and the proclamation of Jerusalem as the capital of Israel as measures that are null and void.

Less than a month later, on 21 December 2017, the GA of the UN once more adopted a resolution on Jerusalem (A/RES/ES-10/19). It is a response to the speech of the President of the United States of 6 December 2017, in which he recognized Jerusalem as the capital of Israel and also announced the removal of the US Embassy from Tel Aviv to Jerusalem.³⁵ This was pursuant to the Jerusalem Embassy Act, which the American Congress with overwhelming majorities in both Houses had enacted in 1995.³⁶ President Trump decided to no longer use the possibility of postponing the implementation of this Act, as his predecessors used to do.

It has to be noted that the resolution of 21 December 2017 was adopted during a meeting of the Tenth Emergency Special Session.³⁷ Apparently, the announcement by the US President was seen as an emergency situation. Resolution A/RES/ES-10/19 was adopted with the votes of 128 Member States in favour, including 22 Members of the EU. Only nine Member States voted against: Guatemala, Honduras, Israel, Marshall Islands, Micronesia, Nauru, Palau, Togo and the United States. There were 35 abstentions, among them 6 EU states, while 21 UN Member States were not present. The GA expressed 'its deep regret at the recent decisions concerning the status of Jerusalem'. This no doubt refers to the status of Jerusalem as the capital of Israel. It should be underlined, first of all, that the US President did not take a decision on the status of Jerusalem. President Trump simply recognized the sovereign decisions of Israel. In its Resolution of 21 December 2017, the GA 'calls upon all States to refrain from the establishment of diplomatic missions in the Holy City of Jerusalem, pursuant to SC resolution 478 (1980)'. This non-binding resolution is apparently the main basis of the request of the GA.

International Law and the Designation of Capitals and the Location of Embassies

Sovereign Equality of States

How solid are the above criticisms in terms of international law? One of the cornerstones of the international legal order is the principle of the sovereign equality of states (Article 2 (1) UN Charter). *Sovereign* means that there is, in principle, no higher human legal authority than the authorities of the state to exert powers over its citizens in its territory. States have the right to establish their own legal and administrative system, to cherish their own cultural heritage, and to pursue their own social and economic policies without any interference by other states or international organizations. They are also free to establish or not relationships with other states or international organizations. Restrictions on the sovereignty of a state have to be based on international law, which body of law, with the exception of *ius cogens*, is ultimately based on the voluntary acceptance by the state itself. *Equality* means that in legal terms, all states are equal, irrespective of their territorial scope, the size of their populations or their economic and military power.

The decision of a state to designate one of its cities as a capital is without any doubt part of its sovereign powers. There is no rule of international law that restricts this right of the state. Next, it is beyond the powers of the UN SC or GA to criticize a state for the choice of its capital. In addition, it should be remembered that the GA and SC resolutions mentioned above are *not* binding under international law. Moreover, the US President cannot be blamed for merely recognizing the sovereign decision of Israel. On the contrary, recognition of the capital of a State shows respect for the sovereign equality of states.

Location of the Embassy

The basic principle of international law concerning the establishment of diplomatic relations between States and of permanent diplomatic missions is, according to Article 2 of the Vienna Convention on Diplomatic Relations (1961), the mutual consent between the States concerned. Article 21 obliges the receiving State to facilitate acquisition of premises or assist in obtaining accommodation in some other way. It is clear that the Israeli government fully agrees with the American decision, so there are no legal impediments for relocation of the US embassy to Jerusalem. According to the UN Charter, the GA has no powers at all to interfere with the sovereign decisions of both the sending and the receiving State on the location of an embassy. On the contrary, it should respect the principle of the sovereign equality of its Member States pursuant to Article 2 (1) of the UN Charter. Apparently, the GA feels free to single out one of the UN Member States, i.e., the State of Israel, and subject it to criticism for the choice of its capital. There is no example of a similar treatment of another Member State about such a choice.

The approach of the GA is one of numerous examples within UN practice of singling out the Jewish State and subjecting it to special standards. It is the international equivalent of the many abject examples in history of the special treatment of Jews in national legal orders, in other words: anti-Semitism. To conclude, the UN resolutions on Jerusalem are without foundation in international law and even sometimes exceed the constitutional powers under the UN Charter. They illustrate the long and sad story

of Israel bashing that has become characteristic of the UN. It has to be feared that they will be used by those interested in spreading hatred, unrest and violence against Israel and the Jewish people.

