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The Historic Basin of Jerusalem

Problems and Possible Solutions

Work Group headed by Ruth Lapidot

Editor: Amnon Ramon

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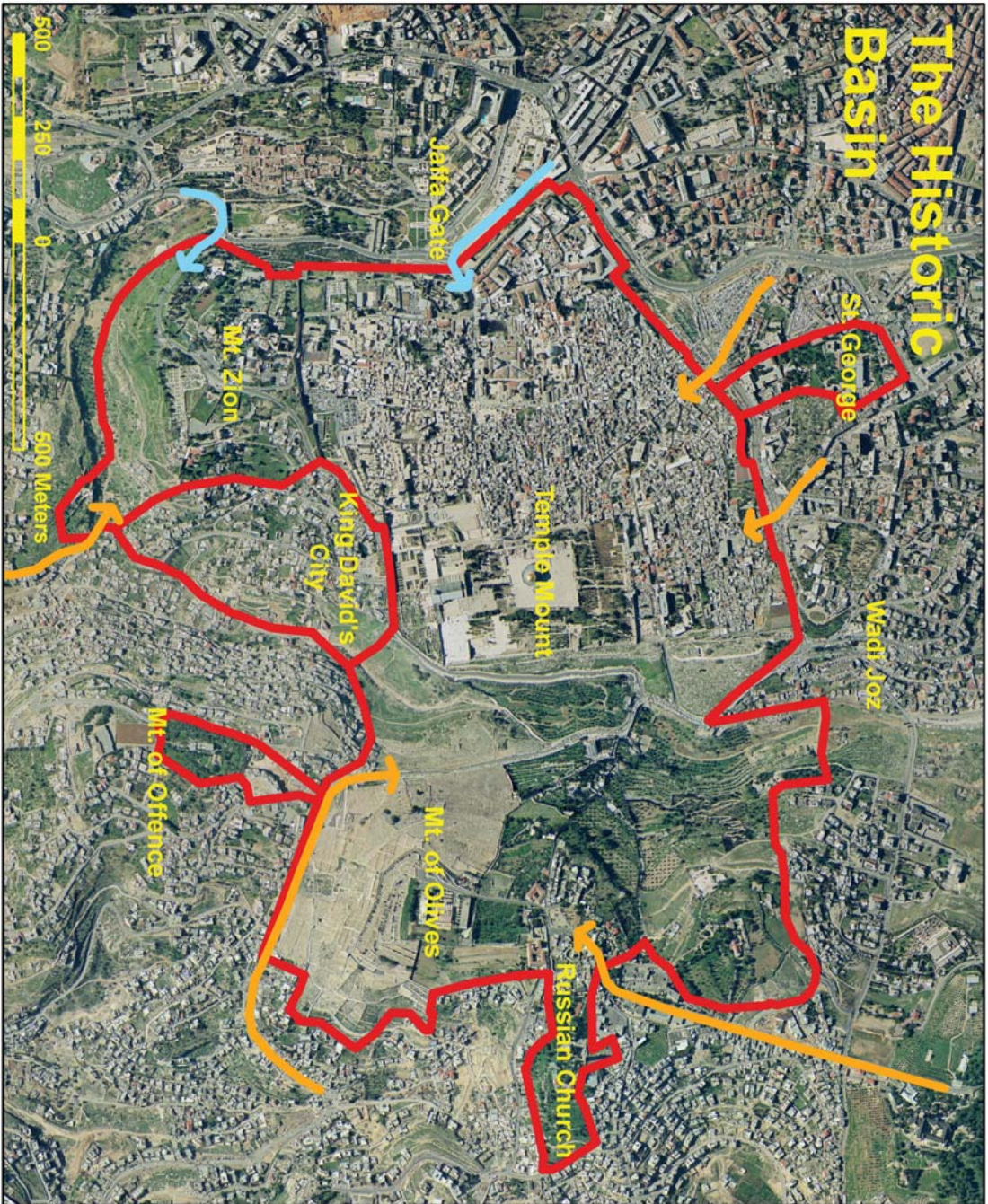
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Foreword

The relationship between academics and researchers, who strive to influence and advance their views, and politicians and decision makers, whose decisions mold our reality, is convoluted. Often, or so it seems, the latter group does not want to listen to the "experts," who for their part then feel frustrated at being ignored. In addition, reality sometimes tricks the academics and contradicts models, ideas, scenarios and plans that themselves had seemed plucked from reality – especially in a city as intricately complex as Jerusalem.

The Jerusalem Institute for Israel Studies set up a special Work Team in 2004 to formulate alternatives for the management of the "Historic Basin of Jerusalem" (encompassing the Old City, the Mount of Olives and Silwan/City of David), drawing on lessons from the failed negotiations at Camp David (2000), Taba (2001) and later. I admit, as we were busy over the next three years, hammering out alternative scenarios for managing the Historic Basin, readying for discussions on a future settlement, and a host of proposals was raised concerning international intervention for such management, I felt the Work Group was cut off from the bleeding reality of the Israeli-Palestinian conflict. It was a time of renewed violence and terror: Hamas were the victors in the Palestinian elections (January 2006) and the Second Lebanon War (summer 2006) punctuated our work. It looked like the chances of reaching accord, even a compromise agreement, were remote especially concerning Jerusalem, the very problematic core of this conflict. Still, we remained focused on our task and completed the Hebrew version of *The Historic Basin* in 2007. Ora Ahimeir, then Director of JIIS, wrote the following in the foreword to that volume:

As we go to press, the debate over Jerusalem may look detached from the harsh reality, which shows no real sign of enabling a renewed peace process or of reaching a permanent agreement to end the conflict. And yet, the vicissitudes of the Middle East are many. Seeds of peace must be sown long in advance so that they might sprout and be harvested when the right moment arrives.

Indeed, the right moment emerged at the end of the tenure of Ehud Olmert as prime minister of Israel, in September 2008. To our great surprise, Olmert offered

Palestinian Authority Chairman Mahmoud Abbas (Abu Mazen) the option of leaving the "Holy Basin," as this area is known, with no sovereign at all (at least for the interim period) but to have it managed by a multinational committee whose members would be representatives of Saudi Arabia, Jordan, Israel, the Palestinians and the US.¹ It later emerged that Olmert and his negotiation team were assisted a great deal by our work on the alternative scenarios for an agreement for the Historic Basin, including the possibility of its management by the two sides with the addition of a third side – that is, the multinational committee proposed by Olmert.

Olmert's resignation on 21 September 2008, as we know, brought an abrupt end to the bilateral talks. Elections in Israel followed a few months later, in February 2009, and the official position of the new government, headed by Benjamin Netanyahu, was that there would be no compromise where Jerusalem was concerned. The Israelis and the Palestinians even toughened their stance and, as we go to press this time, it seems that the chances of reaching an historic compromise on the loaded issues of Jerusalem and the Historic Basin are miniscule. And yet – this being the Middle East – perhaps in the right circumstances, and perhaps under massive American pressure, changes may still happen. We must continue to sow the seeds.

It is interesting to note that, nearly four years since our book appeared, the JIIS Work Team's ideas for a special regime for the Historic Basin continue to be heard at the highest political echelons. Defense Minister Ehud Barak, for example, referred to such ideas three times recently: at a speech he delivered at an event organized by the Geneva Initiative team in July 2010 he said, "The Holy Basin: the City of David, the Old City and the part that goes up to the Mount of Olives, an area in which 40,000 people live, requires a special agreed-upon regime."²

The following September he outlined his views regarding a future agreement in an interview with *Haaretz* writer Ari Shavit: "West Jerusalem and the 12 Jewish neighborhoods, comprising some 200,000 residents – are ours. The Arab

¹ See Barak Ravid and Aluf Benn, <http://www.haaretz.com/print-edition/news/olmert-offered-to-withdraw-from-93-of-west-bank-1.278588>. Ravid and Benn referred in their article to an interview Olmert gave to *Newsweek's* Kevin Peraino on 13 June, 2009: <http://www.newsweek.com/2009/06/12/olmert-s-lament.print.html>.

² Ben Caspit, "Dr. Ehud, Mr. Barak," *Ma'ariv/nrg* web site: <http://www.nrg.co.il/online/1/ART2/138/920.html> (in Hebrew).

neighborhoods, with a quarter of a million Palestinians – are theirs. In the Old City, the Mount of Olives and the City of David – [there will be] a special regime with agreed-upon arrangements."³ Barak reiterated this view at the December Saban Forum.⁴ Moreover, we know that these ideas are being discussed in other fora as well, including some headed by Kadima leader Tzipi Livni, currently head of the opposition and herself a former foreign minister.

The main aim of this Work Paper – which includes the two central chapters of the full tome (the English translation will be issued in its entirety later in 2011) – is to highlight different scenarios for an agreement on Jerusalem's Historic Basin – which, as we know, is the spiritual summit of hundreds of millions of believers the world over as well as the heart of the Israeli-Palestinian conflict.

Two principles underlie this research:

1. Without an agreement on the question of the Historic Basin there is no chance at all of ending the conflict and reaching a peace agreement between the two sides; and
2. A hard-edged territorial division of sovereignty of the Basin (as proposed in US President Bill Clinton's Road Map and the Geneva Initiative) will cause great harm to the functioning of the Basin from urban, economic, tourism and safety perspectives, to the extent that Jerusalem could lose the main feature that sets it out as unique in the world.

The central innovation of this research is the discussion regarding the possibility of international intervention (to various degrees) in administering the Basin. The premise of the Work Group was that such intervention would improve the chances of reaching an agreement – especially in light of the mistrust that has so deeply permeated the views of each side, as well as in light of the immense religious and cultural importance of the area. Transferring the management of the Historic Basin to a third party for a long period, without the need for any side to

³ Ari Shavit, 1 September, 2010, *Haaretz* web site: <http://www.haaretz.com/print-edition/news/barak-to-haaretz-israel-ready-to-cede-parts-of-jerusalem-in-peace-deal-1.311356>.

⁴“Jerusalem will be discussed at the end of the negotiations, with reference to the Clinton parameters, namely, West Jerusalem and the Jewish suburbs for us, the heavily populated Arab neighborhoods for them, and an agreed-upon solution in the ‘Holy Basin’.” http://www.brookings.edu/~media/Files/events/2010/1210_saban_forum/20101210_barak.pdf

relinquish its own claim to sovereignty, could, according to this theory, advance the possibility of a long-term interim arrangement that could remain in force until the sides succeed in rebuilding their mutual trust and pave the way to a permanent agreement.

This paper has two parts. In the first, the central problems that require attention in any possible agreement on the Historic Basin are outlined. The second part includes optional scenarios for international intervention for its management, especially vis-à-vis the Temple Mount/Haram-al-Sharif and the Western Wall. In the near future, as noted, we will add to this paper the Work Group's numerous articles and proposed alternatives that deal with the key issues pertaining to Jerusalem's Historic Basin.

Amnon Ramon
Editor

The Historic Basin – Its Main Problems

Ruth Lapidot

Introduction¹

The centrality of the question of Jerusalem was underscored during the discussions that took place at Camp David in the summer of 2000. What emerged from these discussions is that no resolution to the Israeli-Palestinian conflict nor of the Israeli-Arab conflict, can be reached without a reasonable and consensual solution to the problem of Jerusalem, and, above all, the question of the historic basin, which includes the main holy sites and attracts the attention of hundreds of millions of followers of the three monotheistic religions. This realization led the JIIS team to intensify their efforts to find a solution to this problem.

In accordance with longstanding policy at the Jerusalem Think Tank in the Jerusalem Institute for Israel Studies, this paper does not intend to recommend a particular solution. The team prefers to offer the public and policy makers a series of alternatives, while noting the advantages and disadvantages of each.

It can be assumed that the entire city of Jerusalem will be raised as an issue for discussion in any future negotiations for a permanent settlement. However, as mentioned above, this paper focuses on the most problematic area – the historic basin. From a technical perspective, it would have been easier to focus exclusively on the Old City, which is clearly defined by its walls. However, it is preferable that this study should also include the historical sites that are adjacent to the Old City – i.e. historic and holy sites outside the walls: Mount Zion, the City of David, Kidron Valley and the Mount of Olives- particularly its western slopes (see below, the Borders of the Historic Basin).

The authors preferred the expression “Historic Basin” to “Holy Basin,” since not all the sites included in the relevant area are holy places. They also felt that the term “Historic Basin” is more neutral and less emotionally charged, although

¹ The author wishes to thank Prof. N. Bar-Yaacov, Prof. Y. Bar-Siman-Tov and Dr. Amnon Ramon for their helpful comments on the manuscript of these sections. Special thanks are due to Ilanit Segen for the typing and her patience.

they are, of course, aware of the strength of emotions aroused by the holy places in the basin among the adherents of the three monotheistic faiths.

Two key approaches may be identified in efforts to find a solution to the problem of Jerusalem. The first advocates the territorial division of the whole city, including the historic basin.² The second approach seeks a more uniquely tailored arrangement for the entire city or for the Historic Basin alone, sometimes with the involvement of a third party.³ The merit of the former approach is its simplicity: each of the sides would enjoy complete control, and perhaps even sovereignty, in a defined territory and would be entitled to exercise its full authority within that area, subject to the rules of international law. Some of the adherents of this approach wish to restrict the freedom of action of the controlling state, to a certain extent, out of consideration for the interests of the other side or of the international community. The latter approach considers that, due to the importance of Jerusalem to both sides and in light of their interests, it is preferable to introduce a special arrangement, at least in the Historic Basin, such as joint management or functional internalization. This approach is undoubtedly more complex than the former approach of territorial division. This approach constitutes a form of compromise that both sides may find easier to accept.

Below are 5 alternatives for an arrangement discussed by the JIIS think tank (for details, see the article by Moshe Hirsch below):

1. Full Israeli sovereignty and control over the entire Historic Basin, with the possibility to grant autonomy in certain spheres to the Arab population, and to establish a special status for the Muslim and Christian holy places. It can be assumed that the Palestinians and the international community will not accept this solution.
2. Full Palestinian sovereignty and control over the entire Historic Basin, with the possibility to grant autonomy in certain spheres to the Jewish residents, and to establish a special status to the Jewish and Christian holy places. It can be assumed that Israel will reject this solution.

² For example, President Clinton's plan (2000), the Ami Ayalon – Sari Nusseibeh proposals (2002), and the Geneva Initiative of Yossi Beilin and Yasser Abd Rabo (2003).

³ For example, the proposals made by the Economic Cooperation Fund as found in the booklet: Francesca Nardi, ed., *Israelis, Palestinians Coexisting in Jerusalem*, Centro Italiano per la Pace in Medio Oriente, 2001, pp. 259-330; Shaul Arieli, "Jerusalem – On the Path to a Permanent Settlement: Not Division, but Redefinition and Reorganization," *Strategic Update*, Vol. 8, p. 17.

3. The territorial division of the Basin between the sides, with international supervision by a third party that would assist in monitoring the area and in conflict resolution.
4. A system of joint management, with a division of powers between the parties and with international backing. If the parties fail to implement this system, the administration would be transferred to an international body that would also be empowered to help resolve disputes.
5. The Historic Basin would be administrated by an international body, and powers would be delegated to both sides in certain spheres.

Before discussing the various alternatives in detail, a number of key questions relating to the Basin should be examined:

1. The Symbolism of the Historic Basin

One of the factors that make it particularly difficult to find a solution to the question of Jerusalem is the religious importance of the city and the strong emotions it evokes among many believers.⁴ Any agreement or settlement regarding Jerusalem will have to address the interests of many people who believe the city to be of the utmost importance, but who do not live in the city. There are various grounds for the sanctity and importance of the city as perceived by the different religions. It is sometimes difficult to reconcile the poverty of “mundane Jerusalem” with the importance and sanctity attributed to the city by believers, and indeed non-believers as well. In any case, the symbolic dimension of the city is undoubtedly a powerful factor. The existence and strength of this factor cannot be denied, and it is vital to recognize its capacity to mobilize vast numbers of Israelis and Palestinians, Jews, Muslims and Christians throughout the world. Any agreement or settlement regarding Jerusalem will have to address the interests of many people who do not live in the city. There are various grounds for the sanctity and importance of the city as perceived by the different religions. It is sometimes difficult to reconcile the poverty of “mundane Jerusalem” with the importance and sanctity attributed to the city by believers, and indeed non-believers as

⁴ See the article by Ora Ahimeir, in: Amnon Ramon (ed.), *The Historic Basin – Problems and Possible Solutions*, Jerusalem Institute for Israel Studies, 2007 (Hebrew edition) (hereinafter: *The Historic Basin*). This sub-section is based in part on that article, pp. 179-198.

well. In any case, the symbolic dimension of the city is undoubtedly a powerful factor. The existence and strength of this factor cannot be denied, and it is vital to recognize its capacity to mobilize vast numbers of Israelis and Palestinians, Jews, Muslims and Christians throughout the world. Any agreement or settlement regarding Jerusalem will have to address the interests of many people who do not live in the city.

The issue of *why* Jews, Christians and Muslims see Jerusalem as a holy and central to their faith has been examined in books that have been published by the Jerusalem Institute for Israel Studies⁵ and other institutions, and as such will not be discussed in this paper. For the purpose of our discussion here, it will suffice to enumerate several reasons for Jerusalem's holy and adulated status. The sanctity of Jerusalem can be attributed to historical events and the mythology surrounding the city, as well as the holy sites that fill the landscape, and the apocalyptic nature of some of the beliefs centered around the city. In addition, although special sanctity is attributed to specific places, sanctity is also attributed to the city as a whole. According to Jewish tradition, for example, the Divine Presence dwells on the Temple Mount, from where it radiates to the city of Jerusalem as a whole and therefrom to the Land of Israel. Similar approaches may be found in Christian and Muslim tradition. This article has been written out of a sense of awareness of the importance and impact of the different myths, narratives and symbols that are attached to Jerusalem. It is not the intention of this paper to enter into the debate as to who has greater rights to Jerusalem, or which religion mentions the city more times in its scriptures. The assumption is that the affinity of the religions to Jerusalem is to be respected. Over time, the team hopes that tolerance and mutual respect will emerge among the adherents of the three religions regarding the traditions and affinities of each one toward the city.

The borders of the historical city of Jerusalem are relatively well defined and have changed very little in recent centuries. Since the British Mandate period, however, and even more so after the establishment of Israel and after the Six Day War, the municipal borders of the city have been expanded. The

⁵ See, for example: Shmuel Berkowitz, *The Wars of the Holy Places – The Struggle for Jerusalem and the Holy Places in Israel, Judea, Samaria and the Gaza Strip*, Jerusalem Institute for Israel Studies and Hed Artzi publications, 2000 (hereinafter: *The Wars of the Holy Places*); Amnon Ramon (editor), *A City in a Labyrinth – A Lexicon of Modern Jerusalem*, Jerusalem Institute for Israel Studies, 2003 (hereinafter: *City in a Labyrinth*), pp. 19-76.

name “Jerusalem” is now applied to the entire municipal area of the city, and the municipality recommends its further expansion. In the public conscience and that of political leaders, almost no distinction is made between historic Jerusalem and the remaining sections of the city, and symbolism, sanctity and adulation are attributed to everything included under the label “Jerusalem”. However, this is a flawed conception of the city. The distinction between the Historic Basin and the remaining sections of the city should be emphasized.

Therefore, this paper is only concerned with the Historic Basin. During the twentieth century, this area became the focus of a national conflict between the Zionist movement and the Palestinian national movement. Since 1967, in particular, there have been repeated attempts by religious zealots to create a catastrophic incident in the Historic Basin – mainly around the Temple Mount - that could have disastrous consequences. This phenomenon underscores the need to focus on efforts to find solutions for the Historic Basin area, which covers a very small territory.

2. Criteria for Potential Solutions

The goal of this study is to propose a solution that will avoid violent and potentially disastrous incidents and encourage cultural and economic renewal in the Historic Basin, Therefore, any alternative must be examined according to the following criteria:

- ❖ It must restrain the tendencies of both sides to aspire to dominance and control;
- ❖ It must restrain the tendency to exclude⁶ the other;
- ❖ It must encourage the preservation of holy places and historical sites;
- ❖ It must encourage respect for the other’s religious and historic traditions;
- ❖ It must encourage local culture and creativity;
- ❖ It must stimulate the economy and tourism while maintaining the unique character of the city;
- ❖ It must encourage unifying and common interests.

⁶ Exclusion: is defined as – distancing, preventing access, restricting others’ movements.

3. The Borders of the Historic Basin⁷

The area in question is defined by the term “Historic Basin”. A “basin” is a bowl-shaped area surrounded by hills or ridges. The term “historic” indicates that the area in question has been, in accordance with the different traditions, the location of the unique historic and religious events relating to Jerusalem. These are the determining factors for designating the borders of the area.

The following considerations were used in defining the borders of the Historic Basin:

- ❖ A maximum concentration of the holy places, religious institutions and important historic sites;
- ❖ The delineation of borders that can be clearly identified on the ground;
- ❖ Relatively few residential areas, (apart from the Old City);
- ❖ Separate access to the defined basin from areas populated by Jews, on the one hand, and Muslims, on the other.
- ❖ A defined area that can be administrated in functional terms separately from the surrounding urban areas;
- ❖ An area providing services for visitors, such as parking lots;
- ❖ An area in which different sections can be distinguished for appropriate administration (e.g. the Temple Mount and the Armenian Quarter).

In light of the above-mentioned considerations, it is possible to define:⁸

- A. A “minimal” basin, which includes only the Old City;
- B. A slightly larger basin, including the Old City, Mount Zion and the western slope of the Mount of Olives.
- C. A larger basin, containing the Old City, Mount Zion, the western slope of the Mount of Olives, the City of David and the Christian institutions to the north of the Damascus Gate.

⁷ This sub-section is taken in its entirety from the article by Israel Kimhi, in: Ramon, *The Historic Basin*, pp. 111-119.

⁸ See the attached map on p. 6.

For the purpose of their discussions, the authors chose an area whose borders are as follows:⁹

To the west: The borders are defined by the wall of the Old City from IDF Square to the southern corner of the Sultan's Pool (the dam over Hebron Road).

To the south: The borders are defined by the southern edge of the Sultan's Pool, along the course of Gei Ben-Hinnom to the wall surrounding the Greek Orthodox monastery of Hekel-Dama; and thereafter along the southern border of the monastery to the eastern fence of St. Peter Gallicanto Church (including the surrounding cemeteries). From here, the southern border continues along the southern wall of the Old City until the point where the road curves below the Southern Wall excavations (the Ofel Garden). It then continues in a straight line along the course of Kidron Valley, and east along the fences of the Jewish cemetery bordering the northern section of Silwan until Jericho Road continuing along the fence of the Jewish cemetery on the Mount of Olives, along Jericho Road, until the end of the burial plots.

To the east: The eastern border of the Historic Basin travels along the Jewish burial plots on the Mount of Olives through to the fenced section of the Russian Church of the Ascension. It then continues east to the fence surrounding the compound of the church, and west again as far as Al-Muqassed Hospital. The border line then follows the hospital fence to the west, thus excluding the hospital from the Basin area. It terminates along the eastern fence of the Viri Galilei compound (the holiday residence of the Greek Orthodox patriarch).

To the north: The northern border is defined by the corner of the Old City wall by IDF Square, along the southern margins of Hazanchanim St. and Sultan Suleiman St. to the northeast corner of the walls of the Old City (the Storks Tower opposite the Rockefeller Museum). It then continues south along Jericho Road, and north again along Nachal Egoz (Wadi Joz) to the northern fence of the Luigi Cheda Institution (the former Catholic Hospital), and then east along the edge of the built-up area of Aqbat al-Sawana neighborhood until the fence of the Viri Galilei compound.

Two compounds housing religious institutions may be added to this area: the Abraham Monastery (Bait Abuna Ibrahim) on the Mount of Anointment, and the Christian institutions to the north of the Damascus Gate. An additional option for

⁹ Ibid.

extension is the City of David area, including the archeological excavations and important historical sites.

Substantial sections of the borders of the Historic Basin were delineated by enduring physical objects such as walls or fences in order to clearly and sharply define the area of the Historic Basin. The borders noted above are more or less optimal, and include an area of 2,210 dunams (approximately 550 acres). To this one may add the following areas: the area of the Christian institutions to the north of the Damascus Gate – 75 dunams (12 acres); the Mount of Anointment 41 dunams – (10 acres); and the City of David – 194 dunams (49 acres).

The addition of the City of David to the Historic Basin adds approximately 4,200 residents to the Historic Basin (including several dozen Jewish families). This population lives in very close proximity to the Old City and relies on services provided within the walls. The topographical structure of the ridge and the road system in the area are also directly connected to the Basin. Thus, it seems justified to add this area to the defined Historic Basin.

As alluded to above, there is no reason why different arrangements cannot apply to different sections of the Basin – for example, an arrangement for the Old City within the walls distinct from the remaining sections of the Basin, and a special arrangement regarding the Temple Mount. Moreover, the proposed borders of the Historic Basin are not essential. If necessary, and if such a solution is preferred by the parties, the special arrangement could be confined only to the Old City within its walls.

4. Profile of the Historic Basin Area and Problems To Be Resolved

The Basin, and the Old City in particular, were described in detail in the booklet that was published in 2002.¹⁰ Therefore, this discussion shall be confined to a brief review of the relevant facts and the problems requiring solution. The most prominent features of the area are poverty, congestion and crime, on the one hand,

¹⁰ Ruth Lapidot and Amnon Ramon, *The Old City of Jerusalem: A report in wake of the discussions of a committee on the Old City*, Jerusalem Institute for Israel Studies, 2002 (hereinafter: *The Old City*); see also the articles by Israel Kimhi, (pp. 79-99) and Yifrah Zilberman (pp. 159-171) in: Ramon, *The Historic Basin*.

combined with a wealth of historic sites and holy places of the three monotheistic religions, on the other.