Jerusalem in the Oslo Agreements and the Israeli-Jordanian Peace Treaty

It is worthwhile to reflect on the status of Jerusalem in the instruments that can be seen as the outcome of peace negotiations between Israel and its Arab neighbours after the Madrid Conference in 1991. This Conference resulted in the 1993 agreement on the Declaration of Principles on Interim Self-Government Arrangements, which is the first of a set of agreements generally referred to as the ‘Oslo Agreements’. Next to that, Israel and Jordan succeeded to conclude a peace treaty in 1994.

Under the Oslo Agreements, it is explicitly agreed, in the Declaration of Principles, that the status of Jerusalem is to be included in the parties’ final negotiations. Article V (3) provides: ‘It is understood that these negotiations shall cover remaining issues, including: Jerusalem, refugees, settlements, security arrangements, borders, relations and cooperation with other neighbors, and other issues of common interest.’ No doubt negotiations on the issue of Jerusalem will be difficult. It is important to underline that, contrary to common assumptions, in these negotiations the position of Israel is not that of a State that has occupied the City of Jerusalem, which it may control only temporarily in conformity with the international law on belligerent occupation. As has been explained before, Israel has full sovereignty rights over Jerusalem.



The Oslo Agreements (1993) (Source: YESHA Council)

Notwithstanding the Oslo Agreements, which reserved the question of the status of Jerusalem for the final negotiations, the ‘President of the State of Palestine’ issued on 5 October 2002 a ‘Capital Law of 2002, which declares “Holy Jerusalem” to be the capital of the State of Palestine’ (Article 1).³⁸ This Act imitates to some extent the Israeli Basic Law on Jerusalem. It appoints this City as the seat of the three powers of government: legislative, executive and judiciary (Article 1). It proclaims Palestinian sovereignty over the holy sites and makes the Palestinian state responsible for ensuring freedom of worship and practice of ‘all religious rituals’ (Article 2). It

provides for a special installment of the annual budget for Jerusalem (Article 3). It declares legislation or agreement diminishing Palestinian rights in Jerusalem to be null and void (Article 4). It also has an entrenchment provision. The Law can only be amended or annulled by a two-thirds majority of the members of the Palestinian Legislative Council (Article 5). It has to be noted that, contrary to the Israeli Basic Law, this Act has no clear legal foundation. Moreover, it is clear that the assumed Palestinian sovereignty is not restricted to just a part of Jerusalem but extends to the whole of the City. It ignores completely the position of the State of Israel.

In 1994, Israel and Jordan entered into a Peace Treaty. This agreement includes a reference to Jerusalem. It is not about Jordanian sovereignty claims, which were already relinquished in 1988. It is about holy places. It is agreed that Israel ‘respects the present special role of Hashemite Kingdom of Jordan in Muslim Holy Shrines in Jerusalem. When negotiations on the permanent status [of the West Bank and Gaza] will take place, Israel will give high priority to the Jordanian historic role in these shrines ...’ (Article 9 (2)).³⁹ This arrangement is not without complexities, which was illustrated by the aftermath of the terror attack on the Temple Mount in July 2017. Two Israeli (Druze) police officers were killed there. The Israeli Prime Minister spoke with the King of Jordan, who condemned the murder but criticized the introduction by Israel of, in itself, very common security measures – metal detectors – to control access to the Temple Mount. At the end of the day, Israel gave in to international pressure and removed the detectors.⁴⁰

Governance of the ‘Holy Places’ in Jerusalem

The foregoing already shows that the legal status of the holy places in Jerusalem deserves special attention. The holy places in Jerusalem and in other parts of the Holy Land have been the subject of conflict and special attention during the Ottoman Empire. In 1852, responding to the conflicting claims of the Russians and French, the Ottoman government published the first of a series of *firman*s, which purported to regulate access to and use of the holy sites by the various church denominations. Later, also the Western Wall (Kotel), the Temple Mount (Haram Al-Sharif), the Cenacle on Mount Zion and Rachel’s Tomb were included in the regulations.⁴¹ These *firman*s became known as the ‘status quo’ and were recognized and adopted by the European powers in the Treaty of Paris following the Crimean War (1856) and in the Treaty of Berlin (1878).⁴² When the Mandate for Palestine came into place in 1922, the Mandatory was obliged to respect existing rights and ensure free access to the Holy Places. The Mandatory had no right to ‘interfere with the fabric or the management of purely sacred Muslim shrines, the immunities of which are guaranteed.’ (Article 13). Under Jordanian rule (1948-1967), no obligations or requirements were in place to protect Jewish and Christian holy sites in Jerusalem. Jewish synagogues were destroyed and cemeteries desecrated. As remarked before, contrary to Article VIII of the Armistice Agreement between Israel and (Trans-)Jordan, after the cessation of hostilities, Jews were not allowed to pray at the Western Wall (Kotel) in the Old City. The claims of the Vatican and other Christian denominations to churches in Jerusalem were basically respected. When Israel recaptured the Old City