A. Population

As of the end of 2003, the population of the Old City was at 36,700, and at approximately 41,000 in the Historic Basin (according to the broader alternative). The population of the Old City can be divided as follows: it is 74 percent Muslim, 17 percent Christian and 8 percent Jewish. In addition to the permanent Jewish population, yeshiva students attending yeshivot and other religious institutions in the Old City also live in the area. Several dozen Jewish families live in the City of David area (most of whom belong to the national-religious stream of Judaism). While the number of Muslims and Jews is rising, the number of Christians is stable and is even falling from a proportionate aspect.

Of the above-mentioned groups, the economic condition of the Jewish population, the vast majority of whom are ultra-Orthodox or national-religious Jews, is relatively good as mentioned. In addition to the permanent Jewish population, yeshiva students attending *yeshivot* and other religious institutions in the Old City also live in the area. Several dozen Jewish families live in the City of David area (most of whom belong to the national-religious stream of Judaism).

The Muslim population faces the worst socioeconomic conditions. This is reflected in overcrowding and in income levels which have led to rising crime and drug trading. One of the main reasons for the high level of overcrowding is the fact that Palestinians with Israeli identity cards who formerly lived in the suburbs of Jerusalem, have now moved into the city itself, fearing that they might lose their Israeli residency status (with the social rights this brings) if they continue to live outside the city. It may be assumed that the construction of the security barrier and the restrictions on the movement of Palestinians into the city have intensified the inflow of Arab residents who hold Israeli identity cards.

Most members of the various Christian communities are Arabs. To these, one should add clergy from abroad who serve in the holy places and religious institutions. The three main Christian denominations are the Catholics (the Roman Catholics and the Uniate Churches¹¹), the Greek Orthodox and the Armenians

¹¹ The United Churches are Eastern communities that accept the authority of the pope; Jerusalem is home to Greek Catholic, Syrian Catholic and Armenian Catholic communities.

(who are not Arabs). Three smaller communities are also present in the Historic Basin. These are the Copts (whose base is in Egypt), the Syrian Orthodox and the Ethiopians. The various Christian communities run educational institutions in the Old City which are attended by children from throughout Jerusalem (including a large proportion of Muslim pupils). The socioeconomic status of the Christian Arabs is better than that of the Muslims. Many of them engage in commerce and tourism.

In discussing the future of the population in the Basin and the various alternatives, the question of residence and citizenship are relevant. Arab residents of the Basin are currently permanent residents of the State of Israel. They hold Israeli identity cards entitling them to move and work freely in Israel, to participate in municipal elections, and, most importantly – to enjoy the economic rights available in Israel, mainly national insurance and national health insurance. Permanent residency was granted to these residents automatically in 1967. However, only a minority of these residents are Israeli citizens, although they are entitled to apply for this status through a process of naturalization.

If a special arrangement is established in the Historic Basin, the question of residence and citizenship will arise. There are three possible solutions to this issue: 1) Israeli residence and/or citizenship for the residents of the Basin; 2) Palestinian residence and/or citizenship (the PA or the state, when one is established); and 3) a special residence and/or citizenship of the Basin as an entity distinct from both Israel, or Palestine. If the basin has its own citizenship, one could also envision the continuation of current citizenship, with the possibility for naturalization in the Historic Basin. It may be assumed that different solutions will be developed in the framework of the different alternatives.

B. The Holy Places

In contrast to the depressing condition of the population of the Basin, the area itself is rich in holy places and historical sites.¹² This plethora of sites is a mixed blessing – on the one hand, it enhances the status of Jerusalem and encourages tourism and pilgrimage; on the other hand, some of the sites are sacred to more than one religion, which may lead to friction and tension.

¹² Shmuel Berkowitz, note 5 above; Lapidot and Ramon, *The Old City*, pp. 16-24.

The subject of the holy places raises three questions: First, what is a holy place? Second, what status does it have? And third, how can access and worship be regulated in places that are holy to more than one religion?

1. What is a holy place? As with many familiar and frequently-used terms, the concept of a “holy place” is not clearly defined in international or Israeli law. In the *Encyclopedia of Public International Law*, the term is defined as follows:

Holy places or sacred places are geographically determined localities to which one or more religious communities attribute extraordinary religious significance or consider as subject of divine consecration. Holy places may consist of man-made structures (churches, temples, graves, etc.) or natural objects (trees, groves, hills, rivers, etc.). The entry to or touching of holy places may be connected to rights or duties of the members of the communities concerned or to restrictions and sanctions for non-members. Within the area of a holy place the competence of the local secular authority may be restricted. Holy Places may be of juridical importance within the protecting State as well as between States.¹³

Holy places are characterized by various factors. Believers often attribute traditions of sanctity to the place, which is perceived as a link between heaven and earth. Sometimes such sites are also associated with traditions relating to supernatural phenomena. Some sites became holy because they are connected to events relating to the emergence of the particular religion. Some believers attribute holiness to the tombs of individuals who are considered holy and possible mediators between humans and God.¹⁴ Sometimes the holy place is separated from everyday life, and special rules of behavior pertain to it. And sometimes it serves as a meeting place for humans where they engage in collective worship.

¹³ Christian Rumpf, in Rudolf Bernhardt, ed., *Encyclopedia of Public International Law*, vol. 2, 1995, pp. 863-866. In the Max Planck Encyclopedia of Public International Law (on line, Oxford University Press, 2008) the definition is as follows: "The term Holy or Sacred Places refers lato sensu to sites which are of special meaning to the followers of one or more particular religion(s). stricto sensu it is used in connection with certain sites in the Holy Land" (by Heribert Franz Koeck).

¹⁴ Ruth Lapidot, "Holy Places," in Nili Cohen and Andreas Heldrich, eds., *The Three Religions*, Munich, 2002, pp. 19-33.

In the absence of any definition of the term in Israeli legislation, the Supreme Court has ruled that the sanctity of a site depends on the belief of the followers of a religion for which the place is holy.¹⁵ This is an extremely broad definition, and, moreover, a dynamic one – places may acquire holy status over time and their physical dimensions may change. This flexibility has significant disadvantages: first, as is well known and as shall be explained below, holy places are subject to a special regime, and hence the possibility to expand the list of holy places entails normative changes and is liable to act as a destabilizing factor. Second, the possibility to increase the number of holy places without restriction may encourage such inflation for political motives, since politicians are liable to utilize the profound religious feelings toward holy places among the public for political purposes.

The results of the tendency to increase the number of holy places can be gauged from the following phenomenon: In 1950, a United Nations body prepared a list of the principal holy sites in the Land of Israel. Thirty of these sites were in Jerusalem.¹⁶ In 2000, three experts – an Israeli Jew, an Armenian Christian and a Palestinian Muslim – prepared a list of holy sites in Jerusalem, which numbered no fewer than 318!¹⁷

There is currently no exhaustive and binding list of the holy sites in Jerusalem. In the context of any solution in the Historic Basin, the sides will probably need to agree on a closed list of holy sites, to which changes may be made only by mutual consent or in accordance with the decision of an agreed international body.

2. Many countries, including Israel, provide protection by the authorities for such sites. In the Declaration on the Establishment of the State of Israel, it was guaranteed that Israel would “protect the holy sites of all the religions,”¹⁸ and details of this protection may be found in the Protection of the Holy

¹⁵ HCJ 267/88, *Kolelei Haidra Network, Association, and Rabbi Shlomo Goren v Court of Local Affairs, Piskei Din* 43(3), p. 728.

¹⁶ *UN Doc. T/L* 49, of 7 March 1950.

¹⁷ Yitzhak Reiter, Marlen Eordegian and Marwan Abu-Khalaf, “Between Divine and Human: The Complexity of Holy Places in Jerusalem,” in Moshe Ma’oz and Sari Nusseibeh, eds., *Jerusalem: Points of Friction and Beyond*, 2000, pp. 95-164, at pp. 155-159.

¹⁸ *Official Record*, 5708, (1948), No. 1, pp. 1-2, 5 Iyar 5708, 14 May 1948.

Places Law, 5727-1967,¹⁹ and in the Basic Law: Jerusalem the Capital of Israel, (adopted in 1980.²⁰ Specific provisions regarding some of the Jewish holy sites are detailed in the Protection of Jewish Holy Sites Regulations, 5741-1981.²¹ In addition, various laws include special provisions in this area, such as the National Parks and Nature Reserves Law, 5723-1963, and the Mines Ordinance of 1925.²²

The Protection of the Holy Places Law, 5727-1967, which is the principal law in this context, ensures freedom of access to the holy sites, it prohibits desecration or other injury to the site, and prohibits offending the sentiments of believers. These provisions have been interpreted by the Supreme Court in a long series of rulings that need not be detailed here.²³ The law, however, does not address the question of the freedom of worship. The right to worship is accepted in Israel, in principle, and subject to public order. However, the courts do not usually consider themselves to be empowered to discuss this issue in the context of the holy sites, and the authority to address such matters rests with the executive branch.

In addition to the laws mentioned above, seven Christian holy places, four of which are in the Historic Basin, fall under the “Historical Status Quo” arrangement.²⁴ In 1852, the Ottoman Sultan ruled that the rights of possession, access and worship in these sites would remain as they were at that point in time, and that no changes were to be made. The Historical Status Quo received international recognition in the Berlin Convention of 1878, and was reaffirmed in the Fundamental Agreement between the Holy See and the State of Israel in 1993²⁵ and in the Basic Agreement between the Holy See and the PLO in 2005.²⁶ In those sites to which this arrangement applies, the Historical

¹⁹ *Statute Book*, 5727, p. 75. (authorized English translation available).

²⁰ *Statute Book*, 5740, p. 139 (authorized English translation available). The law was amended in 2000, but not regarding the issue of the holy sites.

²¹ *Regulations Collection*, 5741, p. 1212, and amendment in 5750, p. 190.

²² Article 4 of the National Parks and Nature Reserves Law, 5723-1963, *Statute Book*, 5723, p. 149; Mines Ordinance of 1925, *Dinim*, Vol. 21, p. 9899.

²³ Ruth Lapidot, *Basic Law: Jerusalem the Capital of Israel*, Jerusalem, 1999, pp. 92-105.

²⁴ For more details on the status quo, see L.G.A. Cust, *The Status Quo in the Holy Places*, 1929, reprinted in 1980.

²⁵ The Fundamental Agreement between the Holy See and the State of Israel, *International Legal Materials*, Vol. 36, 1994, p. 153.

²⁶ The Basic Agreement between the Holy See and the PLO, 2000, www.palestinian-info.

Status Quo is to be preferred to the general arrangement pertaining to holy places in the State of Israel, since, as a specific law it takes precedence over a general one.²⁷ The religious bodies who are in charge of the holy sites enjoy various concessions in the field of taxation.

Thus far, this paper has considered the holy places as a single unit. Given the increasing number of holy places in Jerusalem in general, and in the Historic Basin in particular, it would seem appropriate that these be ranked. Such ranking might be based on the level of sanctity: places that are generally considered to be extremely holy, such as the Temple Mount, the Church of the Holy Sepulcher and the Western Wall, would be distinct from places of worship such as churches, monasteries, synagogues and mosques, which would have a lower ranking. A distinction might also be made between active and inactive holy places. The extent of protection and privileges afforded to the different groups might differ.

3. One of the thorniest issues relating to the holy places of the Historic Basin is that of the status of sites that are holy to more than one religion or religious denomination, such as the Temple Mount / *Al-Haram Al-Sharif*.²⁸ For the Jews, this is the site of the First and Second Temples. For the Muslims, it is the third most holy site – the site where, according to Islamic tradition, Mohammed ascended to heaven during his famous Night Journey. The Mount is also of importance to the Christians, due to various events relating to Jesus, but their claims regarding the mount are not akin to those of the Muslims and Jews. The importance and sanctity of the Temple Mount in the Arab world, and particularly among the Palestinian population, have been intensified in recent years, mostly for political reasons. Moreover, many Palestinian Muslim leaders have argued that the Jewish Temple was never located on the Temple Mount nor in Jerusalem.²⁹

²⁷ Lapidot, note 23 above, pp. 100-101.

²⁸ Regarding the Temple Mount, see Yitzhak Reiter, ed., *Sovereignty of God and Man: Sanctity and Political Centrality on the Temple Mount*, Jerusalem Institute for Israel Studies, 2001 (hereinafter: Reiter, *Sovereignty of God and Man*); and the article by Yitshak Reiter, Amnon Ramon and Shmuel Berkowitz on the Temple Mount, below, pp. 77-95.

²⁹ See Yitzhak Reiter, *From Jerusalem to Mecca and Back*, Jerusalem Institute for Israel Studies, 2005 (hereinafter: *From Jerusalem*).

As is widely known, the Temple Mount is currently under the effective administrative authority of the Muslim *Waqf*. Jews may visit the site during certain hours as determined by the *Waqf* officials, but they may not pray there. A significant minority of rabbis, particularly from the national-religious stream, believe that Jewish prayer should be permitted in part of the mount, contrary to the *Halachik* prohibition imposed in 1967, which outlawed visits by Jews of the Temple Mount (for *Halachik* reasons). Among Muslim sages, with the exception of a handful of individuals,³⁰ there is strong and widespread opposition to Jewish prayer on the mount.

Any solution to the issue of the Temple Mount will have to address the different aspects of the problem: will one side hold sovereignty over the mount, or will it be agreed that the question of sovereignty be ignored, as proposed in the Principles for an Agreement drafted by Ami Ayalon and Sari Nusseibeh? Will Jews be permitted to pray in a small section of the Mount or in the outer surroundings? What visiting rights will non-Muslims enjoy on the Mount? Who will be permitted to build or excavate on the Mount and under what conditions? Who will be responsible for preserving the historical buildings on the mount?

It may be assumed that in other sites (besides the Temple Mount) that are holy to more than one religion, it will be easier to find a solution, such as the physical division of the site, or providing rights of access and worship at different hours.

C. Connections between the Historic Basin and the Remaining Sections of the City

Any special arrangement in the Historic Basin must take into account the relationship between the basin and the remaining sections of the city. The Historic Basin is strongly connected to greater-Jerusalem in terms of shared infrastructure, employment, as well as in terms of the religious, commercial, and educational life of the city.³¹

³⁰ Such as Professor Sheikh `Abd Hadi Falachi of Italy. On the Jewish side, one should mention Rabbi She'ar-Yashuv Cohen, who believes that there is no reason why both Jews and Muslims should not pray on the Temple Mount.

³¹ See the articles of Israel Kimhi and Maya Choshen, in: Ramon, *The Historic Basin*, pp. 128-137, as well as Lapidoth and Ramon, *The Old City*, pp. 53-54.

The Basin is a center of religious services: Due to the large number of holy places of different kinds, the Historic Basin constitutes a major center for believers, attracting tens of thousands of people every day, and hundreds of thousands on important festivals. The Historic Basin serves as a religious center for the entire country, as well as for pilgrims from abroad. If a peace agreement is reached, a substantial increase in the number of people visiting the religious centers in the Historic Basin can be expected.

The importance of the Historic Basin as a religious center is not limited to pilgrimage. All three religions – Jews, Christians and Muslims – maintain cemeteries in the area. Any arrangement has to ensure access to these cemeteries, or provide alternative burial sites for all three faiths outside the Historic Basin.

The Basin, and the Old City in particular, also serve as a center for commercial services: The Old City still functions as an economic center for the Arab population of East Jerusalem as well as for the Jewish population in times of calm. If quiet prevails in the area, it may be expected that the economic ties between the Old City and the remaining parts of the city will increase. The expected increase in the number of Muslim pilgrims attending Friday prayers, and in the numbers of Christian and Jewish pilgrims and tourists, will add thousands of consumers, who are not Jerusalem residents, into the commercial system.

The Basin as a tourist center: Because of the Historic Basin's status as a religious as well as an economic center, it is also a major tourist destination. In times of quiet, almost three million tourists a year visited the Old City. If peace is restored, or even just maintained, the influx of tourists can be expected to grow even further. Therefore coordination with the other parts of the city will be needed in terms of pedestrian access, bus routes, parking places for hundreds of private vehicles and buses in and around the Historic Basin, and the supply of merchandise and products to the markets in the Old City.

The Old City currently constitutes a major educational center. In addition to its role as a tourist center, the Basin is also home to schools, *yeshivot* and Muslim religious institutions attended by large numbers of young people who do not live in the area. Almost 10,000 students attend institutions within the walls of the Old City and many of them live in the eastern neighborhoods of the city. Given the

severe lack of classrooms in the Arab sector outside the walls, there will continue to be no alternative but to provide such services within the Old City for many years to come. If, in the context of an agreement, it is decided to restrict the education system solely to the residents of the Old City, new educational facilities in the other sections of the city will have to be provided.

Regarding **infrastructures** – residents of the Historic Basin as a whole, including those of the Old City, are currently completely dependent on water supplied by Israel, as well as electricity and communication systems. The gravity based drainage and sewage systems could function independently, though these, too, are connected by various conduits to other sections of East and West Jerusalem. Of all the systems, the communications network is the most flexible, and could be restricted to the Historic Basin through the use of a satellite system.

In terms of **employment**, it should be noted that about 4,200 people from other parts of the city currently work in the Old City. In the remaining parts of the Historic Basin, however, places of employment are limited to the faculties of the various religious institutions and the employees of Seven Arches Hotel (formerly the Intercontinental Hotel) on the Mount of Olives. Most of the Jews who live in the Jewish Quarter work in the West of the city; only a minority of them are employed inside the quarter.

D. The Road System to, in and around the Basin³²

Sixteen roads currently lead to and from the Historic Basin: four from the south, three from the east, six from the north and three from the west. The Basin itself has ten entrances: three from the west, two from the south, two from the east, and three from the north (see map on p. 6). The only road that intersects the entire Basin is the old Jericho Road from Jerusalem to Jericho. This road formerly connected the areas of Jericho, Al-Azariyah and Abu Dis to Jerusalem, but it is now blocked by the security barrier at Abu Dis junction. Jericho Road is still used by the residents of Ras Al-Amud and Silwan to reach the Old City and the Arab business district along Salah Al-Din Street. There is effectively no alternative to

³² This section is taken in its entirety from the article by Israel Kimhi, in: Ramon, *The Historic Basin*, pp. 117-119.

this traffic route, with the exception of the dangerously narrow and steep "Priests Road", which leads from Abu Dis junction to the peak of the Mount of Olives, and then on to the Old City.

An additional and important route along the margins of the Basin is Sultan Suleiman St., which connects to Road No. 1 to the north (Engineering Corps St.) and to Paratroopers St. to the south. This road permits traffic to pass along the northern edge of the Historic Basin without entering it. This road also permits entry into the Historic Basin through the northern gates of the Old City (Damascus Gate and Herdo's Gate). Within the Historic Basin, movement is possible between the various holy sites without the need to leave and pass through adjacent areas.

As noted, the Historic Basin has numerous entrances. Completely separate entrances could be allocated for Jewish and Palestinian residents respectively. An arrangement could be reached so that Jewish residents will not pass through the Arab neighborhoods of East Jerusalem in order to reach the Basin, and, similarly, that Palestinian residents would not have to pass through Jewish neighborhoods.

However, there is also a drawback to the large number of entrances. The unchecked flow of merchandise and people to the area could exacerbate efforts to maintain order. It will almost certainly be necessary to restrict the number of entrances. Palestinian residents could enter the Basin via the historical Jericho Road, the "Priests Road" and the road leading to Augusta Victoria and Al-Tor, and via the junction of Rockefeller and Sultan Suleiman St. to Flowers Gate and Damascus Gate. Jewish residents could conveniently enter the Historic Basin via Jaffa Gate, the New Gate or via the Pope Road to Zion Gate and Dung Gate (see map on p. 6).

If the Historic Basin were to function as a separate entity, there would need to be the possibility of moving between the different parts of the city without the needing to cross through the Basin at a high level of frequency. In other words, those who have no special need to enter the Basin should be able to circumvent it and reach their destination. Any such by-pass road should also provide rapid access between the Palestinian neighborhoods to the south of the Basin and those to the north. A by-pass road would also serve the purpose of reducing the volume of traffic in the Historic Basin and protecting the sensitive areas visited by large numbers of pilgrims and pedestrians. In many historical cities around the world, the authorities do their best to reduce motor traffic congestion in the ancient

quarter – even if it does not include holy places. To this end, by-pass roads are constructed. Jerusalem does not yet offer such roads to a sufficient standard, and it will be necessary to complete the planned “Eastern By-Pass” as quickly as possible. The road, in its current conception, is planned to pass to the east of Ras Al-Amud, and then to the Palestinian neighborhoods to the south and east, linking these to the Palestinian neighborhoods to the north of the city. However, this road has yet to be completed.

E. The Municipal Structure³³

In seeking alternatives for the optimum municipal structure in the Historic Basin Jerusalem’s special circumstances has to be taken into account.

First, the most prominent characteristic of the Basin as a whole is the large number of holy places within a limited geographic area – a situation that might justify municipal unity for the area. On the other hand, the Old City includes four quarters whose population differs on religious and, in some cases, ethnic lines – a situation that could justify granting personal (i.e. cultural) autonomy to different groups, based on the existing model of “neighborhood administrations” introduced in various parts of Jerusalem. On the other hand, the strong connection the Historic Basin has to the other sections of the city, as mentioned above, requires close cooperation on municipal issues. Moreover, it should be assumed that the Basin will rely on the infrastructures of the adjacent areas in terms of water, sewage and electricity. It may be possible to supply some other municipal services (removal of solid waste, cleaning, etc.) through private contractors, but it may be assumed that the Basin will be dependent on the provision of services and merchandise from the surrounding areas. Lastly, serious consideration should be given to institutional matters: Will a special municipal council be required, or will an executive group be sufficient? Will the councillors of the municipal unit be elected by the residents, or will they be appointed by Israel and the Palestinian entity? Although there is a significant difference in the number of residents on each side, Israelis and Palestinians should enjoy equal representation. It is interesting to note that in 1978 President Sadat proposed a joint city council with

³³ See the article by Maya Choshen and Israel Kimhi, in: Ramon, *The Historic Basin*, pp. 128-137; and Lapidoth and Ramon, *The Old City*, pp. 26-32.

an equal number of Israelis and Arabs, although his proposal was related to the city of Jerusalem as a whole, and not just to the Historic Basin.³⁴

Alternatively, the relatively small number of residents, on the one hand, and the enormous importance of the Basin for Israel and the Palestinians, on the other, may justify the appointment of an executive body by the two sides.

In addition, it would seem desirable to determine in advance who will accept the position of administering the Basin, if the proposed arrangement fails, and who will be empowered to determine that such failure has indeed occurred.

F. Planning, Building and Conservation³⁵

The Historic Basin is one of the most sensitive areas in Jerusalem. It contains the highest proportion of archeological, cultural and historical sites in the city all of which must be protected from the ravages of time and human activity. Any construction or development inside or outside the walls is liable to damage some of the most important sites in the world. In any future arrangement, it will be necessary to establish special procedures relating to sustainable development in the Basin without harming the historical nature of the area.

Two key problems arise in this context:

- A. The first problem is that due to overcrowding (exacerbated by immigration into the Old City), poor living conditions and the absence of suitable inspection, there is extensive illegal construction in the Historic Basin in general, and the Old City, in particular.
- B. The second is the need to find a proper balance between conservation, on the one hand, and development, on the other. The entire Basin actually constitutes an historical area, and maximum conservation would require the complete cessation of any development and construction. However, the area is not a museum, but also a place where people live, and this demands construction

³⁴ Letter from President Sadat to President Carter relating to the 1978 Camp David Summit, *Collection of Treaties*, No. 857, Vol. 25, p. 509, page 525, para. 7.

³⁵ See the article by Israel Kimhi, in: Ramon, *The Historic Basin*, pp. 138-141; and Lapidoth and Ramon, *The Old City*, pp. 40-42.

and development. In any future arrangement, it will be necessary to find the proper balance between these two poles.

In this context, it should be recalled that the Old City and the surrounding walls were registered in the World Heritage List by the Jordanian government in 1981. This registration was undertaken under the terms of a convention signed in 1972 under the auspices of UNESCO – a convention that Israel signed only in 1999.³⁶ The signatories to the convention have to conserve the sites included in the registry, and are entitled to request international assistance, technical or financial, to this end. The state must “identify, protect, conserve and transmit [the site] to the following generations.” The state has also to report to UNESCO of any legislative, administrative or other action undertaken in order to implement the convention. In 1982, the Old City was also registered in the list of endangered sites.

In addition, the various Christian authorities have also demanded that the unique character of historical Jerusalem, and particularly of the Old City, be maintained.³⁷

Due to the difficulties of conservation and international interest, a committee of international experts formerly operated in Jerusalem, advising the mayor on issues of conservation and development.

In formulating alternative solutions for the Historic Basin, attention should be given to all the above elements.

G. Security³⁸

It is generally acknowledged that the subject of security in the Historic Basin is extremely problematic. The area is often referred to as a “tinderbox” where every effort must be made to prevent an explosion.

³⁶ Lapidoth and Ramon, *The Old City*, pp. 49-52.

³⁷ See, for example, the position of the Vatican in the book: Moshe Hirsch, Dvora Haussen-Kuriel, and Ruth Lapidoth, *Whither Jerusalem, Proposals and Positions Concerning the Future of Jerusalem*, Martinus Nijhoff, The Hague, and Jerusalem Institute for Israel Studies, 1995, pp. 127-128.