and the ‘West Bank’ in June 1967, it fully appreciated the importance of respecting Muslim and Christian claims to their holy places. That can be concluded from the *Holy Places Law, 5727-1967* that had been enacted by the Knesset on 27 June 1967, which provides that the holy places shall be protected from desecration and other violations and from anything likely to violate the freedom of access by the various religions to places sacred to them, or their feelings with regard to those places.⁴³ Specific agreements are in place between Israel and the Holy See and other Christian institutions regarding Christian holy sites in Jerusalem, such as the Church of the Holy Sepulchre in Jerusalem and the Church of the Nativity in Bethlehem.⁴⁴

The Temple Mount

The most important and contentious site – at least from Jewish and Muslim perspectives – is the Temple Mount, *Har HaBayit* (Hebrew) or *Haram al-Sharif* (Arabic), which encompasses the following: on the west side, the Western Wall (Kotel), and, on top of the plateau, the Dome of the Rock and the Al-Aqsa Mosque. One week after the end of the Six-Day War, Moshe Dayan, Israel’s Defense Minister, handed control over the Temple Mount to the Muslims and ordered that the *Haram al-Sharif* be open to all Muslims throughout Israel. Under the *Holy Places Law, 5727-1967*, administration of non-religious affairs in Jerusalem was effectively placed under Israeli control, while administration of religious affairs was shared between Jewish, Christian and Muslim authorities. In 1967, the administration of the Haram al-Sharif and other Muslim holy sites was placed under the authority of the Islamic Waqf, which currently controls the day-to-day administration, including guards supervising the entrance to the Haram al-Sharif. Under this authority, Muslims have daily access to the Haram al-Sharif and can freely worship there. Yet, the Waqf has restricted the rights of Jews and other non-Muslims by limiting the rights of access and the freedom to worship on the Haram al-Sharif; non-Muslims are only allowed to visit the place at fixed times, they cannot enter the al-Aqsa mosque and they are not allowed to pray on the Haram al-Sharif.⁴⁵

We have seen that Israel acknowledges the special position of Jordan in relation to the Muslim holy places in Jerusalem. According to the Peace Treaty with Jordan (1994), Israel respects the present special role of the Hashemite Kingdom of Jordan in that respect. It was further agreed that in case of negotiations on the permanent status of the disputed territories, Israel will give high priority to the Jordanian historic role in respect of the Muslim shrines.⁴⁶

Recently, the PLO/PA and Jordan have taken steps to further restrict access to the Temple Mount by Jews. According to an agreement⁴⁷ executed on 31 March 2013, between King Abdullah II of Jordan and the PLO/PA, the PLO/PA affirms recognition by the Arab Palestinians of the Hashemite King as custodian of the Islamic holy places in Jerusalem⁴⁸. The agreement also purports to recognize Palestinian self-determination and sovereignty over the land where the Islamic holy places are situated. This agreement ‘affirms that all Muslims, now and forever, may travel to and from the Islamic Holy Sites and worship there, in conformance with the freedom of worship.’ The Waqf and its properties are to be administered ‘in accordance with the laws of the Hashemite Kingdom of Jordan.’ These arrangements

contain no guarantees whatsoever that Jews or Christians will continue to have access to their holy places connected with the Temple Mount. On the contrary, they therefore show that access will be limited to Muslims.⁴⁹