³⁸ See the article by Kobi Michael, in: Ramon, *The Historic Basin*; Lapidoth and Ramon, *The Old City*, pp. 55-58.

In the field of security, a distinction is usually made between three aspects: external security, i.e. defense against attack from the outside; internal security, i.e. the struggle against terrorism; and public order, i.e. the “regular” war on crime. It is doubtful whether the issue of external security should be addressed in the Basin: the area is so small and sensitive that it would possibly be better to avoid consideration of this aspect of security.

Conversely, acts of terrorism originating inside or outside the area, as well as the maintenance of public order, are aspects that must be addressed seriously. Regarding internal security, the threat of terrorist attacks from Jewish, Christian or Muslim extremists is extremely serious. As for public order, and as noted above, the Basin, and the Old City in particular, suffer from a high level of crime and drug abuse.

It is highly doubtful whether there is any chance of security cooperation between the parties, given the experience of the joint patrols that operated under the terms of the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip of 1995.³⁹ Nevertheless, the possibility and essential need for coordination between these parties remains.

The dimensions of this threat, on the one hand, and the lack of trust between the parties, on the other, require the intervention of a substantial international force. This force could be empowered to coordinate between the police forces of the sides, to assist, supervise and train them and to resolve conflicts and misunderstandings.

Regarding security arrangements, it is possible and indeed desirable, to establish different arrangements regarding specific areas within the Basin: The Temple Mount, the Old City, the Mount of Olives and the remaining areas of the Basin.

The powers and responsibilities of the sides, and of the international force, must be defined according to the details outlined in each different alternative.

³⁹ Kobi Michael, *Truth or Fiction? Why Did the Model for Israeli-Palestinian Military and Security Cooperation Fail? A Personal Retrospective of an Impossible Hope, May 1994 – September 2000*, Davis Institute, the Hebrew University of Jerusalem, 2003.

H. Law and Jurisdiction⁴⁰

Substantial differences in the field of law and jurisdiction can be expected in the various alternatives presented in this study. Therefore, the present discussion of this area will be confined to a number of general comments and clarifications.

First, in any alternative the parties should agree in advance on substantial arrangements that will apply in the Basin, particularly in the following areas: human rights, environmental protection, conservation and development, entry and exit arrangements to and from the Basin, and, in particular, agreed arrangements relating to the holy sites – a list of recognized holy sites, rights of access and worship, particularly in the case of sites that are holy to more than one religion.

Second, when considering each alternative, it will have to be decided whether Israeli or Palestinian law should apply, or alternatively another system such as a combination of these two, or that of another country. On this issue, reference might be made to the extensive efforts in Europe to unify the legal system in certain fields.

In discussing the question as to the desirable legal system relating to a certain activity, attention may be given to three criteria: The citizenship or residency of the individuals involved (the personal dimension); the place of the incident (the territorial dimension); and its character (the functional dimension). These criteria are relevant both in terms of the law that should apply and in terms of the court that should have jurisdiction. An interesting example of recognition of personal jurisdiction in criminal matters is included in the special arrangement established regarding the Naharayim/Baqura and Tzofar/Al-Ghamar areas in the peace treaty between Israel and Jordan.⁴¹ According to this arrangement, the Israeli landowners who enter the area are subject to Jordanian sovereignty but are also subject to Israeli criminal law.

The question arises as to whether some type of combination of Israeli and Palestinian law could be created. Both systems were based, in the distant past, on the Mandatory system, which was influenced by Ottoman and English law, but numerous changes have since been introduced. In Israel, for example, contract

⁴⁰ See the article by Ruth Lapidoth, in: Ramon, *The Historic Basin*, pp. 271-276; Lapidoth and Ramon, *The Old City*, pp. 59-60.

⁴¹ *Collection Of Treaties*, No. 1069, Vol. 32, p. 271, Appendix Ib.

law is now influenced by the German system, and numerous changes have been made in the field of the law of torts.

As for the Palestinian system, the situation is not clear.⁴² While Israel determined on its establishment that the law in force prior to the establishment of the state would remain in force, unless modified by or under the authority of the Knesset,⁴³ the Palestinian Basic Law of 2003 does not say what is the applicable system of law. It merely states that “the principles of the Islamic Shari`a shall be the principal source for legislation” (section 4 (Article(2))), while the proposed constitution of 2003 states that these principles shall be “an important source for legislation,” and that “civil and religious matters of the followers of the monotheistic religions shall be organized in accordance with the instructions of their religion, within the framework of the law, and in a manner permitting the existence and independence of the Palestinian people” (section 7).⁴⁴

Palestinian law is practically comprised of the following elements: the remnants of Ottoman and English law; Jordanian law (in the West Bank) and Egyptian law (in the Gaza Strip); provisions from the Shari`a relating to questions of personal status; and the legislation of the Legislative Council established in 1996. As for the Israel legislation of the Israeli Military commander for the areas of the West Bank and Gaza, it is unclear which sections thereof still apply regarding the Palestinians in accordance with Palestinian law. In any case, after the establishment of the Palestinian Authority, Chairman Arafat determined that all laws which had been in force before 1967 were once again valid.

However, it should also be noted that the Palestinian legal system is in a process of fundamental reform.

In light of the preceding information, it is doubtful whether a legal system can be developed for the Historic Basin on the basis of the two relevant systems – the Israeli and the Palestinian legal systems.

⁴² The author wishes to thank the International Agreements and Claims Unit in the Ministry of Justice, which provided material on the Palestinian system.

⁴³ Section 11 of the Law and Administration Ordinance, 5708-1948.

⁴⁴ An English translation of the Basic Law of 2003 and of the proposed constitution of the same year were published in the booklet *The Palestinian Legal System, Palestinian Legislation and the Palestinian Ministry of Justice*, prepared by the International Agreements and Claims Unit, Ministry of Justice of Israel, February 2005.

Which legal system, then, should be chosen? It might be worth considering the English system, since this is not completely alien to either side, though any other system could also be appropriate. It is doubtful whether the Palestinians would agree to the application of Israeli law, and it can be assumed that the Israelis would not agree to the application of Palestinian law (on this issue, there will naturally be substantial differences among the different alternatives).

Regarding jurisdictional authority, consideration should be given, within the context of the relevant alternatives, to the possibility of mixed Israeli and Palestinian courts, with or without the involvement of foreign judges, as well as to courts of the international authority that may operate in the Basin.

The party that holds jurisdiction would also be in charge of enforcement.

There is also the possibility that individuals might choose to settle their disputes through arbitration or even through mediation.

I. Economic Issues⁴⁵

Many questions in the economic sphere are raised with regard to the Historic Basin. The essential points might be summarized as follows: First, - where will the residents of the area find work? Second, how finance the administration of the Basin? And, third, how to regulate entrance and exit of people and goods in a way that prevents smuggling?

Regarding the question of livelihood, it may be assumed that most residents of the Basin will work outside the area, particularly in other parts of Jerusalem. This is indeed the situation at present.

With respect to financing, it may be assumed that the taxes paid by the population of the Basin, which is mainly poor, will not be able to provide the required budget. It would naturally be possible to impose a levy on tourists and other visitors, but these sums will also be insufficient. Presumably, the Palestinian entity and the State of Israel will be required to bear a significant portion of the

⁴⁵ See the article by Emmanuel Sharon, "The Economic Ramifications regarding the Alternatives for the Status of the Historic Basin Area", in: Ramon, *The Historic Basin*, pp. 170-178.

expenses for the administration of the Basin. Given the large number of holy sites in the area, it may be possible to recruit support from religious institutions.

The most difficult issue is the need to regulate the entry and exit of people and goods, particularly for reasons of security and in order to prevent smuggling. This matter naturally requires different solutions with regard to the various alternatives. If the Basin is to constitute a separate economic unit from the remaining parts of the city, a fence will have to be built around the area; it is doubtful whether this is possible. It is also unclear who would supervise the entry and exit points, and on what conditions a person who arrived in the Basin from country A would be permitted to leave for country B. It will be necessary to provide easier arrangements for people who cross the Basin border on a daily basis, such as residents of the Basin who work outside the area, or students who attend institutions in the Basin.

The economic questions involved in the establishment of a special regime in the Historic Basin are extremely complex, and deserve particular attention and consideration.

J. International Involvement⁴⁶

Due to the lack of trust between the parties, the common belief is that any arrangement in the Historic Basin should include international involvement. Such involvement might be necessary mainly in the fields of security, conservation and ensuring a fair regime in the holy places- that is to say, freedom of access and regulation of worship. The need for such involvement was noted already many years ago, when the UN General Assembly recommended the establishment of a Jewish state, an Arab state and a Corpus Separatum (separate body) for Jerusalem under international administration (Resolution 181(II) dated 29 November,

⁴⁶ See the article by Moshe Hirsch and Shimrit Golan, “*International Intervention in the Historic Basin: Characteristics and Key Alternatives*,” below, pp. 96-119; see also, Moshe Hirsch and Kobi Michael, *International Involvement in the “Holy Basin” in Jerusalem – Possible Alternatives*, Jerusalem Institute for Israel Studies, 2003 (hereinafter: *International Involvement*).

Rosalyn Higgins, *United Nations Peace Keeping 1946-1967: Documents and Commentary*, Vols. 1-3, 1969-1980; F. Seyersted, *United Nations Forces in the Law of Peace and War*, 1966; Robert C.R. Siekman, *Basic Documents on United Nations and Related Peace-Keeping Forces*, 2nd enlarged ed. 1989.

1947).⁴⁷ However, neither the special body for Jerusalem nor the international presence, were actually established.

During subsequent periods, various international forces were established and operated around Israel: The UN Truce Supervision Organization (UNTSO), established in 1948 is still operational; the UN Emergency Force in the Middle East I (UNEF I – 1957-1967); the second emergency force – UNEF II (1974-1979); the UN Disengagement Observer Force (UNDOF) on the Golan Heights (established in 1974 and still operational); the UN Interim Force in Lebanon (UNIFIL – 1978 to date. UNIFIL's powers and responsibilities have been increased substantially after the 2006 war); the Multi-National Force in Lebanon (MNF), established in 1982 – a Franco-American force that was quickly forced to withdraw due to heavy losses; and the Multinational Force and Observers (1981 to date, established following the 1979 peace treaty between Israel and Egypt), which supervise the limitation of forces in the Sinai and the Southern Negev, and ensure passage in the Straits of Tiran; The Temporary International Presence in Hebron (TIPH) (since 1997); and, lastly, the involvement by the European Union and the USA in the agreement regarding the crossings (between Israel, Gaza and Egypt) in accordance with the Rafah Agreement of November 2005.

In other parts of the world, too, there are numerous international authorities or forces whose function varies from case to case. In some cases, the function of the force is to maintain a peace agreement between the sides; in other cases the function of the force is actual peacemaking, and sometimes the force is even called upon to establish the institutions of government in a new or weak nation.

Of the international authorities and forces outside the Middle East, the force in the Congo (1960-1964), the force that still serves in Cyprus (since 1974), and the forces in Bosnia-Herzegovina, Kosovo and Macedonia, and East Timor are worthy of consideration in this context.

There are many differences between the various forces that have been active in the Middle East and elsewhere. These differences are due to a number of factors: the establishing body (the Security Council, the UN General Assembly, another international organization or the parties themselves); which power issues instructions and supervises the body; the composition of the force (for

⁴⁷ General Assembly Resolution 181 (II) on the Future Government of Palestine, *GAOR*, 2nd Session, 1947, pp. 131-151.

example, in the past UN forces did not usually include units from countries that are permanent members of the Security Council); who is empowered to decide on the termination of its operations or to extend its mandate; what are its powers and responsibilities and who finances it.

What was Israel's previous experience with similar forces? The first UNEF force left the region in 1967 at the request of Egypt prior to the Six Day War; some likened this to an umbrella that is removed as rain approaches. The work of the second UNEF force ended following the peace treaty between Egypt and Israel, due to the opposition of the Soviet Union which considered this peace an American achievement. For the most part, UNIFIL has failed to prevent terrorists from infiltrating Israel from Lebanon; some of its soldiers even photographed the kidnapping of Israeli soldiers by Hizbullah. Moreover, in some cases Israel has caught UNIFIL soldiers attempting to smuggle weapons and drugs. After its reinforcement in 2006, there were hopes for improvement.

In Bosnia-Herzegovina and Kosovo, the international forces secured significant successes, but even in this case, they are remembered for a horrifying episode in Srebrenicza – the area was supposedly under the protection of the UN force but Serbs murdered many of the residents and the UN force failed to prevent the incident. The force became successful only after it was manned by NATO soldiers.

Thus, it would seem that an international presence is no panacea. Nevertheless, it may be necessary to make use of such a body in order to overcome the lack of trust between the sides. In particular, and as already mentioned, an international body should assist in security matters, in promoting conservation and in ensuring access and worship at the holy places; and in resolving local disputes and preventing misunderstandings. Naturally, it will be necessary to agree on the composition and mandate of the force and/or powers of the authority in advance. It may be appropriate to establish both a civil administrative body and a military or police force, in accordance with the functions to be entrusted to the body in view of the various alternatives.

K. International Status and International Commitments

A major question is whether the parties to the agreement should grant the Historic Basin any international legal status, and if not – who will be empowered to act on

behalf of the Historic Basin in the international arena, and who will be responsible for what happens on the ground.

International status is usually manifested in the following aspects: the ability to have international rights and obligations; the authority to conclude treaties; the authority to participate in international adjudication; and international responsibility. Many bodies enjoy only some of the above-mentioned powers. A sovereign state holds all these powers, while other bodies – e.g. international organizations and special bodies such as the International Committee of the Red Cross and the Holy See – hold only some.

If the Basin is to remain part of a state, it will be obvious that the Basin will not have any separate international legal status. If, however, it will constitute an enclave that does not belong to any country, the following questions might arise: What entity is empowered to conclude treaties in the name of the Basin? If citizenship is established for the residents of the Basin, who will be empowered to protect the citizens of the Basin abroad (“diplomatic protection”)? Is it appropriate for the Basin to have diplomatic or consular representation in foreign countries, and should foreign countries be represented in the Basin? It may be assumed that the representatives of foreign countries serving in the neighboring countries – Israel, Jordan or the Palestinian Authority – will be authorized by their countries to act also in the Basin. The toughest question of all is who will hold international liability for events in the Basin?

It may be appropriate here to conduct a short review of the various arrangements that have been introduced or proposed in the region. Thus, for example, in the document establishing the British Mandate for Palestine of 1922, it states that "The Mandatory shall adhere on behalf of the administration of Palestine to any general international convention already existing, or which may be concluded hereafter with the approval of the League of nations, respecting the slave traffic, the traffic in arms and the ammunition, or the traffic in drugs, or relating to commercial equality, freedom of transit and navigation, areal navigation and postal, telegraphic and wireless communication or literally, artistic or industrial property" (Article 19).⁴⁸

⁴⁸ Ruth Lapidoth and Moshe Hirsch (eds.), *The Arab Israel Conflict and its Resolution: Selected Documents*, Martinus Nijhoff, The Hague, 1992, pp. 25-52.

The administration in Palestine was only empowered to sign "special customs agreements" with the neighboring countries, and even this only with the authorization of the mandatory power (Article 18, last part). The foreign relations and protection of the citizens of Palestine abroad rested with the mandatory power (Article 12).

Later, during the period 1947-1950, the United Nations considered similar issues relating to the recommendation to establish a special body – *Corpus separatum* – in Jerusalem under the administration of a governor to be appointed by the Trusteeship Council of the United Nations. The plan was not implemented. The UN resolution of 29 November, 1947 stated that the governor on behalf of the United Nations is charged with managing the external affairs of the separate body (Particular Article C2); the Trusteeship Council was to make arrangements for the consular protection of the citizens of the territory while abroad (Article C11); and the proposed Jewish and Arab states would be represented in Jerusalem (Article C9).⁴⁹

Details of the arrangement were laid down in the proposed statute approved by the Trusteeship Council in 1950.⁵⁰ Article 37 refers expressly to "external affairs":

1. Subject to the provision of this Statute and to the instruction of the Trusteeship Council, the Governor shall conduct the external affairs of the city.
2. The Governor may ensure by means of special international agreements, or otherwise, the protection abroad of the interests of the City and of its citizens.
3. The Governor may accredit representatives to foreign States for the protection of the interests of the City and its citizens in those States.
4. Representatives may be accredited to the Governor by any State if he so permits.

⁴⁹ Note 46, above.

⁵⁰ *UN Doc. GAOR*, 5th session, 1950, Supp. 9A/12 86, annex2, pp. 19-27. The document also appears in: Ruth Lapidot and Moshe Hirsch, eds., *The Jerusalem Question and its Resolution: Selected Documents*, Martinus Nijhoff, The Hague, and the Jerusalem Institute for Israel Studies, 1994, pp. 117-134.

5. The Governor, on behalf of the City, may sign treaties which are consistent with this Statute and shall adhere to the provisions of any international conventions and recommendations drawn up by the United Nations or by the specialized agencies referred to in article 57 of the Charter of the United Nations which may be appropriate to the particular circumstances of the City, or would conduce to the achievement of the special objectives set out in the preamble to this Statute.
6. Such treaties and international undertakings entered into by the Governor shall be submitted for ratification to the Legislative Council. If the Legislative Council does not ratify any such treaties or international undertakings within six months of the date of signature by the Governor, the matter shall be referred to the Trusteeship Council which shall have the power to ratify them.
7. Foreign Powers shall enjoy immunities no less than those in force on 29 November 1947 in respect of their property within the City".

The statute further established that the Universal Declaration of Human Rights of 1948 would be "accepted as a standard of achievement" field of human rights (Article 9(15)), and when the covenant on Human Rights would enter into force [the reference is to the covenant eventually adopted in 1966], the provisions would also apply in Jerusalem (Article 9(16)). None of the relevant documents discusses the question of international liability. And as is well known, this plan was never established.

What can be learned from these and other precedents? Several solutions may be considered to resolve the problem. One possibility is that the management of the foreign relations of the Basin be entrusted to a particular country (this was the case for Danzig between the two world wars, and in Andorra through 1993). Another possibility is that the international body supervising the activities of the potential civil and military presence operating in the area will be responsible for foreign relations. In any case, foreign relations should be restricted to a minimum – e.g. adhering to conventions and protecting citizens abroad (if the Basin has its own citizenship), and international responsibility. Regarding conventions, a list of international conventions that should apply in the Basin should be agreed upon in advance, in particular a list of conventions in the fields

of human rights, environmental protection, medical cooperation, the war on drugs and arms smuggling, money laundering, etc.

Regarding multi-lateral conventions to be concluded in the future, a committee of the parties to the agreement could be formed and empowered to decide on the addition of conventions to the above-mentioned list.

The toughest problem is that of international responsibility. One may consider the establishment of an international fund as a form of insurance in the event that a violation of international law occurs in the Basin requiring the payment of compensation – of course, in addition to the personal liability of the perpetrators.

In closing this section, it should be noted that the authorities of the Basin will have to observe not only the conventions binding on the Basin, but also international customary law, without any special notification or formal adherence.

L. Peaceful Resolution of Disputes⁵¹

In the section on law and jurisdiction (section H), the resolution of disputes between the residents of the Basin, between residents and foreigners, and between a resident or a foreigner and the municipal authority was discussed. This section will discuss disputes not included in this framework. This includes disputes between the two parties to the agreement that has established the special regime; disputes between these two parties, or either thereof, and the municipal authority; disagreements between either party and the international body operating in the city, or even the institution that guides and commands this body. Other disagreements that might emerge include disputes between the international body and one of its employees, or between this body and a resident of the Basin or another person. They should also be included in this framework.

Disputes relating to the rights and obligations of the individual may be managed by the local courts. However, it should be assumed that the international

⁵¹ See the article by Ruth Lapidoth, "Peaceful Resolution of Disputes," in: Ramon, *The Historic Basin*, pp. 277-284, as well as, J.G. Merrills, *International Dispute Settlement*, 3rd ed., Cambridge, 1998; *Handbook on the Peaceful Settlement of Disputes between States*, U.N. Doc. OLA/COD/2394 (1992), Sales no. E.92.V.7.

force, the international civilian authority and the body guiding these will not agree to litigate in the local courts.

There is a good chance that practical solutions will be found for all the disputes between private individuals or private bodies and one of the above-mentioned authorities through mediation, arbitration or a special administrative tribunal.

The question is more complex in the case of potential disputes between the two parties, or between these parties (or either thereof) and the international authority.

In international practice, a distinction is usually made between diplomatic means and judicial means for the settlement of disputes. There are two essential differences between these two methods: Diplomatic means (negotiation, mediation and conciliation) take into account all the relevant circumstances, and any resolution adopted has only the status of a recommendation. In contrast, judicial means (arbitration or adjudication) take into account, in principle, only legal considerations, and the decision of the judicial body is binding. Arbitration is slightly more flexible than adjudication by a court, since the parties to arbitration can influence the process by establishing the procedures to be followed, the applicable law and the selection of the arbitrators.

It is important to determine in advance not only the mechanism – negotiation, mediation and conciliation, on the one hand, or arbitration and adjudication, on the other – but also the identity of the mediator or arbitrator. If possible, for example, it should be agreed in advance that mediation will be led by the United States, or by the European Union or the Secretary-General of the United Nations or Russia (the members of the Quartet), or by another country or accepted figure.

If the parties prefer arbitration, the identity of arbitrators, or at least who will appoint them; what law they will apply; and what procedures will be followed, all should be determined in advance. Before any specific arbitration takes place, agreement must be reached ("compromise") on these matters, if they had not been agreed upon beforehand.

The parties could also agree that, in the case of certain types of disputes, they prefer a certain mechanism, such as mediation, while on other issues they will adopt a different method, such as arbitration.

Moreover, probably the establishment of a special regime for the Historic Basin will form part of a more general agreement between Israel and the Palestinian entity. It can be assumed that the general agreement will include provisions relating to the resolution of conflicts, and these may also apply to disputes relating to the Basin. However, there is also the possibility that the parties could decide on an arrangement for the Basin that differs from the arrangement in the general agreement.

The agreement between the parties may only address the ways to resolve disputes between them, while the arrangements with the international body should be included in the agreement with this body.

Lastly, it should be noted that in the case of vital national interests, countries are usually reluctant to agree to binding arbitration. Thus, for example, in the agreed arrangements for the deployment of Egyptian border police forces along the border in the Rafah region (the “Philadelphy” route), of June 2005, it is stated that disputes regarding the interpretation and implementation of the agreement should be resolved by negotiations, “and shall not be submitted by either party for adjudication by any national or international court or tribunal” (Article 83).

All these factors should be taken into account in addressing the various alternatives.

5. The Question of Sovereignty⁵²

Much has been written on the issue of sovereignty in the context of Jerusalem and yet it is an issue that continues to be raised. Regarding the alternatives for the future of the Historic Basin, the question arises as to whether the starting assumption should be that one party or the other should have sovereignty, or whether it would be better to ignore this question entirely – as was the case in the resolution adopted by the General Assembly of the UN in 1947.⁵³ In this resolution, which recommended the establishment of a “Corpus Separatum” in Greater Jerusalem, the word “sovereignty” was not mentioned; instead, the resolution related only to administration and powers, effectively providing for

⁵² Lapidoth and Ramon, *The Old City*, pp. 2-15; Ramon, *City in a Labyrinth*, pp. 229-231; Lapidoth, “On Sovereignty,” in: Ramon, *The Historic Basin*, pp.292-300.

⁵³ See note 46, above.

international administration without mentioning “sovereignty”. The avoidance of the term sovereignty could, it would seem, facilitate the adoption of a compromise in the Historic Basin.

Due to the importance of the subject, this paper will provide a brief review of the history of the term. Two distinct uses of this term can be discerned. The popular use of the term sovereignty indicates the belief in the right to total and exclusive control – a belief that includes a symbolic and even mystical element, and which is often accompanied by strong feelings. In contrast, the professional use of the term refers to full internal control, and independence from external sources, subject to the rules of international law and any commitment the state may have undertaken.

The meaning of this term is sometimes completely distorted. Thus, for example, one may hear a senior civil servant declare that “the minister is sovereign to decide...” The reference probably was to the minister's authority to act in accordance with his own discretion, but this is a mistaken use and it has nothing to do with the actual concept of sovereignty.

The idea of sovereignty developed toward the end of the Middle Ages and the beginning of the modern era. This concept evolved as part of the movement to free the king or prince from the domination of the pope or of the emperor. As noted, the term originally referred to full internal control and external lack of dependence, though subject to international law and the divine commandments.

From the seventeenth century onward, the term sovereignty began to acquire a more extreme meaning, implying the authority to act without any restrictions. In modern times, the term is once again returning to its original dimensions, and possibly becoming even more restricted. The reasons for this development are numerous: federal regimes (which entail the de facto division of sovereignty), democratization, the inter-dependence of nations, the development of international protection of human rights, rapid communications across borders, and the decreasing rigidity of borders –sovereignty is actually based on the presence of rigid borders between states.

The concept of sovereignty has adapted itself to these changes and become more moderate. Moreover, modern discourse sometimes refers to shared, joint or divided sovereignty, to quasi-sovereignty, to de jure sovereignty as opposed to de facto sovereignty (actual control), to restricted or differential sovereignty , to

functional sovereignty, spiritual sovereignty (the Holy see) and, in the case of the province of Quebec in Canada – *souveraineté association* - (two terms that are ostensibly opposed). The tendency is now to emphasize not only the element of control in the concept of sovereignty, but also the responsibility that goes along with this.

In a few regions it has been agreed that sovereignty cannot be acquired (such as the South Pole and the objects in outer space). Sometimes, states agree to disagree on the question of sovereignty (such as the United Kingdom and Argentina in the case of the Falkland or Malvinas Islands in the past); in other cases they agree on a special arrangement due to disagreement on the location of a border (such as the case of the border between Germany and the Netherlands in the Ems-Dollard region).

Despite the declining importance and increasing diversity of the concept of sovereignty, it is still of importance, particularly in the case of new or weak states, and it may be expected to form the focus of future discussions, on the Basin.

It should be emphasized that giving up certain powers by agreement does not impair sovereignty, unless the powers waived are numerous and extensive.⁵⁴

In light of these developments, on the one hand, and the sensitivity to any concession over sovereignty- specifically on the Temple Mount- on the other, it would seem preferable to regulate the subject of the Historic Basin by way of the division of powers or control, and, as far as possible, to avoid discussion of sovereignty. Not all the members of the team, however, share this opinion.

6. The Basin – An “Open City”?⁵⁵

On various occasions, the idea has been raised that Jerusalem should become an “Open City.”⁵⁶ Should this term be applied to the Historic Basin? In order to answer this question, the meaning of this term has to be examined.

⁵⁴ See Moshe Hirsch’s article on the alternatives in this booklet, pp. 53-76.

⁵⁵ Ruth Lapidot and Christian Franz, “The Many Faces of the Term Open City,” in Marcelo Kohen, ed., *Liber amicorum Lucius Caflisch*, 2006.

⁵⁶ See, for example, the principles proposed by Ami Ayalon and Sari Nusseibeh, 2002; and the Taba discussions in January 2001, as described by the EU representative, Ambassador Miguel Moratinos.

According to a well-known classic principle of the laws of war, an open city is a city that one of the belligerent parties has declared to be “open,” i.e. not defended, and which the other party may occupy. If the other side agrees to this declaration, it will occupy the city without acts of hostility. The purpose of this rule is to prevent superfluous killing and destruction, and to prevent unnecessary suffering among people not involved in the fighting.

This principle was applied e.g. to several cities during the American Civil War (Colombia and Richmond), to Paris during the Second World War (1940), and to Rome (1944). On the other hand, requests to apply this rule to Manila (1941), Kabul (2001) and Sarajevo (1993) were rejected. Interestingly, it was once proposed that Jerusalem should also have the status of an open city in this sense. The proposal was made in 1967, and came not from either of the warring parties, but from the pope.⁵⁷

The underlying goal of the institution of the open city – to prevent unnecessary death destruction and suffering – also led to the adoption of provisions relating to “non-defended Localities” “hospital and safety zones” and “neutralized zones.”⁵⁸ These provisions were intended to establish zones in which the elderly, sick, children and mothers of small children could find shelter.

More recently, the term “open city” has been used in a completely different sense. Thus, for example, some cities in the Soviet Union were described as “open cities” in contrast to cities that were closed to the diplomatic corps and to tourists. Economists use this term to denote a city economy that permits the free movement of firms and workers.

In Bosnia-Herzegovina, the term has been used in a very special manner. The war in this region ended in 1995 with the signing of the Dayton Accords.⁵⁹ In order to encourage cities to re-admit refugees, the UN High Commissioner for Refugees initiated a special program: “The Open Cities Initiative of the UN High Commissioner for Refugees.” This program provided international assistance to any community that encouraged refugees belonging to a minority to return

⁵⁷ Amnon Ramon, “Israel-Vatican Relations and the Jerusalem Question (1958-1969) – the Israeli Perspective” (unpublished manuscript).

⁵⁸ 1949 Fourth Geneva Convention regarding the Protection of Civilians in War, Articles 14, 15; 1977 Additional Protocol I to the 1949 Fourth Geneva Convention, Article 59.

⁵⁹ *International Legal Materials*, vol. 35, 1996, pp. 75-183.

to the area. Several cities, including Sarajevo and Konjic, benefited from this initiative.⁶⁰

As already noted above, the term “open city” has also been used with reference to Jerusalem. It was used in the Feisal Hussein proposal (2000), the Beilin—Abu Mazen document (1995), and the Ayalon-Nusseibeh proposal (2002). During the official negotiations at Taba in January 2001, the idea of making Jerusalem an open city was also raised. In his report of the negotiations, Ambassador Miguel Moratinos, the EU representative to the peace process, wrote:

“Both sides favored the idea of an Open City. The Israeli side suggested the establishment of an open city whose geographical scope encompasses the Old City of Jerusalem plus an area defined as the Holy Basin or Historic Basin. The Palestinian side was in favor of an open city provided that continuity and contiguity were preserved. The Palestinians rejected the Israeli proposal regarding the geographic scope of an open city and asserted that the open city is only acceptable if its geographical scope encompasses the full municipal borders of both East and West Jerusalem...

Furthermore the Israeli side proposed a number of special arrangements for Palestinian and Israeli residents of the Open City to guarantee that the Open City arrangement neither adversely affect their daily lives nor compromise each party’s sovereignty over its section of the Open City.”⁶¹

The precise meaning of the term has not been explained. Clearly, the term is not used here in the same sense that it has in international humanitarian law, or in Bosnia-Herzegovina or in the economic sphere. By analogy with other expressions in the international arena including the word open, such as open sea, and open skies, we may, perhaps, infer that the reference in this context is to free access to the city. This meaning is also consonant with the fact that the city is replete with holy places, regarding which the concept of freedom of access is generally accepted.

The author of this paper believes that it would be dangerous to adopt the term “open city” in reference to Jerusalem without first establishing the conditions

⁶⁰ See the sources in note 54.

⁶¹ Summary of discussions as prepared by Ambassador Miguel Moratinos for the European Union – <http://www.ue.eu.int/pesc/envoye/cv/moratinos/mandate.htm>.

and restrictions on the freedom of access. For example: the citizens and residents of which states would enjoy free access? What rules would apply to stateless persons? Is it appropriate to distinguish between types of visitors – tourists, pilgrims, researchers, merchants, and the like? What documents would visitors from the different groups be required to carry? How long would the visitor be entitled to stay in the city? Where and to which country would he leave at the end of his visit? What measures should be taken to ensure security and to prevent smuggling? What reasons and circumstances would justify denying a person the possibility to enter the city? These are all difficult questions, and in the absence of answers to them, it would be better to avoid the use of the expression “open city” in the context of Jerusalem in general, and the Historic Basin in particular.

7. The Basin – An “Exterritorial” Zone?⁶²

Another expression occasionally heard with reference to certain places in Jerusalem is the term “exterritorial.”⁶³ This term literally means “outside the territory,” implying that a given building or zone is deemed not to be situated in the territory in which it is actually located.

This expression is part of the lexicon of capitulations.⁶⁴ The term “capitulation” has two completely different meanings. When used in the context of the laws of war, it means surrender. By contrast, in the context of the status of foreigners, it refers to agreements that exclude foreign citizens from the jurisdiction of the state in which they are actually present, and subjects them to the laws of their country of origin. This is a legal fiction according to which the subject is deemed to be in the country of origin. The foreigners were subject to the jurisdiction of the consul of their country of origin who served in the country in which they were actually present. The regime of capitulations was applied in inter alia in the Ottoman Empire, including Palestine. In certain cases, such as China, entire zones were subject to the rule of a foreign consul. In these cases, the term “exterritorial” may indeed have been appropriate.

⁶² Ramon, *City in a Labyrinth*, p. 249.

⁶³ For example, the Beilin – Abu Mazen plan, 1995.

⁶⁴ Ramon, *City in a Labyrinth*, p. 251.

In addition, there was a time when the status of foreign embassies was also referred to as being a kind of extraterritorial, due to the absolute immunity and the absence of any authority on the part of the local sovereign to intervene in the embassy.

Today, this fiction is no longer relevant. The regime of capitulations has long since been abolished, and the immunities enjoyed by embassies have been reduced. Today, it is generally accepted that immunities are essentially functional, that is to say, their purpose is to assist the embassy in performing its functions, and the fiction that the embassy is actually abroad is no longer relevant.⁶⁵ Several proofs may be mentioned: A legal transaction performed in the embassy is considered to have been performed in the country in which the building is situated; diplomats must respect the laws of the country in which they serve; the transfer of a suspect from the embassy premises to the police of the territorial state is not considered extradition.

Thus, it would seem that the phenomenon of extraterritoriality as described above is now defunct.

Even if this term still existed, it would not be useful to employ it with regard to places in Jerusalem, for the following reason: these places do not represent a foreign country, and, accordingly, if they were not subject to local law, no law would apply to them. Those who have employed the term “extraterritorial” in the context of certain sites in Jerusalem may have intended to express the idea that different rules should apply to these places than to the remaining parts of the city. However, “extraterritorial” is not the appropriate expression to signify this idea.

There is an additional use for the term, “extraterritorial,” though it is not used in this sense in the context of Jerusalem. The meaning referred to the application of the law of a given state to a person, when he is situated outside the territory of that country. In this sense the term “extraterritorial” is still current.

⁶⁵ See the Vienna Convention on Diplomatic Relations, 1961, and the review in: Ramon, *City in a Labyrinth*, pp. 252-255.

8. Concluding Remarks

In this review of the Historic Basin, it has been shown that the Historic Basin is problematic in several respects: the profound symbolism associated with its history; the traditions of sanctity and almost mystical passions felt towards the city by hundreds of millions of believers; the large number of holy places, some of which are problematic since they are sacred to more than one religion or denomination; a poor and highly heterogeneous population; and most importantly, that it is the focus of a political dispute that has religious overtones. The complicating factors—the strong emotional bond of adherents of the monotheistic faiths to the city, on the one hand, and the lack of trust between Israel and the Palestinian Authority, on the other hand, may perhaps require some form of international involvement in the management of this territory, particularly in the fields of security, conservation and supervision of the holy places.

It is certainly an extremely complex task to plan and establish a special regime for the Historic Basin. However, it can be assumed that no other solution can secure the agreement of both sides and of the international community. Although both sides currently reject this idea out of hand, we believe that this is the approach that can lead to compromise.

Lastly, three questions should be examined: first, can anything be learned from the status of the State of the Vatican City in Rome? A more technical question relates to the manner in which the special regime is to be established. In other words, in addition to the agreement between Israel and the Palestinian entity, should the consent of other bodies, such as states, the United Nations, the European Union, the central bodies of the various religions (such as the Vatican) also be attached? The third question is whether the arrangement should be secured by international guarantees.

In terms of whether the solution for the Historic Basin should be modeled on the present day Vatican— it is doubtful that this is possible, due to the fundamental differences between the two cases. First, the Vatican is holy only to one religion, whereas the Historic Basin is holy to three religions and many religious groups. Second, the Vatican is only a religious center, whereas the Historic Basin is also home to permanent residents. Third, the Vatican is an enclave within a friendly city, (at least, it has been such since the Laterano Agreement of 1929), whereas the Historic Basin is surrounded by two peoples who are still mutually hostile.

In terms of the manner in which the special regime is to be established, it is the opinion of the author of this paper that the addition of a protocol open to the adherence of various states and relevant bodies would add positive weight to the arrangement.

As to the issue of international guarantees- as is well known, the Vatican has indeed recommended that international guarantees be provided for the status of Jerusalem. It is unclear whether the recommendation envisages an international convention whose mere existence would constitute a form of guarantee, or to an actual guarantee. It is highly doubtful whether an international guarantee would be more effective than the opening of the agreement to adherence through an additional protocol.

In conclusion, it is worth quoting one paragraph from the Report and Recommendations of the Mitchell Committee (2001):

The Palestinian Authority and Government of Israel should consider a joint undertaking to preserve and protect holy places sacred to the traditions of Muslims, Jews and Christians. An initiative of this nature might help to reverse a disturbing trend: the increasing use of religious themes to encourage and justify violence.⁶⁶

It is the hope of the author of this paper that a special regime in the Historic Basin will indeed help prevent the danger noted by the Mitchell Committee in the last sentence of the quote above.

⁶⁶ Report of The Sharm el-Sheikh Fact Finding Committee, 30 April 2001.

Principal Alternatives for a Solution in the Historic Basin⁶⁷

Moshe Hirsch⁶⁸

Introduction

This chapter presents in brief five alternatives for the future management of the Historic Basin in the context of a permanent settlement:

- (1) Full sovereignty and control of the State of Israel throughout the Historic Basin;
- (2) Full Palestinian sovereignty and control throughout the Historic Basin;
- (3) The territorial division of the Basin between the sides, with international supervision;
- (4) Joint management, the division of authorities between the sides, and international backing;
- (5) Management of the Historic Basin by the international body, which will delegate powers to both sides.⁶⁹

This chapter examines the five above-mentioned alternatives. However, we do not intend to recommend one alternative as the optimum one from Israel's viewpoint. Each of the alternatives has advantages and disadvantages, and Israel's decision makers must determine which alternative they find preferable according to a

⁶⁷ The five alternatives described in this chapter were formulated during the course of numerous discussions by the work group of the Jerusalem Institute for Israel Studies on the subject of the Historic Basin during 2004 and 2005. An analysis of the alternatives and the varying characteristics of the international forces was prepared by Moshe Hirsch. In addition, some of the issues were discussed in depth in the study prepared by Hirsch and Michael, *International Involvement in the "Historic Basin" in Jerusalem*, Jerusalem Institute for Israel Studies, 2003.

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⁶⁹ In this article, the basic assumption is that the parties indeed wish to reach a permanent settlement. The present discussion does not address the diverse aspects of the permanent settlement, but focuses solely on the Historic Basin.

broad range of factors, some of which we shall discuss in this chapter. The last part of the chapter summarizes the main advantages and disadvantages of each alternative from Israel's standpoint, and includes a ranking of the five possibilities in accordance with three key criteria. It should be emphasized that we do not claim to have exhausted all the possible alternatives, but rather seek to present some key options.

The alternatives that are discussed below differ from each other in terms of numerous features. Two of the most prominent aspects are:

1. Granting sovereignty and control over the Historic Basin to Israel or to the Palestinian state (or jointly to both), as opposed to international involvement in the administration of the Historic Basin (i.e., the transfer of certain powers to other countries or to international bodies).

Clearly, an inverse relationship exists between these two components. The more extensive the powers that the sides agree to allocate to an international body, the weaker their control of the Historic Basin.

2. The territorial division of the Historic Basin between several bodies, as distinct from the management of the Basin as a single territorial unit. Territorial division could be between Israel and the Palestinian state, while the management of the Basin as a single territorial (and administrative) unit could be effected by Israel, by the Palestinians, or by a third party (another country or an international organization).

Past negotiations between the sides on the subject of Jerusalem suggest that Israel and the Palestinians will find it difficult to reach agreement regarding the territorial division of the Historic Basin.⁷⁰ If, however, the sides to the dispute manage to reach agreement on this matter, it will obviously be easier to implement an arrangement that clearly defines who is the sovereign in each part of the Basin. Legal arrangements of this type are usually clearer and leave relatively little room for contradictory interpretations and disputes in the future. The advantages and disadvantages of this technique (and others), as well as the mutual relations between these will be discussed in depth, below.

⁷⁰ However, it is evident that the sides will find it even harder to reach an upon agreed arrangement including the first alternative (full sovereignty and control by the State of Israel) or the second alternative (full Palestinian sovereignty and control).

The latter stages of the negotiations between the sides on the subject of Jerusalem and the status of the Historic Basin (from the Camp David summit of July 2000 through the Taba discussions of January 2001) show that the Palestinians and the international community will not agree to adopt the first alternative (full Israeli sovereignty and control throughout the Historic Basin), while Israel will not accept the second alternative (full Palestinian sovereignty and control throughout the Basin). Because of this, the authors have chosen in this study to focus mainly on the three remaining alternatives: territorial division with international supervision, joint management with international backing, and broad international management with the delegation of powers to both sides.

One of the most important aspects of the three alternatives on which this essay focuses is the question of international involvement in the future regime to apply in the Historic Basin. The possibility of international involvement in the resolution of the conflict between Israel and the Palestinians in general, or in resolving the dispute over the future of Jerusalem in particular, has been the subject of extensive attention in recent years. The detailed discussion of this issue reflects general trends in the resolution of international conflicts as these have emerged recently, as well as unique aspects of the Israeli-Palestinian conflict in the context of the Historic Basin. The inclusion of international bodies as a key component in resolving international conflicts is a growing phenomenon. Numerous international forces functioning in different regions of the world have distinct characteristics, particularly in terms of the scope of authorities of the force, the identity of the body responsible for directing and supervising the work of the force, and the identity of the countries dispatching units to the international force (see the detailed discussion below).

The main reasons for granting authorities to an international body in the future regime in the Historic Basin derive from the profound lack of trust between Israel and the Palestinian Authority, from the conflicting interests of the sides in this field, and from the historical and religious importance of the Basin and the holy places it includes to numerous parties in the international arena. To this we must add the doubts among the decision makers on both sides regarding the limited capacity of the authorities of the other side to enforce the agreed arrangement on private individuals and/or groups that oppose its provisions. Thus, the most important goals of international involvement in the future regime in the Historic

Basin are to enhance the credibility of the arrangement reached by the two sides, to assist in the implementation of the agreed arrangement, and to improve the chances that it will indeed be implemented.

Therefore, the relationship between the principal areas of disagreement between the sides and the functions to be allotted to the international body in the Historic Basin also becomes clear. In general terms, the greater the mistrust between the sides, the more evident the need for international involvement. Granting functions to an international body in the Historic Basin naturally involves a weakening of the control of the sides in various fields. Lastly, while international involvement may constitute a significant component in the future regime in the Historic Basin, it should be emphasized that this is only one component in a range of additional factors. Success or failure in realizing the future arrangement in the Historic Basin depend on additional factors not discussed in this work, including political, economic and legal aspects.

First Alternative: Full Israeli Sovereignty and Control throughout the Historic Basin

The realization of this alternative will grant Israel full sovereignty and control throughout the Historic Basin, while allowing a measure of autonomy to the Arab residents, and/or establishing a special status for the Christian and Muslim holy places. This is a simple and relatively clear alternative (as compared to those that follow). This alternative will meet all of the requirements of the State of Israel, at least in the short term. In certain spheres, this alternative constitutes an improvement over the current status quo. It effectively implies the institutionalization and improvement of the existing situation, whereby the internal management of the holy places (such as the Temple Mount) is already delivered to the Muslim (the Waqf) and Christian religious authorities, subject to maintenance of law and order, for which the Israeli security forces are responsible. This alternative would seem to be acceptable to the vast majority of the Israeli people and Israeli policy makers. However, the negotiations on the subject of Jerusalem in 2000-2001 suggest that the Palestinians and the international community will not accept this alternative.

It should be emphasized that modern conception of sovereignty does not grant the state absolute freedom of action in the relevant territory. Accordingly, recognition of Israeli sovereignty throughout the Historic Basin does not imply that Israel will be released of its obligations in accordance with international law relating to this territory (for detailed discussion of this aspect, see the analysis of the third alternative).

The most complex component of this alternative relates to the possibility of granting autonomy to Palestinian residents living throughout the Historic Basin. Past and present autonomous arrangements differ considerably. The powers granted to autonomous authorities are usually limited to the fields of culture, education, social affairs and religion (including personal status), while powers in the field of defense and foreign relations generally rest exclusively with the central government. It should be noted that the spheres delegated to the autonomous authority are not usually subject to the supervision of central government (excluding exceptional cases, such as deviation from authority, threat or injury to state security, or breaching public order).⁷¹

Full Israeli sovereignty and control throughout the Historic Basin could also be accompanied by granting special status to Christian and Muslim holy places. This status would include autonomous provisions for these sites. Thus, for example, routine management of these sites could be granted to the members of the religion to whom the site is sacred. Rules could also be established prohibiting, as a general rule, agents of the authorities of central government from entering these sites without the permission of the head of the religious community (naturally, in the absence of potential or actual damage to public order or state security). Granting international immunity to the holy places and to the clergy who serve there⁷² could provide an additional instrument for reinforcing the independent status of these sites and officials vis-à-vis the State of Israel (which, according to this alternative, would be the sovereign power in the Historic Basin). It should be emphasized, however, that granting immunity to holy places or the clergy serving in them does not amount to the transfer of sovereignty in these sites. Additional

⁷¹ For a detailed discussion, see: Ruth Lapidot, *Autonomy: Flexible Solutions to Ethnic Conflicts*, Washington, DC: United States Institute of Peace Press, 1996.

⁷² For various proposals raised in the past regarding the granting of immunity in the holy places, see Moshe Hirsch and Dvora Haussen-Kuriel, *Jerusalem Whither? Proposal for the Future of the City*, Jerusalem Institute for Israel Studies, 1994, pp. 425-427.

restrictions on the exercising of authority by Israel in the Historic Basin could accrue from the rules of international law, both contractual and custom (see details in the analysis of the third alternative).

Second Alternative: Full Palestinian Sovereignty and Control throughout the Historic Basin

This is a simple and relatively clear alternative that will grant the Palestinians full sovereignty and control throughout the Historic Basin (in accordance with the border prior to the Six Day War, i.e., not including Mt. Zion, which will remain under Israeli control), and with autonomy for Jewish residents (e.g. in the Jewish Quarter) and special status for the Jewish holy places. In many aspects, such as full sovereignty in the Jewish Quarter, this alternative offers the Palestinians far more extensive control in the Historic Basin than is currently the case. This alternative would be acceptable to the vast majority of the Palestinian people and to policy makers in the Palestinian Authority, but it would seem that the State of Israel would reject it out of hand (for various options regarding the granting of autonomy and special status to the holy places, see the analysis of the first alternative above).

As noted above, modern sovereignty does not grant the state absolute freedom of action in the relevant territory. Accordingly, additional restrictions on the powers of the Palestinian Authority in the Historic Basin might accrue from the rules of international law, both contractual and custom (for details, see the analysis of the third alternative).

Third Alternative: Territorial Division between the Sides, with International Supervision

This alternative combines the techniques of the division of sovereignty in the Historic Basin with limited international involvement. The dominant principle in this alternative is the territorial division of the Historic Basin between Israel and the Palestinians (the PA or the Palestinian state, as and when it is established). According to this alternative, the international body will play a relatively limited role.

Regarding the territorial division: After Israel and the Palestinians reach agreement on marking the border between them in the Historic Basin, each side will be the sovereign and the holder of authority in the territory allocated to it in the agreement. On the general level, it is evident that the sides will find it difficult to reach agreement regarding the division of the territory in the Historic Basin. Disagreement on this matter includes the struggle over religious, national and historical symbols, and it can be assumed that the sides will find it difficult to agree on a compromise, particularly on the Temple Mount. Equally, though, it is clear that if the sides can reach agreement on this matter, this alternative will be easier to implement than joint arrangement requiring cooperation between the sides, or arrangements including a large degree of international involvement.

Legal arrangements that include a territorial division are usually clearer and leave relatively little room for conflicting interpretations and future disputes. Thus, for example, if questions arise regarding the authority of either side to undertake a given action in the Basin, it is clear that most such questions can be relatively easily resolved due to the legal preference (albeit not absolute) for that side holding sovereignty in the relevant area.⁷³

The territorial division of the Historic Basin between Israel and the Palestinians could be based on a wide range of alternative borders; the authors do not intend to recommend any specific territorial division. However, we do wish to identify five key and general alternatives in this respect:

- A. The Jewish Quarter and the Armenian Quarter will be included in the sovereign territory of the State of Israel. The Muslim Quarter and the Christian Quarter will be under Palestinian sovereignty. The Temple Mount will be included in the sovereign Israeli territory.
- B. The Jewish Quarter and the Armenian Quarter will be included in the sovereign territory of the State of Israel. The Muslim Quarter and the Christian Quarter will be under Palestinian sovereignty. The Temple Mount will be included in the sovereign Palestinian territory.
- C. The Jewish Quarter will be included in the sovereign territory of Israel. The Muslim, Christian and Armenian Quarters will be under Palestinian

⁷³ This type of arrangement is also the easiest to implement in the economic sphere (customs, taxation, passage of merchandise, etc.)

sovereignty. The Temple Mount will be included in the sovereign Palestinian territory.

- D. The Jewish, Armenian and Christian Quarters will be included in the sovereign territory of Israel. The Muslim Quarter will be under Palestinian sovereignty. The Temple Mount will be included in the sovereign Israeli territory.
- E. Any of the four above-mentioned alternatives, together with the territorial division of the Temple Mount between Israel and the Palestinians.

Regarding the Temple Mount, the possibility might also be considered of applying one of the other alternatives discussed in this chapter – management by an international body or joint management by the sides.⁷⁴

Additional key questions to be discussed in the context of the territorial division of the Basin include: what restrictions should be imposed in the agreement on the freedom of action of the sides (ensuring free access to the holy places, freedom of worship, supervision of construction and conservation of antiquities, human rights, conditions of passage, and possibly even restrictions in the security sphere); what will be the scope of criminal jurisdiction of each side over the citizens of the other side who enter the territory under its control; and so on. It is highly desirable that these issues should be regulated in detail in the agreement between Israel and the Palestinians.

As already noted, the control or sovereignty of one party over a particular area within the Historic Basin will be restricted in accordance with the international obligations of that party under international law. The international obligations of each country in this respect (including the PA state, as and when it is established) may accrue from international conventions or from the rules of international custom law.