A matter of deep concern is the position of UNESCO on the Temple Mount. During its 197th session on 21 October 2015, the Executive Board of UNESCO adopted a Decision in which it condemned Israel for restricting Muslims' freedom of worship and access to the Al-Aqsa Mosque/Al-Haram Al Sharif.⁵⁰ It did so again during its 200th session in Paris on 18 October 2016.⁵¹ In these Decisions, as well as in a Decision of its World Heritage Committee of 26 October 2016,⁵² the Jewish and Christian relationship to the Temple Mount is systematically ignored. Both texts refer only to the site according to its Islamic name in Arabic ('*Al-Haram Al-Sharif*') combined with the Arabic name for the Islamic house of worship, the '*Al-Aqsa Mosque*'. In both texts, it is called a Muslim holy site. The importance of the Temple Mount, which is the location of the Binding of Isaac, and of the First and the Second Temple, for the Jewish faith is not mentioned. The Temple Mount as the location where Jesus was presented as an infant, and as the place where he taught, was equally ignored. It seems that UNESCO endorses the recent Palestinian attempts to erase the Biblical history from Jerusalem, the city so essential for Judaism and Christianity. It is difficult to believe that an international organization dealing with issues of *education, science* and *culture* is prepared to contribute to the falsification of history. However, by blaming UNESCO, we, in fact, criticize many of its member states. The member states of UNESCO that voted to support these decisions bear the responsibility.

The UN GA in its Resolution of 30 November 2017 (A/RES/72/15) also addresses the status of the Temple Mount, without using these words nor the Hebrew equivalent *Har HaBayit*. Instead, the GA only uses the Arab expression *Haram al-Sharif*. In doing so, the GA follows the example of UNESCO institutions to ignore the prominent place in Jewish history of the Temple Mount, as well as its relevance for Christianity. Also, the GA seems to accept the false new Palestinian narrative, which purposely wants to erase the relationship between the Jewish people and the land of Israel and Jerusalem. It is rather cynical to read in the fourth operative paragraph of the concerns of the GA about the status quo at the holy places of Jerusalem, especially with regard to the fact that history has shown that only under Israeli sovereignty the free access to the holy places of Judaism, Christianity and Islam has been guaranteed, as well as the freedom of religion in general. Many of the sponsors and supporters of the Resolution, Islamic and non-Islamic, do not recognize freedom of religion at all.

Concluding Remarks

The status of Jerusalem is one of the main legal issues in the debate on Israel and its relationship to the Palestinian Arabs. The Israeli position that Jerusalem 'complete and united' is the capital of Israel is fiercely criticized by both the Palestinian Arabs and what is commonly called 'the international

community'. Several countries are considering recognition of Jerusalem as the capital of Israel and locating their embassies or diplomatic offices to this city.

There are strong legal arguments for the position that Jerusalem as such is part and parcel of the territory of the sovereign State of Israel. These derive principally from the Mandate for Palestine and the principle of *uti possidetis juris*, pursuant to which Jerusalem became an integral part of the State of Israel in 1948. Jordan occupied and illegally purported to annex part of Jerusalem and the whole of the "West Bank". Israel took control of these territories in a legitimate manner in June 1967, and since then Israel has, in a legitimate manner, asserted its sovereignty over the whole city of Jerusalem.

Israel, in our view, has the right that all sovereign states have to choose its capital. There is no valid reason to criticize the proclamation of Jerusalem as its capital. There is also no sound legal argument to deny any other state the right to locate its embassy in Jerusalem if both Israel and the sending state agree. What has been said also leads to the conclusion that the Temple Mount is within the sovereignty of Israel. It is a reason for serious concern if the strong connection between the Temple Mount and Judaism is denied. It is up to Israel itself to enter into arrangements as to the administration of its holy sites, as long as freedom of religion is respected.

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¹ This text is partly based on Matthijs de Blois and Andrew Tucker, *Israel on Trial. How International Law is Being Misused to Delegitimize the State of Israel*, The Hague Institute for International Cooperation, Soest (NLD), 2018.

² See for example Michel Join-Lambert, *Jerusalem*, Elek Books, London 1966, Simon Sebag Montefiore, *Jerusalem. The Biography*, Phoenix, London 2011 and Martin Gilbert, *Jerusalem in the Twentieth Century*, John Wiley & Sons, Inc., New York, 1996.

³ Jacques Paul Gauthier, *Sovereignty over the Old City of Jerusalem: A Study of the Historical, Religious, Political and Legal Aspects of the Old City*, Institut universitaire de hautes études internationales, 2007, p. 215.

⁴ Arutz Sheva, 18-05-2012.

⁵ The USA was present, in its capacity of Associated Power, as an observer at the San Remo conference; it did not, like the other four—Britain, France, Italy and Japan—belong to the Principal Allied Powers. The USA only joined the First World War in April 1917, see Cynthia D. Wallace, *Foundations of the International Legal Rights of the Jewish People and the State of Israel and the Implications for the Proposed New Palestinian State*, Lake Mary, Florida; Creation House, 2012, p. 4.