Regarding international conventions, each side that exercises control in the Historic Basin will be required to do so in a manner that is consonant with bilateral conventions signed in the past, particularly agreements signed in this

⁷⁴ For a detailed discussion of the unique characteristics of the Temple Mount, see Yitzhak Reiter (ed.), *Sovereignty of God and Man – Sanctity and Political Centrality in the Temple Mount*, Jerusalem Institute for Israel Studies, 2000 (hereinafter: *Sovereignty of God and Man*). Regarding the alternative arrangements for the Temple Mount, see the article by Reiter, Ramon and Berkowitz in this booklet, below, pp.77-95.

field between Israel and the Palestinians. Multilateral conventions signed by the state in the past may also restrict the exercise of authorities throughout the Historic Basin area. This is the case, for example, with human rights conventions joined by Israel (such as the 1966 Convention on Civil and Political Rights), or conventions regarding environmental protection. These restrictions will apply to the exercising of authority by the state (such as police authorities), even if it is not considered a sovereign power in the Historic Basin. Several international tribunals have ruled that human rights conventions also apply to territories outside the sovereign territory of the state in which the state exercises effective control.

In addition to the duties incumbent on the sides under the terms of multilateral conventions, the special agreement between Israel and the Palestinians on the future of the Historic Basin may impose on each side obligations included in multilateral conventions that have not been joined by either (or both) of the sides. Thus, for example, if a Palestinian state is not established, or if such a state is established⁷⁵ but is not a party to certain multilateral conventions (such as human rights conventions), the bilateral agreement between Israel and the Palestinians could include reference to a list of international conventions both sides are bound to apply in their relations in the Historic Basin. In place of a technique of reference, the bilateral agreement could also include sections copied from multilateral international conventions (that has not yet been joined by either or both of the sides). The bilateral agreement could also include rules from global conventions with the necessary modifications in the specific context of the Historic Basin.

Additional restrictions on the exercise of control or authority in the Historic Basin could also accrue from the parties' obligations in accordance with the rules of custom law. These rules bind all the nations of the world, regardless of the question as to whether or not they have joined any particular convention.⁷⁶ Thus, for example, the sides' obligations to maintain freedom of worship and allow access to the holy places may accrue from international custom law.

⁷⁵ In general, the control of the Historic Basin could be divided between Israel and a Palestinian state, or between the State of Israel and a Palestinian entity that is not a state.

⁷⁶ A rule of international conduct is considered a custom rule if the majority of nations of the world obey this rule consistently due to a sense of legal commitment. Extensive affiliation to an international convention by states may, in certain circumstances, transform that convention into a "custom convention" binding all nations of the world (regardless of whether they actually joined the convention).

The Function of the International Body

Monitoring: According to this alternative, the sides will (by mutual consent) grant monitoring powers to an international body. The function of this body will be to examine whether the parties are implementing the provisions of the arrangement. These monitoring functions may have important ramifications in terms of the realization of the agreed arrangement. The publication by the observers of clear findings may create international pressure on the contravening side (and, in some cases, even lead to sanctions from international bodies, including non-governmental organizations). In certain cases, the publication of such findings may also provide justification for unilateral actions taken by the side injured by the violation (for example, a temporary deviation from one of the provisions of the agreement). In exceptional cases, the commander of the international body may be empowered to recommend that a given international organization take certain steps required in order to realize the provisions of the agreement.

Under this alternative, members of the international monitoring force perform the function of “observers.” They are deployed in the field and examine which of the sides is contravening the provisions of the agreement, and to what extent. When a violation is observed, several possibilities exist for reporting: The members of the international body may report only to the sides; to a joint body (also including third parties); to an external international organization (such as the Security Council); or it may publish the findings by itself. It is highly desirable that the agreement explicitly specify that the sides must allow the members of the international body free movement within the Historic Basin, in the access roads, and in additional areas outside the Historic Basin. In addition, appropriate international immunities should be established (such as personal immunity against detention) enabling the observers to perform their functions effectively and without fear (the immunities are generally functional, applying to actions performed within the framework of their official function).⁷⁷

⁷⁷ For details on the subject of international forces whose principle function is to monitor the implementation of international agreement, see Hirsch and Michael, *International Involvement*, Note above 67, above; Kobi Michael, *International Involvement in Jerusalem – Background and Ramifications*, Jerusalem Institute of Israel Studies, 2003.

Resolution of disputes: Monitoring operations may also include the resolution of disputes between the parties. Thus, for example, the parties are entitled to empower certain officials in the international body (such as the commander or the legal advisor of the force) to make rulings on certain disputes that may emerge between the parties relating to the implementation and interpretation of the agreement (e.g. disputes relating to freedom of access to the holy places, or to the implementation of repairs in these places). The sides may also choose to establish an international tribunal connected to some extent with the international force that will maintain such monitoring functions. A prominent example of an international body for the resolution of disputes established by the opposing parties in order to supervise the implementation of the provisions of an international agreement is the “Israel-Lebanon Monitoring Group,” established in a memorandum of understanding from 1996. Agreements for the resolution of disputes between the sides may relate to all provisions of the agreement, or only to certain of its provisions (such as those relating to the holy places). If the parties agree to establish such a tribunal, the agreement should include an appendix detailing rules relating to the composition of the tribunal, the identity of the body entitled to file complaints (usually the governmental authorities of the sides), the law that shall be applied by the tribunal, and the provisions of the agreements between the sides (and, generally, the rules of international custom law).

It should be noted that many countries are reluctant to transfer issues that have a significant bearing on their national security to the determination of international tribunals. One technique that may alleviate the concern of both sides in this respect is to grant the international body the authority to recommend that the parties adopt certain steps consonant with the provisions of the agreement, but not to adopt decisions that bind the parties (this was the case, for example, in the 1985 trade agreement between the US and Israel).⁷⁸ It should be noted that although the decisions of such bodies are not binding on the parties in legal terms, it can be expected that they will have a significant impact on the behavior of the sides, on the reactions of countries participating in the international body, and on the reactions of other countries and international organizations.

⁷⁸ See Section 19 of the Free Trade Agreement between the USA and Israel, *International Legal Materials*, 24 (1985) 657.

One of the main obstacles to the implementation of the agreement reached by the sides is liable to relate to the behavior of extremist individuals and private groups. In addition to the central function of each of the sides to impose its authority over such persons, the sides may also empower the international body to prosecute individuals who violate certain provisions of the agreement, before an international tribunal (or a joint tribunal). In this case, the parties should delineate in the body of the agreement (or in a special appendix) the legal rules that will be enforced by the tribunal (substantive rules regarding offenses, and procedural rules regarding the legal proceedings before the tribunal), as well as methods for realizing the tribunal's decisions regarding convicted individuals. The sides may agree that persons convicted by the tribunal and sentenced to imprisonment should serve their sentence in the prisons of one of the sides (under the supervision of the international body), in the prisons of other countries that are not a party to the agreement (this is the case, for example, with the international tribunal for crimes committed in Yugoslavia), or in a prison established by the international body.

Fourth Alternative: Joint Management, Division of Authorities between the Sides and International Backing

According to this alternative, the Historic Basin will, in general, be managed as a single unit,⁷⁹ and the sides will exercise jointly most of the administrative and policing powers in the Basin. As long as the sides manage to administer the Basin efficiently, the international body will have a relatively limited role. The agreement between the sides will stipulate which authorities are to be exercised jointly by both sides and which will be implemented separately (such as the fields of education and culture). These authorities will be exercised by the side (jointly or separately) in accordance with the provisions of the bilateral agreement. Additional restrictions on exercising these authorities in the Historic Basin may derive from the rules of international law, contractual and custom (see details in the analysis of the Third Alternative). The international body will take and exercise the authorities of the sides in areas in which joint application fails for any reason. The agreement between the sides may establish a minimum or

⁷⁹ Israel and the Palestinians could agree that this alternative (joint management with international backing) be applied to a specific part of the Historic Basin, such as the Temple Mount.

maximum period after which the international body shall return (or shall attempt to return) the said authorities to the sides.

Authority of the International Body

As long as the sides manage to implement their authorities successfully, the international body will have no more than monitoring functions (as in the Third Alternative). It may be considered whether the international body should, at this stage, be granted solely monitoring powers, or should be given administrative and executive authority in limited and sensitive fields (such as the management of one or two holy places, such as the Temple Mount, or maintaining the special character of the Historic Basin). If joint management by the sides fails, the international body will exercise broad authorities (similar to those of the international body in the Fifth Alternative).

Key questions that must be addressed by the agreement in this context include: in which circumstances will the international body take the authorities of the sides, and who will be empowered to determine that circumstances justifying this step have indeed emerged? The agreement should establish substantive criteria (what will be considered “failure” in the implementation of the joint authorities by the sides in a given field), as well as procedural rules for this purpose. Thus, for example, the agreement should establish which official in the international body is empowered to make the decision regarding the taking of authorities, what procedures must be observed before doing so (consultation with the sides and/or with outside experts), and so on. Naturally, it would be possible to establish that such decisions will be valid only after ratification by an external body (such as an international organization or a head of state) established for this purpose.

As and when the international body takes any or all of the authorities of the sides, several questions will arise regarding the rules that shall govern the actions of the international body. Clearly, the bilateral agreement must specify a number of rules to be followed by the international body in accordance with this alternative. In addition to rules derived from the bilateral agreement, additional obligations incumbent on the international body will also accrue from general international law (contractual and custom). Since many multilateral conventions cannot be joined by international organizations (such as most of the main human rights conventions), it is highly desirable that the sides specify in the bilateral

agreement, or in the establishing documents of the international body, the list of obligations limiting the actions of the body that will exercise authority in the Historic Basin. Here, too, the parties could agree to adopt a technique of reference to international conventions binding the organization (although it is not a formal party to these conventions), or could copy into the bilateral agreement a detailed list of obligations drawn from various multilateral conventions (e.g. relating to the obligation to maintain fair legal proceedings). Additional obligations restricting the actions of the international body may accrue from the rules of international custom law. This is the case, for example, regarding the freedom of worship or the freedom of access to the holy sites (see the Third Alternative for discussion of these aspects).

Fifth Alternative: Management of the Historic Basin by the International Body, with the Delegation of Authorities to Both Sides

According to this alternative, the Historic Basin⁸⁰ will generally be managed as a single unit. Under the agreement, and with the consent of both sides, the international body will exercise extensive authorities and manage by itself large areas of the Basin. However, it is possible that relatively small areas (such as a limited number of holy places regarding which there is no dispute) may be divided between the sides on a territorial basis. Similarly, authorities in relatively restricted areas of activity may be allotted to the sides by the international body (for example, in matters relating to religious services and education). In those spheres or territories in which the international body will delegate authorities to the sides, they will be required to exercise their authorities in accordance with the bilateral agreement and in accordance with the rules of international contractual and custom law (as detailed in the Third Alternative).

As noted above, the main reason for granting extensive administrative authorities to the international body is the profound lack of confidence between Israel and the Palestinians.

⁸⁰ Israel and the Palestinians could agree that this alternative (management by an international body with the delegation of some authorities to the sides) be applied to a specific part of the Historic Basin, such as the Temple Mount.

Authorities of the International Body

Under this alternative, the international body will not merely be granted monitoring powers, but will actually administer the Historic Basin, and will constitute the source of authority and control in the area. In certain cases, the international body will delegate authorities to the sides in specific territories or fields of activity. According to this alternative, the personnel of the international body will enjoy a wide range of authorities, from protecting the holy places against attack or desecration (including ensuring free access to these places) and ensuring the arrangements for entry into the Historic Basin to a diverse range of authorities in the fields of policing, taxation, planning and building. The personnel of the international body could also be empowered to use force against individuals violating the provisions of the agreement and to prosecute them in judicial tribunals to be established by the international body. It should be emphasized that the greater the scope of authorities granted to the international body, the greater the importance of its composition, its modality of operation and its supervision. Nevertheless, such a process inevitably entails the restriction of the authorities of both sides (this aspect will be discussed in greater depth below).

Most of the international forces established in the past have not been empowered to manage a specific territory. However, a number of international forces (particularly over the past decade) have received such extensive administrative authorities, usually for a limited period of time. The most prominent examples of this over the past decade are the United Nations operations in East Timor (1999-2002), Cambodia (1991-1993) and Kosovo (from 1999).⁸¹

The international body that will manage the Historic Basin according to this alternative will exercise its authorities in accordance with the bilateral agreement between the sides, and in accordance with its obligations under international law. As noted above, the sides should delineate the obligations incumbent on the international body in detail in the bilateral agreement between them or in the establishment documents of this body. The sides may adopt different techniques to this end. Among other approaches, they could include references to multilateral conventions that the international body will be required to respect in its actions

⁸¹ For further discussion, see: Hirsch and Michael, *International Involvement*, Note above 67, above.

(even if it has not joined these conventions), or it may specify in the bilateral agreement a list of obligations drawn from various international conventions.

Who will run the international body?

International forces operating in different parts of the world show widely divergent characteristics. The principal characteristics for our purposes (in addition to the functions of the international body) are the identity of the body that guides and supervises the work of the international body, and the identity of the states that will send units to this body.

The three main alternatives regarding the body that will guide and supervise the work of the international body are: (1) An international organization (such as the United Nations, NATO or the European Union); (2) A special multinational organization established by the sides for the purpose of this mission (an ad hoc force); (3) States (such as the United States, Canada or Switzerland).

The most common of these alternatives is the allotment of such tasks to the United Nations, which has acquired extensive experience in these types of operations. The involvement of the United Nations in guiding the force leads to the almost automatic application of a fixed corpus of rules developed by the organization over the years, and accordingly the extent of influence by the sides to the conflict over these vital rules is relatively limited.

The influence of the sides in shaping the rules that control the direction and supervision of the work of the international body is increased dramatically if the sides formulate by themselves an ad hoc international mechanism, as in the case of the International Multinational Force of Observers (MFO) in Sinai. The tremendous and exceptional importance attributed by Israel and the Palestinian to the regime that will apply in the Historic Basin, the expected aspiration of both sides to influence the general development of the direction and supervision of the international force in the area, and concern among Israeli politicians regarding the inability of the United Nations to exercise its authorities in a neutral manner all create grave doubt regarding the likelihood that Israel would agree to deposit this task in the hands of the UN. Accordingly, the two main alternatives remaining in this matter are to charge an ad hoc organization with the direction and supervision of the international force, or to refer to a specific state or several states.

An additional important characteristic of international bodies relates to the organizational or national affiliation of the personnel in the intervening force. The principal alternatives facing the sides are an international force comprising national units from several countries, or the forces of a single country. Naturally, the countries selected by the sides will be ones in which each side has confidence (thus, for example, it is difficult to imagine that countries that do not maintain diplomatic relations with Israel will be included in the composition of the international body). One of the main limitations of international forces is the heterogeneity of the force, which may exacerbate smooth functioning. Appointing a single country that will send units to the intervening force reduces the heterogeneity of the force and ensures more consistent policy. On the other hand, it would seem that few countries would be willing to undertake such a task, and the sides might find it difficult to agree on the identity of the country whose forces would comprise the international body.

In order to enable a compromise between the conflicting aspirations of Israel and the Palestinians regarding the identity of the countries that will supervise the work of the international body and contribute units, and in order to enhance the trust between the sides and this body, consideration should be given to dividing the authorities between two distinct international bodies that will operate in the Historic Basin. One will be active in the civilian and administrative sphere, and the other in the sphere of policing and security. The body empowered to act in the civilian and administrative sphere could include units from several countries (such as Canada and Australia), while the force empowered to act in the field of policing and defense could include units from the USA and other NATO member countries.

What is the Desirable Alternative? Different Criteria and Priorities

An analysis of the five alternatives discussed above inevitably leads to the question as to which is the most desirable alternative for the State of Israel. The discussion in this chapter above suggests that, given the complexity and enormous sensitivity of this subject, it is impossible to provide a single simple answer to this question. Each of the alternatives has advantages and disadvantages, and

selection of the optimum alternative depends on the basic assumptions of Israeli policy, political and international circumstances, and priorities of Israeli decision makers at any given point in time. Selection of the most desirable alternative for Israel also depends on the following factors: (A) The scope and strength of Israeli control in the Historic Basin; (B) The likelihood that the sides will reach an agreed arrangement; (C) The likelihood that the agreed arrangement will be implemented successfully.

The likelihood that the agreement will actually be implemented successfully depends on: (1) The number of bodies involved in managing the Basin; (2) The simplicity and clarity of the agreement; (3) The management of the Basin as a single territorial unit (see detailed discussion below). Firstly, this paper will discuss the advantages and disadvantages of each alternative, and then rank the alternatives according to each of the three criteria above.

Advantages and Disadvantages of Each Alternative

First Alternative – full Israeli sovereignty and control throughout the Historic Basin. The evident advantages lie in granting control to the State of Israel throughout the Historic Basin, and in the higher probability that an agreement including this alternative will be implemented. The alternative presents a relatively clear arrangement whereby a single body is responsible for administration in the Basin, and for the administration of the Basin as a single territorial unit. The prominent disadvantage of this Basin lies in the low probability that the Palestinians and the international community would agree to accept it.

Second Alternative – full Palestinian sovereignty and control throughout the Historic Basin. The advantages of this alternative lie in the relatively high probability that an agreement including this alternative will be implemented (assuming Israel's consent). This alternative (like its predecessor) present a clear arrangement that involves a single key body in managing the Basin, and administration of the Basin as a single territorial unit. The prominent disadvantages are the elimination (or virtual elimination) of Israeli control throughout the Historic Basin, and the very low probability that the State of Israel would agree to accept it.

Third Alternative – territorial division of the Historic Basin between Israel and the Palestinians, with international supervision. The advantages of this alternative lie in the relatively high probability that Israel and Palestinians will agree to an arrangement in accordance with this alternative, which grants control over part of the Historic Basin to Israel, and in the relatively high probability that the arrangement will be implemented successfully. This alternative entails a relatively clear arrangement and the involvement of a relatively small number of bodies in the management of the Basin. However, the Historic Basin is not managed as a single territorial unit under this alternative.

Fourth Alternative – joint management of the Basin by Israel and the Palestinians, a division of authorities between the two sides, and international backing. The advantages of this alternative lies in the relatively high probability that the sides will agree to it. However, it has prominent disadvantages in terms of the relatively low probability that it could be implemented successfully (due to the large number of bodies involved in managing the Basin, which is liable to lead to numerous disputes and conflicts between the sides), as well as the relatively limited scope of Israeli control in the Historic Basin.

Fifth Alternative – management of the Basin by an international body, with delegation of authorities in certain fields to Israel and the Palestinians. The advantages of this alternative lie in the moderate probability that the sides will accept it. Its prominent disadvantages are the low probability that the agreement would be implemented successfully (the large number of bodies involved in managing the Basin, and a relatively unclear arrangement), as well as the relatively limited scope of Israeli control in the Historic Basin.

Ranking the Alternatives

Several factors may influence the choice of the desirable alternative from Israel's perspective. The most important factors in this context are: (A) The scope and strength of the control enjoyed by the State of Israel in the Historic Basin; (B) The probability that the sides will reach an agreement; (C) The probability that the agreement will be implemented successfully.

As we shall see below, these factors are clearly inter-related. For example, the adoption of an alternative that greatly increases Israel's control of the Basin may reduce the probability that the sides will be able to reach an agreement.

A. Scope and strength of the control of the Historic Basin by the State of Israel: It is fairly obvious that Israel will, in general, prefer arrangements that grant it maximum control over developments in the Historic Basin, and will attempt to reduce the scope of control of the Palestinians or of international bodies in this area. Regarding the possible allocation of authorities to the Palestinians or to an international body, it would seem that Israel will prepare to grant these to an international body in which it has confidence. From this perspective, the desirable order of priorities for the State of Israel would seem to be as follows:

- (1) Full Israeli sovereignty and control throughout the Historic Basin;
- (2) Territorial division of the Basin between the parties, with international supervision (however, if this alternative is indeed adopted by the sides, Israel will probably seek to enhance the supervisory authorities of the international body in that section of the Basin under Palestinian sovereignty);
- (3) Joint management of the Basin by Israel and the Palestinians, the division of authorities between the sides, and international backing in the event that joint management fails;
- (4) Management of the Historic Basin by an international body, with the delegation of authorities to both sides;
- (5) Full Palestinian sovereignty and control throughout the Historic Basin.

Israeli decision makers might agree to the transfer of certain functions to an international body in which they have confidence, given the lack of trust between Israel and the Palestinians, and with the objective of enhancing the reliability of the arrangement agreed by the sides. Clearly, the greater the confidence of Israeli decision makers in the international body, the greater their willingness to transfer more extensive authorities to this body.

B. Probability that the sides will reach an agreement: It would seem that Israel and the Palestinians will not be able to reach agreement on the adoption of the alternatives that grant full sovereignty and control to either Israel or the Palestinians throughout the Historic Basin (the first or second alternatives). The dispute on this matter includes a struggle over religious, national and historical symbols, and it can be assumed that the sides to the conflict will find it difficult to reach an agreement whereby one side enjoys complete control of all these assets. Accordingly, it is obvious that Israel will vigorously oppose the adoption of the second alternative, and that the Palestinians will not agree to the adoption of the first alternative. On the other hand, it would seem that the prospects of finding an agreed arrangement increase when those alternatives that include a dimension of compromise are discussed (alternatives 3, 4 and 5). One type of compromise is the territorial division of the Basin (the third alternative), which leaves each side with a given area under its own sovereignty, with international supervision of the agreed arrangement. The struggle with regard to this alternative would almost certainly center on the nature of this territorial division. Although the allocation of partial or full authorities to an international body inevitably limits the authorities of the sides, it can also soften the sense of loss on both sides, since the compromises are not made directly to the other side. From this perspective, it would seem that the desirable order of the alternatives for Israel, assuming that it is not possible to ensure full Israeli sovereignty throughout the Basin, are as follows:

- (1) Territorial division of the Historic Basin between the sides, with international supervision;
- (2) Joint management of the Basin by Israel and the Palestinians, the division of authorities between the sides, and international backing in the event that joint management fails;
- (3) Management of the Historic Basin by the international body, with the delegation of authorities to both sides;
- (4) Full Palestinians sovereignty and control throughout the Historic Basin.

Here, too, it can be assumed that the greater the confidence among Israeli decision makers in the international body, the greater their willingness to transfer more substantial authorities.

C. Probability that the agreement will be successfully implemented:

Realization of the arrangement agreed by the two sides depends on numerous factors; we shall focus here on three: The number of bodies involved in the management of the Historic Basin; the relative simplicity (or clarity) of the provisions in the arrangement; and the management of the Historic Basin as a single territorial unit (as opposed to its territorial division).

The greater the number of countries and bodies involved in the management of the Historic Basin the greater the questions and tensions regarding the division of responsibilities among the different bodies, and the greater the problems resulting from the difficulty in coordinating among the different bodies active in the Basin. From this perspective, it would seem that the desirable order of priorities for Israel is as follows:

- (1) Territorial division of the Basin between the sides, with international supervision;⁸²
- (2) Management of the Historic Basin by an international body, with the delegation of authorities to both sides;
- (3) Joint management, the division of authorities between the sides, and international backing in the event that joint management fails.

Regarding all the alternatives that include the transfer of authorities to a third party (another country or an international body), it will generally be preferable for the authorities to be transferred to a single country rather than to an international body including several countries; furthermore, it will be preferable to secure agreement for one international body comprising several countries, rather than the allocation of authorities to several international bodies (each comprising several countries).

A relatively clear and simple arrangement can be expected to enhance the prospects that the agreement will be implemented successfully. Vague and complex arrangements are liable to increase the number of disputes between the sides relating to how the provisions in the agreement are interpreted, and

⁸² The alternatives of full Israeli or Palestinian sovereignty and control throughout the Historic Basin also reduce the number of countries and bodies involved in the management of the area. However, it is obvious that Israel and the Palestinians will not prefer such an arrangement, due to the considerations discussed above.

the number of conflicts arising between the sides during implementation. From this perspective, it would seem that the order of priorities for Israel is as follows:

- (1) Full Israeli sovereignty and control in the Historic Basin;⁸³
- (2) Territorial division of the Basin between the sides, with international supervision;
- (3) Management of the Basin by an international body, with the delegation of authorities to both sides;
- (4) Joint management, the division of authorities between the sides, and international backing in the event that joint management fails.

Management of the Basin as a single territorial unit may offer clear advantages in certain fields. One example of this is addressing environmental hazards, where effective attention requires as closely integrated an administrative system as possible. The same applies to the development and implementation of effective policy in the field of various infrastructures (such as transport). If the Historic Basin is not managed in the future as a single territorial unit by a single body, it is highly desirable that coordination and mechanisms for cooperation be created among all the bodies involved (the countries and the relevant international bodies). From this perspective, the order of priorities for Israel would seem to be as follows:

- (1) Full Israeli sovereignty and control in the Historic Basin;⁸⁴
- (2) Management of the Basin by an international body, with the delegation of authorities to both sides;
- (3) Joint management, the division of authorities between the sides, and international backing in the event that joint management fails;
- (4) Territorial division of the Basin between the sides, with international supervision.

⁸³ The alternative of full Palestinian sovereignty and control throughout the Historic Basin also constitutes a relatively clear arrangement, but it is also clear that Israel will not prefer this arrangement, for the considerations detailed above.

⁸⁴ In theory, one could also include the alternative of full Palestinian sovereignty and control here. However, for the reasons already stated, it is clear that this alternative is not acceptable to Israel

In conclusion, it must be recalled that an international body may indeed play a significant role in the future regime as determined by the sides for the management of the Historic Basin. However, it is evident that an international body does not constitute a “miracle cure” removing all the obstacles in the way of the implementation of an agreement. Realizing a future agreement in the Historic Basin in Jerusalem depends on additional factors relating to the sides themselves, as well as additional aspects that have not been discussed in this chapter.

Alternative Arrangements for the Temple Mount and the Western Wall

Yitzhak Reiter, Amnon Ramon, Shmuel Berkowitz

1. Background: The Importance and Centrality of the Issue of the Temple Mount / *Al-Haram Al-Sharif* from the Jewish and Muslim Standpoints

The question of the Temple Mount is undoubtedly the hardest to resolve or regulate in the Historic Basin, as was illustrated during the discussions at the second Camp David Summit (summer of 2000) and the reactions to the proposals raised by President Clinton in his famous plan from December 2000.⁸⁵ From the perspective of both Jews and Muslims, the Temple Mount / *Al-Haram Al-Sharif* is a symbol of religious and national identity, and hence it is also a serious bone of contention.

The sanctity of the Temple Mount in Jewish tradition is due primarily to its status as the location of the First and Second Temples. The sanctity of the site for Jews does not relate to a specific event, but to the fact that, according to Jewish tradition, it is the place where God dwells and the site of the Ark of the Covenant – the ancient focus of worship of the Children of Israel (Kings 1:8).

For some 1900 years, from the destruction of the Second Temple (in 70 ACE) up until 1967, Jewish worship on the Temple Mount was almost completely discontinued. The site became a central focus of sanctity and worship for Islam from the seventh century, further impeding Jewish access to the area. Jewish pilgrims visited the Mount when permitted to do so by the authorities (mainly through the end of the 12th century). As a generalization, it may be stated that the Temple Mount was “out of bounds” for Jews from the destruction through 1967. However, with the assistance of the Ottoman authorities, the Western Wall

⁸⁵ For further discussion of this subject as well as other subjects relating to the Temple Mount, see: Reiter, *Sovereignty of God and Man*.

became the most important place of prayer in the Jewish world from the 16th century on, due to its status as a “remnant of the Temple.”

It was only in the late nineteenth century that the Muslim Ottoman authorities began to allow prominent Jewish guests to visit the Temple Mount. During the British Mandate period (from 1928-1948), the Mount was open to non-Muslim visitors on a paying basis (but not to prayer). During the Jordanian period (1967-1948), Jews were not able to visit the Temple Mount or the Western Wall.

During the Six Day War a new reality was created when the Temple Mount was occupied by Israel. Then Minister of Defense, Moshe Dayan, established the guidelines for the new status quo on the Mount: internal management and control of the site were given to the Muslim Waqf, while the Israeli authorities were responsible for the security of the external shell and for overall security on the Mount.⁸⁶ Jews were to enjoy free access to the site via the Mughrabi Gate, but would not be permitted to pray within the site. All Jewish ritual activity would be transferred to the Western Wall, which is the western retaining wall of the Temple Mount. This situation has been institutionalized through tacit agreements with the leaders of the Waqf and with the Jordanian authorities, and has received *de facto* recognition from the Israeli government and Supreme Court.

The new status quo created on the Temple Mount by Moshe Dayan was intended to neutralize the religious element in the Jewish-Arab conflict. Dayan believed that Muslim management of the site would prevent eruptions and enable the Muslim population in the Territories and throughout the Muslim world to adapt to the new reality of Israeli occupation.

In 1967, the prohibition against Jewish worship on the Mount did not provoke widespread opposition among the Jewish public, due to the religious edict-relating to the laws of ritual purity and impurity- of the Chief Rabbinate and of the leading religious rulers of the Orthodox and Ultra-Orthodox communities prohibiting Jews from visiting the Temple Mount. Dayan’s decision and the *Halachik* prohibition against Jews entering the site prevented messianic fervor on the Jewish side and possible clashes between Jewish and Muslim zealots on the Temple Mount. In recent years, however, there has been a gradual erosion in the *Halachik* prohibition, and many rabbis, particularly from the national-religious

⁸⁶ This responsibility is manifested in an Israeli police outpost positioned on the Temple Mount since 1967.

camp, now support Jews entering “permitted areas” that, they believe, are outside the confines of the Temple and hence permissible for entry. This process has led to an increase in the number of Jews visiting the site, and to the establishment of organizations which advocate Jewish prayer in the “permitted areas.” While this is a minority position, it is one that is growing.⁸⁷ In addition, some extremist Jewish group see the Temple Mount as an ideal site for creating a provocation in order to thwart political moves (an example is the attempt by the Revava movement, during the campaign against Israel’s disengagement from the Gaza Strip, to bring ten thousands Jews for a mass demonstration and show of force on the Temple Mount).⁸⁸

A significant change in the perceived status of the Temple Mount among significant sections of the Israeli Jewish public was also seen following the second Camp David Summit (in the summer of 2000) and the subsequent Israeli-Palestinian negotiations through to the Taba talks (January 2001). The denials by the Palestinian negotiators of the Jewish affinity to the Temple Mount, and the willingness of the Israeli government headed by Ehud Barak to consider such proposals as the suspension of sovereignty on the Mount, or the vertical separation of sovereignty (i.e.-Palestinians above, in the area of the mosques, and Israel below, inside the mount and at the Western Wall),⁸⁹ paradoxically led to a strengthening of the status of the Temple Mount even among non-religious Jews, who have begun to see the site as an essential national symbol.

The Palestinian and Islamic ethos identifies the Temple Mount with the term mentioned in the Koran as the Mosque of *Al-Aqsa*. The entire site- and not merely the mosque- is associated with the Koranic verse (1:17) relating the journey of the Prophet Mohammed from the Holy Mosque (Mecca) to the Furthest Mosque (*Al-Aqsa* is Arabic for “the furthest”). Islamic tradition relates that Mohammed rose into the heavens from the rock (under the Dome of the Rock), and it was here that the commandment was given relating to the five daily prayers incumbent on the Muslim believer.

⁸⁷ See: Amnon Ramon, *Beyond the Western Wall: The Attitude of the State of Israel and the Different Sections of the Jewish Public toward the Temple Mount (1967-1999)*; Reiter, *Sovereignty of God and Man*, pp. 113-142.

⁸⁸ See: Nadav Shragai, “A Provocation that Became a Threat,” *Ha’aretz*, April 10, 2005.

⁸⁹ On these ideas and others raised at Camp David, see: Gilad Sher, *Within Reach*, Yediot Aharonot, Tel Aviv, 2001, pp. 181, 218, 228, 231, 233, 248, 285, 331, 361 and *passim*.

From the seventh century through 1967 (with the exception of 88 years of Crusader rule and 30 years of British rule), the Temple Mount / *Al-Haram Al-Sharif* was under full Muslim control. This long period consolidated a strong connection between Islam and Muslim believers and the Mount, whose sanctity was actually enhanced during periods when the Mount was under the control of “infidels.”

Although the sacred site has been under the internal management and control of the Muslim Waqf since 1967, Muslims consider it to be “desecrated” and constantly threatened by the Israeli-Jewish side in the conflict. The actions and failings of the Israeli-Jewish side, which is perceived as enjoying security control in the Temple Mount since the Six Day War, have played into the hands of Muslim elements. The arson attack on the Al-Aqsa Mosque in August of 1969 marked the start of a media and propaganda campaign that has, for the past decade, adopted the slogan “Al-Aqsa Is in Danger!” This psychological campaign seeks to establish that, as long as East Jerusalem (and, in particular, the Historic Basin and the holy places) are under Israeli control and sovereignty, the Al-Aqsa site is in danger, and it is the religious duty of every Muslim to act to secure its liberation. At the same time, there has been a strengthening of the Palestinian and Muslim rejection of the Jewish connection to the Temple Mount and to its status as the site of the First and Second Temples, even though this rejection is contrary to early Muslim sources⁹⁰ and to Christian tradition, which recognizes the Jewish connection to the Mount.

For both sides, then, the Temple Mount is a charged and explosive site which must be treated with the utmost caution. In addition to developing agreement on the key questions relating to the authorities for the management and control of the site, attention must also be given to the way the agreement can be “marketed” in order to secure acceptance by the majority of Israeli Jewish and Palestinian Muslim communities.

⁹⁰ Reiter, *From Jerusalem*, pp. 35-42.

2. Constraints Mitigating against an Arrangement on the Question of the Temple Mount / *Al-Haram Al-Sharif*

- A. The Palestinians have adopted a consistent and forceful position that utterly rejects any Jewish right to pray in any part of the site, and negates recognition of any legitimacy for any Israeli status or authority in relation to the Temple Mount. While the leaders of the Waqf, who have varying connections with Jordan and the Palestinian Authority, have reached informal practical arrangements with the Israeli authorities regarding provisions for security, entry and behavior on the site, they consider these quiet agreements to be no more than a temporary provision “as long as the occupation prevails.” Their position regarding a permanent settlement is completely different, and they believe that the Mount should be under full Palestinian control and sovereignty.
- B. An additional factor impeding the possibility of compromise on the Temple Mount is the idea disseminated by the Palestinian leadership according to which the profound obligation towards Jerusalem is being not merely a Palestinian matter, but a concern for the entire Muslim nation. This idea has been absorbed and internalized in the Muslim world, to the extent that at academic and semi-formal meetings of Israelis, Palestinians and representatives from the Arab nations, the latter express more extreme opinions regarding the possibility of compromise in Jerusalem than do the Palestinian representatives themselves. The Second Camp David summit, in the summer of 2000, illustrated the well-known fact that the question of the Muslim holy places in Jerusalem, and the question of East Jerusalem in general, is no longer a merely Palestinian issue. Evidence of this could be seen during the trans-Atlantic discussions with Arab leaders chaired by President Clinton in July 2000, at the request of Yasser Arafat, in order to hear their opinions on the compromise proposals he raised on the subject of Jerusalem. The Palestinian side sought to secure support from the Arab and Muslim world, and was more successful in this than it could have anticipated, and possibly even than it would have liked.

The Palestinians now find themselves “imprisoned,” to a large extent, on the question of the Temple Mount / Al-Haram Al-Sharif, and restricted in terms

of their leeway. Any proposal raised at the negotiating table on the question of Jerusalem will require the consent of key Arab and Islamic elements, principally the rulers of Egypt, Saudi Arabia, Morocco, Jordan and the rich Gulf States on whose financial support the Palestinians depend. The implication is that the room for political maneuvering on the holy places in Jerusalem has been reduced, and that discussion of the holy places in Jerusalem now belongs to the broader political context of foreign relations.

- C. There is a mistaken perception among the negotiators on behalf of the Palestinian Authority regarding the position of the Israeli public and leadership towards possible solutions for the Historic Basin in general, and the Temple Mount – Al-Haram Al-Sharif in particular. The Palestinian representatives believe that, at the moment of truth, the Israeli side will be willing to accept full Palestinian sovereignty over the Temple Mount / Al-Haram Al-Sharif, in return for Palestinian recognition of Israeli control in the Western Wall plaza and the Jewish Quarter. They wrongly believe that the Temple Mount is not so sacred to the Jews, and that Israel is merely using the Mount as a bargaining chip to secure advantages on other issues on the table (such as the return of refugees and the right of return). This perception is based mainly on the Halachic evaluation prohibiting Jews from entering the Temple Mount, on the secular character of the Israeli regime and large sections of Israeli society, and on the fact that Israel has refrained from taking full control of the Temple Mount since 1967. These Palestinian elements are unaware of the processes that Israeli society has undergone over the past generation and of the growing importance of the Temple Mount as a national symbol, particularly after the second Camp David summit.
- D. As noted above, Palestinian construction work on the Temple Mount, the willingness of the Barak government to make concessions regarding sovereignty on the site, and the denial of the Jewish affinity to the Temple Mount and the Western Wall by Yasser Arafat all, paradoxically, strengthened the status of the Temple Mount in the Israeli mind. This development has been identified in opinion polls, the most recent of which showed that only 9 percent of Jews are willing to accept exclusive Palestinian sovereignty in the site as part of a peace agreement, while 51 percent insist on exclusive Israeli

sovereignty over the Temple Mount.⁹¹ These positions within the Jewish public (and particularly in religious and ultra-Orthodox circles) will make it very difficult for the Israeli leadership to be flexible on the question of the Temple Mount. It is entirely evident that any Israeli concession in terms of Israeli sovereignty on the site (or even the official institutionalization of the status quo) will provoke to strong reactions among significant sections of the Jewish public. Strong opposition will come not only from the national-religious and ultra-Orthodox sectors, but also from within the non-religious population. Extremist Jewish groups and organizations active on the issue of the Temple Mount can also be expected to take various forms of action (including the use of violence and provocations) in order to thwart any attempt to reach a compromise on this issue.

- E. Like the Palestinian leadership, the Israeli leadership also incorrectly evaluates the strength of Jerusalem's importance in the Palestinian psyche and that of the entire Arab and Muslim world.⁹² The demand for "residual" or "divisional" Israeli sovereignty on the Temple Mount, which was raised by the Israeli negotiators during the Camp David discussions in July 2000, is an example of how the potential room for maneuvering by Palestinian side – which is almost non-existent – is misunderstood.
- F. Therefore, the leeway on both sides in terms of a compromise on this sensitive issue is extremely limited, due to pressure from influential religious circles (on both sides) and from significant segments of the Israeli and Palestinian populations, who view any compromise on the Temple Mount as injuring the holiest (in both the religious and national senses) and most precious site. It is in this context that various figures (on both sides) have argued in the name of religion (and in the name of God) that politicians and mere mortals have no right to make concessions on so sacred a subject that properly belongs to God.

⁹¹ Nadav Shragai, "Survey: 91% of Jews Unwilling to Give the Western Wall for Peace," *Haaretz*, March 10, 2005.

⁹² See: Reiter, *From Jerusalem*, pp. 81-114.

Despite these tremendous difficulties, this subject, which constitutes the greatest stumbling block threatening any effort to achieve a permanent peace settlement in the Middle East, could not remain unexamined. The authors of this essay chose to examine the alternatives proposed by Moshe Hirsch in his article,⁹³ although it is equally possible to propose special alternatives for arrangements on the Temple Mount that are not necessarily congruous with the alternatives for the Historic Basin, such as the management of the Temple Mount by an international body and the division of sovereignty between Israel and the Palestinian state in the remaining parts of the Historic Basin. However, the prospects for the realization of such alternatives are extremely slight.

3. The Alternatives for an Arrangement in the Temple Mount and the Western Wall

First Alternative: Full Israeli Sovereignty and Control throughout the Historic Basin

Implementation of this alternative vis-à-vis the Temple Mount could take place according to one of the following secondary alternatives:

- A. Granting special status to the Muslim Waqf in terms of the management of the Temple Mount, in such areas as autonomy, diplomatic status, or a similar arrangement, along with a similar special status for Christian and Jewish bodies in managing their holy places.⁹⁴ Places sacred to more than one religious community would be managed according to the existing status quo.

In any arrangement, provisions would be ensured for entry into the Temple Mount area by Israeli and non-Muslim visitors. Entry into the site by senior Israeli government officials could be conditioned on prior consultation and

⁹³ See Moshe Hirsch's article on the alternatives in this booklet, pp. 53-76.

⁹⁴ Shmuel Berkowitz proposed that the area of the mosques on the Temple Mount should be the location of the Palestinian diplomatic delegation in Jerusalem, thus granting it the status and immunity established according to the rules of international law. See: Berkowitz, *The Wars of the Holy Places*, p. 425.

coordination with the Muslim Waqf. The directors of the Waqf could be granted international immunity.

- B. The continuation of the status quo, according to which the Temple Mount is managed by the Muslim Waqf, subject to Jordanian control and somewhat connected to the Palestinian Authority. Israel is responsible for overall security and for the external shell of the site (the parameters of which run through the police outpost on the Mount, the Makhkama building and at the Mughrabi Gate). Jews are entitled to visit the Temple Mount area, but not to engage in prayer or ritual.

- C. The strengthening of Israeli control beyond that provided by the current status quo. This secondary alternative presents a situation that is preferable to that pertaining at present from Israel's perspective. Strengthening Israeli control of the Mount could, in theory, be manifested in four spheres: in the more vigorous enforcement of planning and building laws and the Antiquities Law; in greater Israeli involvement in the routine management of the site (opening and closing hours, who is entitled to enter, censoring the sermons on Fridays, and such like); in enabling Jews to pray in the site on certain dates and in specific locations; and in establishing a stronger presence of the security forces within the Temple Mount area in order to enhance Israeli security control and maintain public order.

In the estimation of the authors of this essay, any change in the status quo created on the Temple Mount since 1967 would lead to violent and widespread reactions among the Muslim population and to fierce international opposition. It is important to emphasize that strengthening Israeli control over the Temple Mount does not necessarily imply permitting Jews to pray on the Mount or changing the rules of the de facto status quo that has emerged since 1967 in terms of ritual and prayer. It is highly likely that changes in this field would lead to a major outburst of the utmost ferocity in Jerusalem and in the wider the Arab and Muslim world. However, attention could be given in this alternative to establishing closer Israeli supervision of building and planning activities by the Muslim bodies in the Temple Mount, and to enforcing at least some of the Israeli laws in the fields of planning, building and antiquities. In all the alternatives, the Waqf should be

prohibited from undertaking archeological excavations and construction work on the Temple Mount, with the exception of routine maintenance work to be undertaken with Israeli authorization. In secondary alternative B, it should be ensured that the Muslim body managing the activities in the Temple Mount site act to prevent inciting statements in the Friday sermons.

Evaluation: It is evident that these alternatives (including the first secondary alternative) will not be acceptable to the Palestinian and Arab side, and there is no chance that they could lead to a settlement of the status in the Historic Basin.

Second Alternative: Full Palestinian Sovereignty and Control throughout the Historic Basin

In this alternative, the Palestinians would enjoy legal sovereignty and full legal authority in the Temple Mount site. However, within the framework of the agreement between the sides, it would be possible to include restrictions intended to prevent injury to the character of the site and to the interests of the members of other faiths on the Mount. Current Israeli security control over the external shell and the gates to the Temple Mount would be removed and Israel would no longer restrict entry into the site. However, Jews and non-Muslims would continue to be entitled to enter the site for the purposes of visiting and tourism only, at fixed hours as agreed by the sides.⁹⁵

In addition, the State of Israel would be required to establish provisions enabling Muslim and Christian citizens of Israel to enter their holy places under Palestinian sovereignty and control, including the Temple Mount. Jews would enjoy the right of access and worship at the Western Wall, which would be managed by the Jewish religious authorities with an autonomous or diplomatic status, similar to the management of the Temple Mount by the Muslim Waqf under Israeli supervision, according to the first alternative. Muslims would be permitted to enter their holy places in Israeli territory, such as the Tomb of David – Nabi Daoud – on Mt. Zion.

⁹⁵ Similarly, the right of access and worship of Jews would be maintained in other holy places, such as the cemetery on the Mount of Olives, the Tomb of Zachariah, Yad Avshalom and other Jewish holy places to be included in the sovereign territory of the Palestinian state, if, and when, it is established.

Evaluation: This alternative would be acceptable to the Palestinians and to many countries, but would be utterly rejected by Israel. Accordingly, there is no chance that it could lead to a settlement in the Historic Basin.

Third Alternative: Territorial Division between the Sides, with International Supervision

The territorial division of control in the Historic Basin is a solution that reflects the needs of both sides to maintain effective control over the sites that are most important to them: The Temple Mount / Al-Haram Al-Sharif for the Muslims, and the Western Wall and the Jewish Quarter for the Jews.⁹⁶

In this alternative the Temple Mount would be under Palestinian sovereignty, while the Western Wall and the Western Wall Tunnel (excluding the northern exit, and including the Jewish Quarter and the access road thereto) would be under Israeli sovereignty. The Palestinian side would be subject to restrictions in certain aspects relating to the Temple Mount in order to protect Israeli interests, while restrictions would also be imposed on Israel, particularly in terms of excavations and activities in the Western Wall and Western Wall Tunnel areas. Works would only be undertaken on the Temple Mount or at the Western Wall with the agreement of both sides. In the absence of agreement between the sides, the head of the international supervisory mechanism will determine the issue. The sovereignty of each side would include jurisdictional authority. The agreement would ensure the presence of an access road to the Western Wall under Israeli control (such as the Pope Road, which leads from the Sultan's Pool to the Western Wall and the Jewish Quarter via Dung Gate).

Possible restrictions on the Palestinian side might include: denial of access to a restricted area on the Temple Mount plaza from where it is possible to throw stones down to the Western Wall plaza; ensuring free access for non-Muslim visitors and tourists (without prayer or other religious ceremonies), and for Israeli Muslim citizens (without any particular restrictions). Access to the Temple Mount would be permitted during agreed hours and with agreed entry arrangements (no

⁹⁶ Israeli sovereignty over the Temple Mount according to this alternative is, in the authors opinion, a relatively theoretical possibility, and appears in Alternative C above. For additional information see the article by Moshe Hirsch on the alternatives in this booklet, pp. 53-76.

fee would be charged for visiting the Temple Plaza, while a reasonable fee would be charged for visits to the Dome of the Rock, the Al-Aqsa Mosque, and the Islamic Museum; modest dress and behavior would be mandated). Additional possible restrictions might be: maintaining the existing character of the site; and prohibiting demolition, construction or excavations unless these are agreed upon by both sides.

Due to the special status of the Al-Haram Al-Sharif site (Al-Aqsa) in the Muslim world, the possibility of including representatives of Muslim countries that maintain diplomatic relations with Israel (such as Turkey, Jordan, Egypt, Qatar, Morocco, etc), as well as a representative of the Muslim citizens of the State of Israel in the international body responsible for supervising the implementation of the arrangement representatives of Muslim could be evaluated. A representative on behalf of UNESCO could also be included.⁹⁷

Evaluation: In certain circumstances this alternative might be acceptable to Palestinian and international opinion. However, the chances of it being accepted in the foreseeable future, both by the Israel leadership and the Jewish public, are very slight.

Fourth Alternative: Joint management, the division of authorities between the sides and international backing

In this alternative, the Temple Mount would be managed by the Muslim Waqf, while the Western Wall (including the Western Wall Tunnel) would be managed by an Israeli Jewish authority. Joint Israeli-Palestinian management would be put in place in terms of maintaining order and security, supervising entry into the site, and addressing maintenance and renovation problems. No national flags would be flown over the Temple Mount or the Western Wall, and no prominent signs would be erected manifesting the sovereignty of each country. An international body with substantive powers would maintain supervisory and monitoring operations in order to ascertain that the sides are maintaining their commitment

⁹⁷ A detailed model for an international supervisory mechanism for the holy places was proposed by Shmuel Berkowitz in his doctorate thesis. See: S. Berkowitz, *The Legal Status of the Holy Places*, thesis toward an LL.D. degree, the Hebrew University of Jerusalem, 5738, pp. 375-377.

to the agreement, and would be empowered to impose sanctions on any side that fails to do so.⁹⁸

Jurisdictional authorities would be determined in accordance with the citizenship of the person suspected of breaking the law. In the case of foreign visitors, authority would be determined according to the point through which the suspect entered the Historic Basin (either through Israeli territory or through the territory of the Palestinian state). In the event that the joint management arrangement collapses, jurisdictional authorities would be transferred to the international body. Jurisdictional authority relating to the violation of the arrangement would rest with a joint committee of both sides and the international body.

The international body would ensure the implementation of the provisions of the agreement relating to the following issues: freedom of access and entrance arrangements for visitors; the prohibition of prayer by non-Muslim visitors to the Temple Mount; prohibiting excavation, construction, demolition and other such activities; prohibiting changes to the character of the site or attempts to display signs of national sovereignty; maintaining public order and security; and prohibiting political activities, including incitement of any type.

If the sides fail to respect the undertakings they made in the context of joint management, the international body would be empowered to take over the management and operation of the site pending the resolution of the dispute between the sides and the emergence of conditions permitting the reapplication of the agreement.

Evaluation: Both sides will find it difficult to accept this alternative. The Palestinians will not accept Israeli involvement in security matters on the Temple Mount, while the Israelis will not accept Palestinian involvement in the affairs of the Western Wall, and will be reluctant to accept the exclusive management of the Temple Mount by the Muslim Waqf. Nevertheless, this alternative seems more realistic than the preceding ones, albeit not in the foreseeable future.

⁹⁸ See the article by Moshe Hirsch in this booklet, pp. 53-76.

Fifth Alternative: Management of the Historic Basin by an International Body, with the Delegation of Authorities to Both Sides

In this alternative, the international body would constitute the source of authority for control in the Temple Mount and Western Wall, and would delegate some of its authorities to the religious bodies that currently manage the sites (the Waqf on the Temple Mount and the Chief Rabbinate and/or the Western Wall Heritage Fund at the Western Wall and the Western Wall Tunnel). This delegation of authority will apply provided that the sides respect the rules, restrictions and undertakings adopted regarding the management of the sites. The most important managerial function of the international body would be in the security sphere; it would refrain from intervening in the arrangements for ritual procedures and in the routine management of the Temple Mount and the Western Wall.

The international body would maintain strict supervision via a strong international police force, ensuring the maintenance of arrangements in the following fields:

- ❖ Refraining from displaying symbols of national sovereignty on the Temple Mount;
- ❖ Ensuring freedom of worship for the sides (Muslims on the Temple Mount and Jews at the Western Wall) and free access for visitors;
- ❖ Maintaining the existing character of the sites and refraining from unilateral excavation, construction or demolition.

In the event that either side violates the undertakings and restrictions it accepted in the agreement, the international body would be able to assume the authorities delegated to the sides, pending the situation's return to its former status.