⁶ See for example L. Oppenheim, *International Law, A Treatise*, Vol. I (Third Edition), Edited by Ronald F. Roxburgh, Longmans, Green and Co., London 1920, pp. 394-400. See further Ian Brownlie, *Principles of International Law* 4th edition pp. 111-112, in relation to the ex-German territories after the First World War, quoting on p. 112 from the joint dissenting opinion of Judges Spender and Fitzmaurice in the South West African cases (Prelim. Objection) I.C.J. reports 1962, p. 482: "[T]he Principal Powers retained, and may still retain on a dormant basis, a residual or reversionary interest in the actual territories concerned except where they have attained self-government or independence."

⁷ Resolution of the Council of the League of Nations adopted during the Twenty-Third Meeting (Private) of the Council on September 29th 1923, *League of Nations Official Journal*, Volume 4, 1923, Issue 11, (November 1923), p. 1355.

⁸ Emphasis added.

⁹ After 1949 it was no longer possible to subject the territory of Palestine to the U.N. Trusteeship system, as Israel had by then become a recognized State and a Member of the United Nations: see Article 78 of the Charter.

¹⁰ Howard Grief, *The Legal Foundation and Borders of Israel under International Law*, Mazo Publishers, Jerusalem, Israel, 2008, p.257. See also Hersch Lauterpacht, Article 18 of the Mandate for Palestine and the Dissolution of the League of Nations, Chapter 4 of *International Law: Volume 3, Part. 2-6: The Law of Peace* (ed. E. Lauterpacht), Cambridge University Press, Cambridge etc., 1977, pp.101-112, at p. 108.