Jurisdictional authority in areas relating to ensuring the undertakings (with the exception of minor offenses by private individuals) would rest with the international body, which would establish a special tribunal for this purpose and possibly even maintain its own detention facility.

Evaluation: Of all the alternatives mentioned here, this is the most realistic, particularly if the period of management by the international body is presented as an interim one. This would enable both sides to argue that they have not

waived their sovereignty over the Temple Mount and Western Wall, while still effectively continuing the practices that have developed since 1967. An important condition for realizing this alternative is that both sides must have confidence in the international body and its ability to manage the holy place in a fair manner. However, it should be assumed that extremist groups on both sides will see the international control of the Mount as tantamount to sacrilege, and will attempt to struggle against this control by all means possible. A further weakness of this alternative lies in the profound difficulty of persuading key elements in the international arena (particularly the United States) to join the international body – a complex mission liable to entail difficult and unexpected complications.

Conclusion: The Division of Responsibilities on the Temple Mount and at the Western Wall according to the Different Alternatives

| Area of Action | Alternative A | Alternative B | Alternative C | Alternative D | Alternative E |
|--------------------------|--|----------------------|--|--|---|
| Sovereignty (control) | Israeli (not all the manifestations of sovereignty will be realized in practice) | Palestinian | Palestinian on the Temple Mount and Israel at the Western Wall and Western Wall Tunnel | Suspended | The international body is the source of authority, but does not intervene in routine management and ritual arrangements |
| Jurisdictional authority | Israeli | Palestinian | Palestinian on the Temple Mount and Israel at the Western Wall and Western Wall Tunnel | Individuals – according to citizenship or according to the point of entry into the Historic Basin; in the case of the violation of arrangements by either side – the joint committee under international auspices. | An international body in accordance with a special agreement |

| Area of Action | Alternative A | Alternative B | Alternative C | Alternative D | Alternative E |
|---------------------------|--|---|---|---|--|
| Security in the “shell” | Israeli | Palestinian | Geographical division between Palestinian and Israeli security services. | Geographical division under international supervision. | International body. |
| Policing and public order | Israeli in the shell, with the authority to enter the site in the case of violent incidents; guarding by the Waqf inside the site. | Palestinian; guarding of the Western Wall with Israeli involvement. | Palestinian on the Temple Mount and Israeli in the Western Wall plaza. | Palestinian on the Temple Mount and Israeli in the Western Wall plaza and in the access to the Western Wall from the Jewish Quarter, under international supervision. | International body. |
| Management | By a committee of the Waqf, including Israeli (Muslim) representatives. | Palestinian | Muslim Palestinian on the Temple Mount; Israeli Jewish in the Western Wall Plaza. | Muslim on the Temple Mount and Israeli Jewish in the Western Wall plaza. | The international body will empower the Muslim Palestinian side to manage the Temple Mount and the Israeli Jewish side to manage the Western Wall plaza. |

| Area of Action | Alternative A | Alternative B | Alternative C | Alternative D | Alternative E |
|---|---|--|---|---|---|
| Symbols and flags | No flags, except on the Makhkama building, which serves a security function. | As determined by the Palestinians. | According to sovereignty. | No flags or national symbols. | No flags or national symbols. |
| Freedom of access (entry by visitors, but not for prayer or ritual) | The only restrictions on entry will be for reasons of security and public order. | Access by non-Muslims will be ensured at agreed times. | Ensured under international supervision; the access road to the Western Wall and Jewish Quarter will also be ensured. | Ensured under international supervision. | Ensured under international supervision. |
| Freedom of worship | The situation in which Jews refrain from exercising their right of worship will continue. | Muslims only. | Muslims on the Temple Mount and Jews in the Western Wall plaza. | Muslims on the Temple Mount and Jews in the Western Wall plaza. | Muslims on the Temple Mount and Jews in the Western Wall plaza. |
| Rules of behavior | As coordinated by the sides. | As determined by the Muslims. | By sovereignty and custom. | With restricted supervision and according to custom. | As agreed, under the supervision of the international body. |
| Excavation, building, demolition | According to Israeli law. | According to Palestinian law. | Unilateral actions will be prevented. | Unilateral actions will be prevented. | Restrictions, under the supervision of the international body. |

| Area of Action | Alternative A | Alternative B | Alternative C | Alternative D | Alternative E |
|-------------------------------------|----------------------|----------------------|--|--|---|
| Authority of the international body | None. | None. | Monitoring and restricted supervision to ensure compliance with the restrictions and rights as detailed above; participation in the multilateral managing group. | Close monitoring and supervision to ensure compliance with the sides' undertakings; authority to remove management from the side violating its undertakings in a substantive and ongoing manner. | Full powers as the source of authority; delegation of managing authorities to the religious bodies, but these can be removed in the case of substantive and ongoing violations. |

International Intervention in the Historic Basin: Characteristics and Key Alternatives

Moshe Hirsh, Shimrit Golan⁹⁹

A. Introduction

The potential need for international intervention as a solution to the Israeli-Palestinian conflict regarding the future of Jerusalem is raised whenever the negotiations between the two sides reach an impasse. Different alternatives for such intervention have recently attracted attention from researchers, policy makers, and journalists. The discourse on this issue is influenced both by general approaches to the resolution of international conflicts and by the unique characteristics of the conflict between Israel and the Palestinians. The use of international forces as a key component in conflict resolution has expanded in recent years; prominent examples include the special regimes established in Kosovo, East Timor, Bosnia, and elsewhere. The willingness of countries that are not involved in a conflict to contribute units to such international forces often reflects their desire to stabilize the geopolitical situation in a given region and to prevent injury to their vital interests (such as an influx of refugees or illegal migration to their territory,¹⁰⁰ as well as a desire to enhance their political influence in the region.

International bodies have always been involved in various aspects of the Arab-Israeli conflict. Examples include the multinational force in Sinai and the observers stationed in that region; the “Monitoring Group” in Lebanon; the involvement of the European Union in ending the siege of the Church of the Nativity in Bethlehem in April 2002; and, more recently, the stationing of European observers at Rafah border crossing with Israeli consent. The main

⁹⁹ This chapter is an updated and expanded version of a chapter included in the study by Hirsh and Michael, *International Involvement*, Note above 67.

¹⁰⁰ On this aspect, see, for example: Richard Caplan, *A New Trusteeship? The International Administration of War-torn Territories* 8-9 (International Institute for Strategic Studies, Oxford, 2002).

factor informing discussion of international involvement in the future regime in the Historic Basin in Jerusalem is the profound lack of trust between Israel and the Palestinians. This is compounded by the doubts among decision makers and public opinion on both sides, and particularly on the Israeli side, regarding the ability of the other side's key institutions to enforce any agreement that is reached on groups opposed to its provisions (generally extremist groups). Public debate relating to the resolution of the conflict focuses not only on the content of the agreement, but also on the reliability and intentions of the other side and its ability to implement any agreement that may be reached. There is a close connection between the confidence on each side that an agreement will be implemented and its willingness to compromise on areas of disagreement. As a generalization, it is true to say that the greater the confidence of both sides that the agreement reached will be implemented, the greater their willingness to make painful concessions. Conversely, the more profound the mistrust between the sides, the greater the need for international involvement. Granting functions to an international force in the Historic Basin naturally entails a weakening of the control enjoyed by the parties within this area.

Allocating functions to an international force may indeed strengthen the credibility of the arrangement reached by the sides, provided the force enjoys the trust of both sides. In general terms, it is obvious that the greater the trust each side has in the international force, the more willing it will be to allocate significant powers to the force. One Factor, among others, that influences the level of trust the sides have in the international force is its profile (e.g. the specific countries comprising the force and the identity of the commanding entity). These aspects will be discussed in detail below.

Dozens of international forces are currently operational in many different areas of the world. These forces offer diverse models. The discussion herein will focus on three key aspects of the international forces that may be involved in a future regime in the Historic Basin: (A) the functions of the international force; (B) the identity of the body that will supervise and direct the work of the international force; (C) the composition of the international force.

As will be discussed below, these different aspects are interconnected.

B. Functions of the International Force

International entities may be involved in shaping the provisions of an agreement and may even determine some of the provisions (as in the example of the negotiations in 2004 regarding the future regime in northern Cyprus).¹⁰¹ In some cases, forces are involved in establishing public and democratic institutions (e.g. in Kosovo).¹⁰² However, the potential function of an international force in the historic basin will probably be to implement the provisions of an agreement as reached by the parties to the conflict. As noted above, one of the main impetuses for international intervention is the lack of trust between the sides, particularly with regard to implementation of any agreement's provisions. In such a situation, each side fears that the other is liable to evade implementation of the provisions of the agreement, or to introduce arrangements contrary to the agreement's letter or spirit. However detailed an agreement is, it can never relate to the entire range of questions that may emerge during its implementation. It may reasonably be assumed that many of the agreement's provisions will be open to different interpretations. This reality heightens the concern of each side that the other side will implement the agreement in an unfair manner. The involvement of an external body in which both sides have confidence (or, at least, more so than in the opposing side) may alleviate this problem.

An international force may potentially fill a wide range of roles in the future regime in the Historic Basin-- from limited authorities in the field of inspection and control, to a wider authority including the use military force against either side. The three main alternative for the range of roles are: (A) monitoring arrangements designed to ascertain whether either side is implementing or violating the provisions of the agreement; (B) implementation of specific arrangements as agreed by the sides; (C) use of means of coercion by members of the force against a side violating the provisions of the agreement.

¹⁰¹ See, for example: *Report of the Secretary-General on His Mission of Good Offices in Cyprus*, S/2003/398, 1 April 2003. http://www.cyprus-un-plan.org/UNSC_SG_Reports2003Cyprus.pdf.

¹⁰² Michael J. Matheson, "United Nations Governance of Post-conflict Societies," 95 *American Journal of International Law* 76, 79-80 (2001). See below for further discussion of the international intervention in Kosovo.

1. Monitoring

In this alternative the personnel in the international force would play the role of observers. They are present in various areas and examine whether either side is violating the provisions of the agreement and to what extent. The effective functioning of an observers force requires clear arrangements regarding actions and reporting procedures in the case of concern or in reporting violations. In cases of violations, the personnel in the force may only report to the sides, to a joint body (which may also include third parties), or to an external international organization (such as the UN Security Council); alternatively, the force may publish its findings. In order to ensure that the personnel in the force can collect information on these aspects, the agreement should explicitly state that the sides must allow the personnel free access within the Historic Basin and in its access roads. Provisions should also be established requiring both sides to enable personnel from the force to perform their functions without fear. The agreement should ideally include provisions detailing the scope of international immunity to be enjoyed by the personnel (this is generally a functional immunity).

It should be noted that although the functions of the force are confined to inspection and monitoring, the information secured by it may sometimes have important ramifications for the implementation of the agreement. The publication of clear findings by the observers may create international pressure on the violating side (and sometimes even lead to the imposition of international sanctions). In some cases, publication of the findings may serve as justification (“legitimization”) for unilateral steps by the injured party.

Prominent examples of international forces whose functions are mainly to inspect and monitor the agreements adopted by the sides in international conflicts include: the UN forces on the Golan Heights; the Multinational Force and Observers in Sinai; the UN force in Cambodia; and the UN force in Bosnia-Herzegovina.

(A) **United Nations Disengagement Observer Force (UNDOF)**: This force was established in accordance with UN Security Council Resolution 350 (1974).¹⁰³ The resolution followed the disengagement agreement between Israel and

¹⁰³ Security Council Resolution 350 (31 May 1974), <http://www.un.org/documents/sc/res/1974/74r350e.pdf>.

Syria at the end of the 1973 Yom Kippur War.¹⁰⁴ The main function of the force is to implement the separation arrangements as detailed in the appendix to the above-mentioned agreement.¹⁰⁵

(B) **The Multinational Force and Observers in Sinai** was established in accordance with the peace treaty between Israel and Egypt (1979)¹⁰⁶ and the protocol signed by both countries in 1981.¹⁰⁷ The main function of this force is to inspect compliance with the provisions of the peace agreement regarding the limitation on forces in the different areas (Sinai and the Negev), and to ensure freedom of passage in the Straits of Tiran. In order to implement these functions, the force operates checkpoints, patrols, and observations on land and at sea.¹⁰⁸

(C) **The United National Transitional Authority in Cambodia (UNTAC)** was established in order to implement the Paris Agreement of 1992 regarding the end of the internal conflict in this country.¹⁰⁹ UNTAC was authorized to manage several regions of Cambodia on a temporary basis, but eventually was confined to inspecting and monitoring implementation of the agreement.¹¹⁰

(D) **The United Nations Mission in Bosnia and Herzegovina (UNMIBH)**¹¹¹ is an example of an international force that was granted monitoring powers

¹⁰⁴ The Agreement on the Disengagement between Israeli and Syrian Forces, 31 May 1974, UN Doc. S.11302/Add. 1-3, 31 May 1974, reproduced in Ruth Lapidot and Moshe Hirsch, eds., *The Arab-Israeli Conflict and Its Resolution: Selected Documents* 152, Dordrecht, Kluwer-Nijhoff Publishers, 1992.

¹⁰⁵ For further details about the functions of UNDOF in theory and practice, see: <http://www.un.org/DEPTS/DPKO/Missions/undof/undofM.htm>.

<http://www.un.org/DEPTS/DPKO/Missions/undof/undofB.htm>.

¹⁰⁶ Article 4 of the Peace Agreement between Israel and Egypt, *Treaty Documents*, Vol. 25, p. 695.

¹⁰⁷ *Treaty Documents*, 26, p. 631.

¹⁰⁸ For details of the MFO, see: Ruth Lapidot, "The Multinational Force and Observers in Sinai and the Negev," in *The Zussman Book* (ed: Gabriella Shalev), Chen Publishers, Jerusalem, 1984 (in Hebrew); Malla Tabory, *The Multinational Force and Observers in Sinai: Organization, Structure and Functions* 1, Westview Press, Boulder, 1986; R. W. Nelson, "Peacekeeping Aspects of the Egyptian-Israeli Peace Treaty and Consequences for United Nations Peacekeeping," 10 *Denver Journal of International Law and Policy* 113, 1980.

¹⁰⁹ See: "Agreement on a Comprehensive Political Settlement of the Cambodia Conflict," 23 October 1991, 31 *International Legal Materials*, 183, 184 (1992).

¹¹⁰ For a discussion of the reasons that led UNTAC to refrain from exercising administrative powers in these regions, see: Caplan, *supra* note 2, at 13-14.

¹¹¹ Regarding this force, see: <http://www.un.org/DEPTS/DPKO/Missions/unmibh/unmibhM.htm>.
<http://www.un.org/DEPTS/DPKO/Missions/unmibh/unmibhB.htm>.

in a single functional area. UNMIBH was established in accordance with a Security Council resolution (Resolution 1035 from 1995);¹¹² it also operates in accordance with the provisions of the peace agreement (the Dayton Agreement) signed in November 1995 by Bosnia and Herzegovina, Croatia, and Yugoslavia. The main function of the force is to monitor the law enforcement agencies in these territories; to examine complaints of human rights violations by police forces;¹¹³ and to inspect and evaluate the functioning of the court systems.¹¹⁴

(E) **The United Nations Preventive Deployment Force in Macedonia (UNPREDEP).**¹¹⁵ This is a further example of a force whose principal function is to inspect and monitor border zones, albeit with a strong preventative element (as distinct from a force whose function is essentially to enforce an agreement ending a conflict). The UNPREDEP personnel were stationed along the borders of Macedonia in 1995 in order to prevent the expansion of the violent conflict that was being waged in Yugoslavia at the time into Macedonian territory. The force, while established in 1995, has its origins in a general UN force that operated in and around Yugoslavia in 1992, **UNPROFOR** (the UN Protection Force), on the basis of Security Council Resolution 743. The function of UNPROFOR was to create conditions of peace and security in order to help resolve the conflict in Yugoslavia.¹¹⁶ Between 1992 and the cessation of its activities in November 1995, the functions of UNPROFOR were expanded and amended in accordance with a series of Security Council resolutions. Security Council Resolution 983 granted independent status to the forces already stationed in Macedonia, under the name UNPREDEP.¹¹⁷

¹¹² See: Security Council Resolution No. 1035, 21 December 1995:
<http://www.un.org/Docs/scres/1995/scres95.htm>.

¹¹³ See: Security Council Resolution No. 1088, 12 December 1996:
<http://www.un.org/Docs/scres/1996/scres96.htm>.

¹¹⁴ See: Security Council Resolution No. 1184, 16 July 1998:
<http://www.un.org/Docs/scres/1998/scres98.htm>.

¹¹⁵ Regarding this force, see: http://un.org/Depts/dpko/dpko/co_mission/unpredep.htm.

¹¹⁶ See: Security Council Resolution No. 743, 21 February 1992, regarding the establishment of UNPROFOR: <http://www.un.org/Docs/scres/1992/scres92.htm>.

¹¹⁷ See: Security Council Resolution No. 982, 31 March 1995, regarding the extension of UNPROFOR's mandate: <http://www.un.org/Docs/scres/1995/scres95.htm>.
See also, Resolution No. 983, 31 March 1995, regarding the establishment of UNPREDEP and the abolition of UNPROFOR: <http://www.un.org/Docs/scres/1995/scres95.htm>.

The authorities of the original force, which were defined in Security Council Resolution 908 (from 1994) and elsewhere,¹¹⁸ granted the force leeway in interpreting its authorities in both the military and the civilian spheres.¹¹⁹ As the force operated in the area its functions were extended on an informal basis to include border inspection and monitoring, creating deterrents, enhancing security and stability, and reporting on threats.¹²⁰

The force's presence created the desired deterrence and managed to prevent the conflict in Yugoslavia from spreading into Macedonian territory. The force's operations were renewed every six months. On 14 July 1998, the UN Secretary-General submitted a report to the Security Council recommending that the force's authorities be expanded.¹²¹ Following the report, the Security Council adopted Resolution 1186 (on 21 July 1998) granting these additional authorities to the force: liaison between the armies of the relevant countries (Macedonia, Croatia, and Yugoslavia); joint response to skirmishes; joint determination of the administrative border with Yugoslavia for the purposes of reporting and monitoring; and reporting on arms deliveries, etc.¹²² The presence of the force also helped improve the treatment of minorities; mitigated tensions between different political and ethnic groups; and encouraged cooperation with other organizations, such as the Organization for Security and Cooperation in Europe (OSCE) and the Red Cross.¹²³ In addition to these tasks, the force also provided medical assistance and helped repair infrastructures in the country, including roads, water supplies, and communications.¹²⁴

¹¹⁸ See: Security Council Resolution No. 795, 11 December 1992:
<http://faq.macedonia.org/politics/un.resolutions.html#795>.

¹¹⁹ For example, see: Article 11 of Security Council Resolution No. 908 (31 March 1994):

"... emphasizes the need for UNPROFOR to deploy its resources in a flexible manner, in particular, in and around the safe areas, and authorized UNPROFOR to carry out these tasks..."

<http://www.un.org/Docs/scres/1994/scres94.htm>.

¹²⁰ See: Stephen T. Ostrowski, "Preventive Deployment of Troops as Preventive Measures: Macedonia and Beyond," 30 *New York Journal of International Law and Politics* 793, 804-5, 809, 1998.

¹²¹ Report of the Secretary-General of the United Nations S/1998/644, 14 July 1998:

<http://www.un.org/Docs/sc/reports/1998/sgrep98.htm>.

¹²² See Article 1 of Security Council Resolution No. 1186, 21 July 1998:

¹²³ See Ostrowski, *supra* note 22, at 814-815.

¹²⁴ *Ibid.*, p. 816.

Security Council Resolution 1186 extended the force's operations by a final period of six months, ending on 28 February 1999, when the force ceased to be operational. The general evaluation of the functioning of the UN force in Macedonia was that it succeeded in securing its objectives¹²⁵ despite the problems that arose during the course of its operations. One of these problems was that the American soldiers continued to obey orders from the US authorities as well as from the commander of the force.¹²⁶ In addition, the expansion of authority from a purely military one into civilian matters was not welcomed by the Macedonian government, which saw this as an affront to its sovereignty.¹²⁷ A further problem encountered by all forces with a preventative mission (and not only UNPREDEP) is the inability to determine precisely when its operations may be halted – i.e., when the threat has been removed and operations need not be extended.¹²⁸

Conflict resolution: The responsibilities of the monitoring and inspection operations may be expanded to include the resolution of conflicts between the parties. Thus, for example, the parties would be authorized to empower certain officials within the international force (such as the commander of the force or the legal adviser, either working individually, or together with the representatives of the parties) to rule in conflicts between the parties relating to the agreement's interpretation and implementation. The authority to resolve conflicts may, of course, be restricted to specific provisions in the agreement and not to all spheres. In this case, the agreement should include an appendix detailing rules for the composition of the “tribunal” – i.e. who is empowered to submit claims

¹²⁵ Among the factors contributing to the success of the force, Ostrowski notes the timing of its establishment (the force was established prior to the outbreak of hostilities); the expansion of its functions to include preventative actions not included in the original mandate on the basis of the flexible wording of the Security Council resolutions that granted the commanders of the force extensive discretion; the existence of cooperation and commitment on the part of all the parties, leading to an appropriate political atmosphere; the fact that the force enjoyed the confidence of the Serbs and the Albanians and refrained from identifying with the US and NATO; the preliminary consent of the Macedonian government and the ongoing cooperation with this government (*ibid.*, pp. 819-821).

¹²⁶ *Ibid.*, p. 823.

¹²⁷ The Macedonian government noted that mediation and humanitarian services were already being provided by the OSCE. In practical terms, however, it could not have withdrawn its support for the force, since this would have made it impractical for the troops to remain along the border (*ibid.*, p. 824).

¹²⁸ *Ibid.*, p. 826.

(governmental/public authorities; non-governmental organizations, or even private individuals). The appendix should also include guidelines for the scope of authorities of the tribunal (do its decisions constitute “recommendations” or “binding decisions?”)

The Israel-Lebanon Monitoring Group is a key example of an international body established in order to monitor the implementation of an agreement’s provisions by means of a system for conflict resolution. The group was established in the Memorandum of Understanding (26 April 1996)¹²⁹ at the conclusion of Operation Grapes of Wrath, and was composed of representatives of the United States, France, Syria, Lebanon, and Israel. The procedural rules for the group’s mission were determined in a protocol agreed by the parties (dated 12 July 1996), according to which the chair-people of the committee were the representatives of the United States or France.¹³⁰ The representatives of Syria, Lebanon, and Israel were mainly senior army officials, while the delegations from the United States and France were headed by diplomats.¹³¹ The group operated through the year 2000, when the IDF forces withdrew from southern Lebanon. The authorities of the group were limited from the outset to monitoring the four points included in the Memorandum of Understanding, which essentially embodied an undertaking to refrain from attacks against civilians or civilian targets (including industrial installations), while reserving the right to self-defense.¹³² It is therefore clear that the establishment of this monitoring group was based on the assumption that the conflict between the parties would continue on a temporary basis, but within

¹²⁹ For the full text of the Memorandum of Understanding, see:
http://www.knesset.gov.il/process/asp/event_frame.asp?id-44.

¹³⁰ For details of the work of the committee see: Rotem Giladi, “Israeli Practice and Case Law in Matters Related to International Law: The Israel-Lebanon Monitoring Group,” 32 *Israel Law Review* 355, 363, 1998.

¹³¹ *Ibid.*, p. 366.

¹³² See: “Memorandum of Understanding,” note 31 above:

1. Armed groups in Lebanon will not carry out attacks via Katyusha rockets or via any other kind of weapon into Israel.
2. Israel and those cooperating with it will not fire any kind of weapon at civilians or at civilian targets in Lebanon.
3. In addition, the two parties commit to ensuring that under no circumstances will civilians be the target of attack and that civilian populated areas and industrial and electrical installations will not be used as launching grounds for attacks.
4. Without violating this understanding, nothing herein shall preclude any party from exercising the right of self-defense.

restricted conditions.¹³³ The monitoring group functioned as a mechanism for conflict resolution between the parties; though it could not impose substantive sanctions on any party, its practical power and efficacy accrued from the public approbation inherent in the publication of its conclusions.¹³⁴

The fact that the procedural rules were not precisely detailed in the protocol meant that the group enjoyed relative latitude. This also contributed to the development of modalities that facilitated the work of the group.¹³⁵ For example, in procedural terms the principles that emerged mandated confidentiality; agreement that all the principles in the agreement enjoyed equal weight; a demand for precision in the wording of complaints; threshold requirements regarding the gravity of the complaint and the quality of evidence; and the imposition of the burden of evidence on the party accused of a violation (when the other party filed a reasonable complaint relating to the killing of civilians).¹³⁶ The monitoring group also urged the parties to refrain from disproportionate actions and from endangering civilian life or the security of populated areas, and adopted the principle that grave liability was to be imposed on the attacking party.¹³⁷

According to the procedural rules of the monitoring group, the party submitting the complaint was required to present prima facie evidence that the other party had indeed violated one of the rules. Thereafter, with the parties' agreement, personnel from the military staff of the United States and France examined the details of the complaint within the territory of Israel and Lebanon.¹³⁸ Israel and Lebanon were not permitted to participate in clarifying the details of an event that occurred in the territory of the other country, while Syria was permitted to participate only in the clarification of the details of an event occurring in Lebanon.¹³⁹ The countries were required to cooperate with the procedures for the examination of complaints, in addition to the general obligation imposed on them

¹³³ Adir Waldman, "Clashing Behavior, Converging Interests: A Legal Convention Regulating a Military Conflict," *27 Yale Journal of International Law* 249, 2002, at 251.