- ¹¹ Abraham Bell & Eugene Kontorovich, 'Palestine, Uti Possidetis Juris and the Borders of Israel', *Arizona Law Review*, Vol. 58, 633 [2016].
- ¹² See the Report of UNSCOP to the G.A. Res. UNDoc. A/364 (3 Sept. 3, 1947).
- ¹³ See Jacques Paul Gauthier, *Sovereignty over the Old City of Jerusalem: A Study of the Historical, Religious, Political and Legal Aspects of the Old City*, Institut universitaire de hautes études internationales, 2007 pp. 635-636.
- ¹⁴ See Shlomo Slonim, 'The United States and the Status of Jerusalem 1947-1984', *Israel Law Review*, Vol. 19, Issue 2 [Spring 1984], pp. 179-252, at p. 192.
- ¹⁵ Howard Grief, *The Legal Foundation and Borders of Israel under International Law*, Mazo Publishers, Jerusalem, Israel, 156, (2008).
- ¹⁶ Elihu Lauterpacht, *Jerusalem and the Holy Places*, London: The Anglo-Israel Association, 1968, p. 36.
- ¹⁷ Martin Gilbert, *Jerusalem in the Twentieth Century*, John Wiley & Sons, Inc., New York, 1996, p. 243.
- ¹⁸ Idem, p. 244.
- ¹⁹ Idem, p. 247.
- ²⁰ Idem, p. 254.
- ²¹ See on these developments *inter alia* Ruth Lapidoth, 'Jerusalem, past, present and future (Jerusalem, reflexions d'ordre juridique sur son passé, son présent et son futur)', *Revue internationale de droit comparé*, 1-1996, pp. 9-33, at pp. 15-17.
- ²² Ruth Lapidoth, 'Jerusalem, past, present and future (Jerusalem, reflexions d'ordre juridique sur son passé, son présent et son futur)', *Revue internationale de droit comparé*, 1-1996, pp. 9-33, at p. 16.
- ²³ Gilad Shir, 'The Residency Status of East Jerusalem's Palestinians', *INSS Insight* No. 759, October 28, 2015, <http://www.inss.org.il/publication/the-residency-status-of-east-jerus...>
- ²⁴ Ruth Lapidoth, Jerusalem, past, present and future (Jerusalem, reflexions d'ordre juridique sur son passé, son présent et son futur), *Revue internationale de droit comparé*, 1-1996, pp. 9-33, at pp. 16-17.
- ²⁵ See for a different view Ian S. Lustick, Has Israel annexed East Jerusalem?, *Middle East Policy*, Vol. V. No. 1. January 1997, pp. 34-45.
- ²⁶ The Resolution was adopted by a vote of 99 in favour, none against, 20 abstentions and 3 absent.
- ²⁷ Martin Gilbert, *Jerusalem in the Twentieth Century*, John Wiley & Sons, Inc., New York, 1996, p. 243.
- ²⁸ Idem, p. 244.
- ²⁹ https://www.knesset.gov.il/spokesman/eng/PR_eng.asp?PRID=13709
- ³⁰ The Times of Israel 18 July 2018 and 19 July 2018.
- ³¹ The United States abstained from voting on SC resolutions 476 and 478 in 1980.
- ³² In March 2009, a confidential "EU Heads of Mission Report on East Jerusalem" was published, in which the Israeli government was accused of "actively pursuing the illegal annexation" of East Jerusalem. The report stated: "Israeli facts in the ground - including new settlements, construction of the barrier, discriminatory housing policies, house demolitions, restrictive permit regime and continued closure of Palestinian institutions - increase Jewish Israeli presence in East Jerusalem, weaken the Palestinian community in the city, impede Palestinian urban development and separate East Jerusalem from the rest of the West Bank: Rory McCarthy, "Israel annexing East Jerusalem, says EU", The Guardian, 7th March 2009.
- ³³ Council of the EU, Press Release 9110/12, 14th May 2012.
- ³⁴ Council of the EU, Press Release 9110/12, 14th May 2012.
- ³⁵ <https://globalnews.ca/news/3900657/donald-trump-full-speech-u-s-...> The example of the USA was followed by Guatemala and Paraguay, *The Times of Israel*, 11 May 2018.
- ³⁶ Jerusalem Embassy Act of 1995, Public Law 104-45-Nov. 8, 1995, 109 Stat. 398.
- ³⁷ This Session on the '[Illegal Israeli actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory](#)' was convened for the first time in 1997 (!) and had met for the last time in 2009. Emergency special sessions have been made possible by Res. 377 (V) (1950) of the GA ("Uniting for Peace") as a possibility for the GA to bypass the SC in cases of threats of world peace when decision-making in the SC is blocked by one of its permanent members. Apparently it was assumed that this was here at issue. The adoption of a similar resolution of the SC on Jerusalem was vetoed by the USA on the 18th of December 2017.
- ³⁸ <http://www.cidi.nl/dossiers/je/2002-10-05.html>
- ³⁹ Ruth Lapidoth, Jerusalem, past, present and future (Jerusalem, reflexions d'ordre juridique sur son passé, son présent et son futur), *Revue internationale de droit comparé*, 1-1996, pp. 9-33, at pp. 30-31.
- ⁴⁰ jewishnews.com/2017/07/25/Israeli-cabinet-decides-to-remove-metal-detectors-from-the-temple-mount/
- ⁴¹ Jessie Steinhauer, 'Timelines, Jerusalem's Holy Sites', *The Cairo Review of Global Affairs*, 2017, p. 2; *Selectively Sacred: Holy Sites In Jerusalem and its Environs*, Emek Shaveh 2016, <https://alt-arch.org/en/selectively-sacred-holy-sites-in-jerusalem-and-its-environs>, p. 6.
- ⁴² Treaty of Peace between the State of Israel and the Kingdom of Jordan, article 9. See also R. Lapidoth, 'Jerusalem – Some Jurisprudential Aspects', *Catholic University Law Review*, Vol 45, 1995, p. 663.
- ⁴³ Protection of Holy Places Law 1967

<http://www.mfa.gov.il/mfa/foreignpolicy/mfadocuments/yearbook1/pages/14%20protection%20of%20holy%20places%20law.aspx> (visited on 12 November 2015).

⁴⁴ Fundamental Agreement between The Holy See and The State of Israel, Dec. 30, 1993, *reprinted in* 33 I.L.M. 153 (1994).

⁴⁵ <http://mfa.gov.il/MFA/ForeignPolicy/Issues/Pages/Jerusalem-Temple-Mount-12-Nov-2014.aspx> (visited on 12-11-15).

⁴⁶ Article 9 (2).

⁴⁷ <http://jordanembassyus.org/news/jordanian-palestinian-agreement-jointly-defend-al-masjid-al-aqsa> retrieved 11 September 2017.

⁴⁸ In his capacity as descendant of the Sharif Hussein bin Ali of Mecca, who was Caliph of Islam for several months in 1924.

⁴⁹ For more information about this agreement, see: R. Lapidot, 'A Recent Agreement on the Holy Places in Jerusalem' *Israel Journal of Foreign Affairs* VII:3 (2013), pp.61-70.

⁵⁰ UNESCO Executive Board 197 EX/SR.1.

⁵¹ UNESCO Executive Board 200 EX/25; 200 EX/26.

⁵² UNESCO World Heritage Committee 40 COM 7A.13.

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