¹³⁴ *Ibid.*, pp. 253, 273. In addition to publishing a report, the decision that a particular party had violated the agreement effectively granted a form of legitimacy for the other party to respond with punitive actions. *Ibid.*, pp. 252, 268-269.

¹³⁵ *Ibid.*, pp. 363, 370.

¹³⁶ Waldman, *supra* note 35, at 288-289.

¹³⁷ *Ibid.*, p. 289.

¹³⁸ In practice, this sort of inspection this was undertaken on just two occasions (due to the lack of consent of all the parties in other cases); *ibid.*, p. 270.

¹³⁹ Giladi, *supra* note 32, at 371.

to facilitate the work and ensure the safety of the group.¹⁴⁰ In accordance with the rules developed during the course of the group's operations, when the parties could not reach unanimous agreement regarding the report's conclusions, the matter was referred to the foreign ministers of the member countries. In practice, the group was not required to activate this provision, since all the discussions resulted in a report that was unanimously accepted. The fact that the reports were adopted unanimously does not necessarily imply agreement among the parties regarding the content of the complaint, since the report itself could conclude by noting that the parties disagreed regarding the incident.¹⁴¹ The report determined whether liability – and, in the later stages of the group's work, even guilt – should be imposed on the party against which the complaint was filed.¹⁴²

The reports of the monitoring group were not published, but press statements included a summary of their main points. These statements were each phrased in a similar way: they began with the statement that the group had convened to discuss a certain number of complaints, they then detailed the claims raised in the meeting and established that the group had accepted the fact that an incident had occurred (even if it had not accepted all the details). The statement then continued to say that the group had discussed the complaint in accordance with the parties' claims, stated the claim of defense of the party accused of the violation (only in rare cases was no such claim submitted); and detailed the group's findings regarding the claim.¹⁴³ Carefully-worded comments by the committee reflected

¹⁴⁰ Ibid., p. 372. Section 3(D) of the Protocol of 12 July 1996:

“On the basis of Israel's and Lebanon's commitment to the April 26, 1996 understanding, and without derogating from any of the terms: Israel and Lebanon will take necessary measures to facilitate the work and ensure the safety of the Group, and refrain from any actions and reactions which could endanger the Group and its work during the period of review of a complaint. For the Monitoring Group to function effectively, Lebanon and Israel will strive to create a stable and tranquil environment for it to carry out its work.”

See the format of the protocol, *ibid.*, p. 387 (Appendix II), and Waldman, *supra* note 35, at 310 (Appendix I).

¹⁴¹ Ibid., pp. 373-375; Waldman, *supra* note 35, at 278. For example, see: Press Statements by Monitoring Committee for Supervision of Understandings, 16 December 1996, on the site of the Israeli Foreign Ministry:

<http://ww.mfa.gov.il/MFA/Terrorism+Obstacle+to+Peace/Terrorism+from+Lebanon+Hizbullah/PRESS+STATEMENT+BY+MONITORING+COMMITTEE+FOR+SUPERV.htm>.

¹⁴² Waldman, *supra* note 35, at 278-279.

¹⁴³ Ibid., pp. 280-284. When the group was unable to reach a factual conclusion or to determine that a violation had occurred, the report was confined to the claim and the defensive claim. In rare cases, the parties agreed that an action did not constitute a violation of the agreement.

different degrees of guilt.¹⁴⁴ Recommendations were also suggested in order to avoid future injury to civilians.¹⁴⁵ The monitoring group met a total of 103 times,¹⁴⁶ the last meeting being on 11 February 2000. Israel subsequently refused to participate in the group's meetings (though it did not officially leave the group). This refusal came against the background of the worsening security situation and the assessment that Israel's planned withdrawal from Lebanon meant that there was no longer any need to use this system.¹⁴⁷

Reactions to the work of this unique system were positive; scholars agree that it was successful in reducing injuries among civilians.¹⁴⁸ On an informal level, the system also functioned as a channel of communication between Israel and Syria. In addition, the process whereby complaints could be filed helped to reduce internal pressure that might otherwise have led to an exacerbation of the conflict.¹⁴⁹

2. Authorities for civilian administration and implementation

One of the main impetuses for international involvement where the Historic Basin is concerned is the lack of trust between the parties. This is particularly true in the context of implementation of the provisions of the arrangement by each party. In the current political environment, each party fears that the other may implement sections of the agreement in a manner that contradicts the agreement's provisions

¹⁴⁴ Ibid., p. 284. Examples include: "fails to conform to the provisions of the Understanding;" "the Group acknowledged it as a violation of the Understanding and condemned it;" "strongly condemning;" "rejected;" "strongly rejected;" "... could be considered a violation of the Understanding."

¹⁴⁵ Ibid., p. 287.

¹⁴⁶ Ibid., p. 270.

¹⁴⁷ Ibid., p. 294.

¹⁴⁸ Waldman notes a number of incentives that encouraged the parties to observe the provisions of the agreement, including: the awareness of the parties that they would have to meet to discuss a complaint; publication of statements by the monitoring group and the gradual emergence of confidence that the agreement would indeed help reduce violations by the other party; the gradual and significant increase in the number of appeals to the group by the parties, at first due to covert competition (the desire to file at least as many complaints as the other party), but later due to the importance the parties came to attach to the agreement. Waldman argues that the fact that the party accused of a violation was also included in drafting the statement meant that the statement was not excessively harsh and did not impair willingness to use the mechanism in the future (ibid., pp. 275-277).

¹⁴⁹ Ibid., pp. 301-302.

or its spirit. Moreover, even if a party intends to observe the letter and spirit of the agreement, it is liable to encounter considerable difficulties in enforcing the agreement against private groups and individuals opposed to the implementation of some of the provisions in the agreement. Tension and confrontation between the two sides may result from the failure to implement certain provisions in the agreement and from disagreements in this context, and these are liable to thwart the implementation of the agreement as a whole. Entrusting the international body with administrative authorities in such sensitive areas may facilitate the implementation of the agreed arrangement by the parties.

The personnel of the international force may themselves implement arrangements as they have been agreed upon by the parties. The potential range of authorities delegated to the force is highly diverse. Examples of narrow functions include ensuring freedom of passage to the sacred sites, arrangement for passage into the Historic Basin (“safe passage;”) or protecting specific sites against desecration or physical damage. In such cases, the personnel of the international force may also be empowered to act against private individuals or groups that violate provisions of the arrangement (thus, for example, personnel in the international force may be empowered to detain persons blocking access to sacred sites or desecrating them). The international force may also be granted more substantial administrative authorities (including policing, taxation, planning, and building). The force may be granted a very wide range of authorities and effectively empowered to manage the entire Basin. It must be emphasized that the broader the scope of the authorities granted to the intervening force, the greater the importance of the composition of the force, the manner of its operation, and its supervision (regarding alternatives for the composition of the force, see below).

Most international forces established to date have not been empowered to manage a given territory. A number of international forces (particularly over the past decade) have, however, received broad administrative authorities, albeit usually for a limited period of time. Examples of this include the management of the city of Danzig by troops from the League of Nations (1920-1939); the management of the Saar province by the League of Nations (1920-1935); and the management of West Irian by United Nations forces (1962-1963).¹⁵⁰ The most

¹⁵⁰ For more details on these international forces, see: Ralph Wilde, “From Danzig to East Timor and Beyond: The Role of International Territorial Administration,” 95 *American Journal of International Law* 583, 586-589, 2001.

prominent examples over the past decade are the United Nations forces in eastern Slovenia (1996-1997), East Timor (1999-2002), and Kosovo (since 1999).

The two key examples of the management of territories by international forces over the past decade are East Timor and Kosovo:

The United Nations Transitional Administration in East Timor (UNTAET):

This United Nations force was established following the violent riots that erupted on the island of East Timor during and after a referendum on its future held in the summer of 1999. In the initial stage, an international force led by Australia (INTERFET) was empowered by the Security Council¹⁵¹ to restore peace and security on the island. Later, under Resolution 1272 (1999), the Security Council established the above-mentioned United Nations force, which was granted extremely broad authorities to manage the island during the transitional period.¹⁵² The Security Council granted the force “overall responsibility for the administration of East Timor,” and empowered it “to exercise all legislative and executive authority, including the administration of justice.”¹⁵³ In May 2002, after the end of the transitional period and establishment of the new state, the Security Council decided to end the work of INTERFET and establish a new United Nations force (United Nations Mission of Support in East Timor) to help the new government in vital administrative duties, including those in the fields of law enforcement and public security.¹⁵⁴

United Nations Force in Kosovo: The civil war that erupted in Kosovo in 1999 and the cruel treatment of the residents of this province by the Yugoslav government led to intervention of several international forces. The Security

¹⁵¹ See Security Council Resolution 1264 (1999): <http://www.un.org/Docs/scres/1999/scres99.htm>

¹⁵² For details of the events preceding the establishment of the United Nations force and its functions, see: <http://www.un.org/peace/etimor/UntaetB.html>

<http://www.un.org/peace/etimor/Untaetchrono.html>

¹⁵³ See Article 1 of Security Council Resolution 1272, 25 October 1999:

“1. *Decides* to establish, in accordance with the report of the Secretary-General, a United Nations Transitional Administration in East Timor (UNTAET), which will be endowed with overall responsibility for the administration of East Timor and will be empowered to exercise all legislative and executive authority, including the administration of justice.”

<http://www.un.org/Docs/scres/1999/scres99.htm>

¹⁵⁴ See: Security Council Resolution 1410, 17 May 2002:

<http://www.un.org/Docs/scres/2002/scres2002.htm>

Council was extremely active in this crisis,¹⁵⁵ empowering two international forces to act in the region: the NATO force (see below), which was empowered to perform military functions, and the United Nations force which was charged with undertaking civil administration missions. Under Security Council Resolution 1244 (1999), the United Nations Interim Administration Mission in Kosovo (UNMIK) was empowered to establish a temporary civilian administration in the region.¹⁵⁶ The decision also established a number of principles for the management of the province of Kosovo: the granting of extensive autonomy to the residents of the province in accordance with the Rambouillet agreements; the development of independent and democratic institutions; the maintenance of law and order (inter alia by establishing local and international police forces); and the protection of human rights and the return of refugees.¹⁵⁷

3. Means of coercion

This is the most extreme alternative of those mentioned above. If this alternative were to be implemented the personnel in the international body may use force against a party violating the agreement.¹⁵⁸ The means of coercion may take the form of economic sanctions or military operations. They may be applied by an international force situated in the area of dispute (soldiers or police), or by the forces of third countries (which are necessarily members of the international force on the ground). Naturally, means of this type are usually exercised only in extreme or broad cases entailing the violation of fundamental provisions of the agreement.

¹⁵⁵ For details of the United Nations force in Kosovo, see:

Michael J. Matheson, *supra* note 4; Elizabeth M. Cousens, "The Implementation and Enforcement of Peace Agreements between Sovereigns and Intermediate Sovereigns: Making Peace in Bosnia Work," 30 *Cornell International Law Journal* 789, 1997; Kaplan, *supra* note 2, at 15-16.

¹⁵⁶ See Article 10 of Security Council Resolution 1244, 10 June 1999:
<http://www.un.org/Docs/scres/1999/scres99.htm>

¹⁵⁷ See Articles 10-11 of the above-mentioned Resolution 1244. For details on the function of UNMIK during its first two years of operation, see: <http://www.unmikonline.org/2ndyear/unmik2.htm>: UNMIK at Two: In-depth Kosovar Involvement.

¹⁵⁸ It should be noted that the activation of a police force (including the use of force) against private individuals violating the provisions of the agreement (such as those blocking access to a sacred site) are included in this section as part of the administrative and executive authorities discussed above. This section discussed the use of coercion against the parties to the agreement.

The authors are not aware of any case in which the parties to a conflict have reached an agreement in which they granted a priori authorization to an international organization, or to specific countries, to use military force against a party violating the agreement. There are, however, several examples in which international organizations have used force against a state violating fundamental provisions of international law. During the Cold War, the Security Council urged the United Nations member states to assist South Korea in its war against the aggression by North Korea.¹⁵⁹ In addition, the Security Council recommended that these countries place their armed forces at the disposal of the “Joint Command” led by the United States.¹⁶⁰ In the winter of 1991, the Security Council empowered states to take “all necessary means” in order to liberate Kuwait from the Iraqi occupation,¹⁶¹ and in the spring of 1999 NATO airplanes bombed numerous targets in Yugoslavia with the goal of halting the cruel actions of the Yugoslav army against the residents of Kosovo.¹⁶² In June 1999, the United Nations Security Council empowered NATO¹⁶³ to intervene by force (“to maintain an international military presence”) in Kosovo,¹⁶⁴ inter alia in order to prevent the resumption of hostilities between the parties and to ensure maintenance of the ceasefire and withdrawal of Yugoslav forces.¹⁶⁵

¹⁵⁹ See: Security Council Resolution 82, 25 June 1950:

<http://www.un.org/documents/scres/1950/scres50.htm>

¹⁶⁰ See: Security Council Resolution 83, 27 June 1950:

<http://www.un.org/documents/scres/1950/scres50.htm>

See also, Security Council Resolution 84, 5 July 1950:

<http://www.un.org/documents/scres/1950/scres50.htm>

¹⁶¹ See: Article 2 of Security Council Resolution 678, 29 November 1990:

<http://www.un.org/documents/scres/1990/scres90.htm>

For a discussion of the role of the United Nations during the Gulf War of 1990-1991, see: Oscar Schachter, “United Nations Law in the Gulf Conflict,” 85 *American Journal of International Law* 452 (1991).

¹⁶² For a discussion of the bombings carried out by NATO against the Yugoslavian troops in Bosnia in August-September of 1995 (and of their legality), see: Tania Voon, Pointing the Finger: Civilian Casualties of NATO Bombing in the Kosovo Conflict, 6 *Am. U. Int'l Rev.* 1083, 2001; Mats Berdal, The Security Council, Peacekeeping and Internal Conflict after the Cold War, 7 *Duke Journal of Comparative and International Law* 71, 84-85, 1996. For a discussion of the actions of the UN forces in Yugoslavia, see, *ibid*, from pg. 76 and on.

¹⁶³ NATO was not mentioned by name in the resolution, but it was obvious to everyone involved that the resolution referred to this organization (Article 7 of Resolution 1244).

¹⁶⁴ See: Article 7 of Security Council Resolution 1244, 10 June 1999:

<http://www.un.org/documents/scres/1999/scres99.htm>

¹⁶⁵ See Article 9 of the above-mentioned resolution. For further details regarding the operations of

Another example of forces empowered by the United Nations to exercise enforcement are the United Nations forces in Sierra Leone: the UN Observer Mission in Sierra Leone (**UNOMSIL**), and the UN Mission in Sierra Leone (**UNAMSIL**), which replaced UNOMSIL. Both forces were designed to address the internal conflict in this country.¹⁶⁶ One unique characteristic of the latter force was that its authorities were expanded gradually in response to changing circumstances. Beginning in 1991, a civil war raged between the the presidential forces, on the one hand, and a rebel organization called the Revolutionary United Front (RUF), on the other in Sierra Leone . In 1996, the RUF joined forces with a military junta that managed to seize power in the country. In 1998, the president was reinstated with the assistance of the military observers group (ECOMOG) of the ECOWAS organization (the Economic Community of West African States).

The UN Observer Mission in Sierra Leone (UNOMSIL) was established under Security Council Resolution 1181 (13 June 1998)¹⁶⁷ for an initial period of six months. The resolution established that the function of the force would be to monitor the disarmament of combatants and to rebuild the security forces in the country. The unarmed personnel of this UN force, with support from ECOMOG, reported on human rights violations. When the rebel forces reached the capital, the force members were evacuated. On 7 June 1999 the warring parties signed the Lomé Accord, in which they agreed to establish a government of national unity.¹⁶⁸ After the parties requested an expansion of the function of the force, Security Council Resolution 1260 (20 August 1999) authorized an increase in the number of observers to 210.¹⁶⁹ One month later, Security Council Resolution 1270 established the UNAMSIL force, which was larger than its predecessor

the NATO force in Bosnia, see: <http://www.nato.int/kfor/kfor/objectives.htm>
<http://www.nato.int/sfor/docu/d981116a.htm>

For a discussion of additional cases in which the Security Council has empowered international forces to use force, see: B. Simma, ed., *The Charter of the United Nations: A Commentary* 699-700, Oxford University Press, Oxford, 2002.

¹⁶⁶ For general information about these forces, see:
<http://www.un.org/Depts/DPKO/Missions/inomsil/Unomsil.htm>

¹⁶⁷ See Security Council Resolution 1181, 13 June 1998:
<http://ww.un.org/documents/scres/1998/scres98.htm>

¹⁶⁸ The Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, 7 July 1999. For the content of the agreement, see:
<http://www.sierra-leone.org/lomeaccord.html>.

¹⁶⁹ See Security Council Resolution 1260, 20 August 1999:
<http://ww.un.org/documents/scres/1999/scres99.htm>

(including up to 6,000 soldiers, including 260 military observers), in order to implement the Lomé Accord.¹⁷⁰

In 2000, the Security Council amended and expanded the scope of the force's authorities.¹⁷¹ According to the resolution, the military personnel of the force was expanded to 11,000. The units responsible for civilian affairs, the civil police and administrative and technical aspects were also expanded. The maximum number of personnel in the force was increased in subsequent Security Council resolutions. The original authorities of the force were established in the above-mentioned Resolution 1270;¹⁷² its principal functions were: to implement the Lomé Accord in cooperation with the Sierra Leone government and the other parties; to assist the government in disarmament, the dissolution of the army and its merger through presence of the force at key points in the state. It was also authorized to monitor the ceasefire (under the terms of the ceasefire agreement of 18 May 1999); to encourage the parties to take confidence building steps; and to assist in the provision of international aid.

Security Council Resolution 1289 (7 February 2000),¹⁷³ adopted in accordance with Section VII of the United Nations Charter, expanded the authorities of this force, including authorities of a security-related nature: securing key points and government buildings; facilitating the free passage of persons, merchandise, and humanitarian aid along agreed routes; securing disarmament sites; assisting the law enforcement authorities in the country; and protecting and processing weapons and ammunition collected from former combatants. The Security Council also empowered the force to take action to meet these additional functions while ensuring the safety of the force and, in emergencies, of civilians. The force was subject to attacks by the rebel forces and, accordingly, Security Council Resolution 1313 (4 August 2000) empowered the force to respond to such attacks.¹⁷⁴

¹⁷⁰ This force replaced UNOMSIL. See Security Council Resolution 1270, 22 October 1999: <http://www.un.org/documents/scres/1999/scres99.htm>

¹⁷¹ See Security Council Resolution 1289, 7 February 2000: <http://www.un.org/documents/scres/2000/scres2000.htm>

¹⁷² See note 73, above.

¹⁷³ See: <http://www.un.org/documents/scres/2000/sc2000.htm>

¹⁷⁴ See Security Council Resolution 1313, 4 August 2000:

<http://www.un.org/Docs/scres/2000/sc2000.htm>

Article 3 of this resolution empowered the force: "To deter and, where necessary, decisively counter the threat of an RUF attack by responding robustly to any hostile actions or threat of imminent and direct use of force."

On 14 August 2000, the Security Council asked the United Nations Secretary-General to begin negotiations with the government of Sierra Leone regarding the holding of elections. According to a report of the UN Secretary-General dated 14 March 2001, adopted in Security Council Resolution 1346,¹⁷⁵ the main goals of the force were to assist the government in restoring law and order and to promote disarmament and free elections. Security Council Resolution 1389 (16 January 2002)¹⁷⁶ stated that UNAMSIL was also to undertake functions relating to the holding of elections. The elections were held on 14 March 2002 without any incident of violence. In January 2002, following the improvement in the situation after the elections and the success of the disarmament process, the United Nations Secretary-General extended the force's authority. Subsequent to this extension, it was agreed that the force would gradually be reduced and withdrawn. Under this agreement authorities were to be transferred to the army and the local police when these bodies were ready for these responsibilities.¹⁷⁷

As may be seen from the developments in Sierra Leone, United Nations forces can also operate in cooperation with other forces – in this case, with the ECOMOG forces of ECOWAS. In cases when the desired scope of international intervention is considerable and includes several different spheres, the functions may be divided among a number of international bodies with built-in mechanisms for coordination. Prominent examples of the operation of several international forces in the same territory are Bosnia-Herzegovina and Kosovo. Two major forces operate in coordination in Kosovo: The NATO Kosovo Force (**KFOR**) and the United Nations Interim Administration Mission in Kosovo (**UNMIK**). Additional international bodies active in the region include the European Union, which is involved in economic rehabilitation; and the Organization for Security and Cooperation in Europe (OSCE), which is involved in democratization and institution building. In the past, the UN High Commissioner for Refugees was also involved in humanitarian aspects.¹⁷⁸

¹⁷⁵ See Security Council Resolution 1346, 30 March 2001:
<http://www.un.org/Docs/scres/2001/sc2001.htm>

¹⁷⁶ See Security Council Resolution 1389, 16 January 2002:
<http://www.un.org/Docs/scres/2002/sc2002.htm>

¹⁷⁷ On this process, see: <http://www.peacekeeping.co.uk/UNAMSIL.asp>.

¹⁷⁸ Michael J. Matheson, *supra* note 4, at 79-80.

The allocation of authorities between KFOR and UNMIK is the product of lessons learned from the less successful experiences in Bosnia. The main problem in the functioning of the international forces in Bosnia related to the division of functions between the forces. The NATO forces were involved in implementing the military provisions of the Dayton Accord, while the (unarmed) UN police force addressed the civilian provisions of the United Nations.¹⁷⁹ The NATO forces generally interpreted the definition of their functions in a restrictive manner. For example, they did not take the view that their function included attention to threats against minorities or opposition leaders.¹⁸⁰ The separation between the military and civilian functions led to a vacuum between the implementation of the military and the civilian provisions of the Dayton Accord. The civilian UN force required military backup, but the NATO forces declined to attend to non-military matters.¹⁸¹ The cooperation between the NATO and UN forces during the rehabilitation of Kosovo was designed to prevent the recurrence of such problems.

C. Direction and Supervision of the International Force

The second key characteristic of the international forces relates to the direction and supervision of their work. The body charged with direction and supervision plays an important role in actualizing any arrangement. Such a body may, for example, decide when the work of the force will end (and the personnel will be withdrawn from the region), and in which cases special authorities granted to the force are to be exercised. In some cases, the founding document of an international force (for example, the agreement between the parties or the decision of an international organization) stipulates the circumstances under which the force's functions are to terminate. Even in such cases, the body supervising the work of the international force enjoys discretion in deciding when and how to order the termination of its functions.

The three principal alternatives in this context are as follows:

¹⁷⁹ Elizabeth M. Cousins, *supra* note 58, at 801-802.

¹⁸⁰ *Ibid.*, pp. 807-808.

¹⁸¹ *Ibid.*, p. 815.

- (1) Direction and supervision may be entrusted to an international organization (such as the United Nations, NATO, or the EU). This was the case, for example, with the international forces active in Kosovo and Bosnia.
- (2) These functions may be entrusted to a special multinational organization established by the parties for this purpose (an “ad hoc force.”)
- (3) A specific country (such as the United States or Switzerland) may be charged with directing and supervising the work of the force.

It is important to note that the involvement of forces from an international organization generally leads to the imposition of a comprehensive corpus of rules developed by that organization in the past, and applied routinely to international forces (for example, in the case of UN forces).¹⁸² The influence of the parties involved in the dispute in developing these important rules is relatively limited. Conversely, when the parties themselves establish a new international force, they enjoy greater control over its direction and supervision (for example, the functions of the multinational observer forces in Sinai were established in a series of agreements between Israel and Egypt).¹⁸³

D. The Countries Comprising the Force

The organizational or national affiliation of the personnel in the intervening force is an extremely important aspect issue that involves the political interests of the sides and speak to the level of trust that the parties have in the international force, among other aspects. It should be noted that when a familiar international organization sends international forces to any region, the force is actually composed of units from several countries. Accordingly, the main alternatives open to the parties regarding the force’s composition are a multinational force composed of national units from several countries, or forces from a single country.

¹⁸² For example, see Article 10 of the Security Council resolution regarding the application of a UN model agreement in the case of the international forces in the Congo: Special Council Resolution 1291 (24 February 2000), <http://www.un.int/usa/sres1291.html>.

¹⁸³ For discussion of the multinational force in Sinai, see above. For a discussion of other ad hoc international forces, see: B. Simma (ed.), *The Charter of the United Nations*, supra note 40.

(1) **A multinational force composed of national units from several countries:**

The parties involved in the conflict can usually influence the identity of the countries that will send their national units to the international force. Naturally, the countries each party will select will be those in which it has confidence (accordingly, for example, it is hard to imagine that countries with which Israel does not maintain diplomatic relations could participate in the force). The multinational force in Sinai was composed by Egypt and Israel in this manner. One of the limitations of a multinational force relates to the force's heterogeneity, which may impede its functioning. The makeup of the force sometimes reflects the distinct (and even contradictory) interests of the countries composing the force.

(2) **A force composed of units from a single country:** The appointment of a single country to send units to serve as an intervening force (such as the Russian forces in Abkhazia in Georgia)¹⁸⁴ reduces the force's level of heterogeneity and ensures consistent policy relative to a multinational force. In this case, it may be determined that a single country (such as the United States or Switzerland) will send all the units involved in the force. In such a case, the parties may find it difficult to reach agreement regarding the identity of the country whose troops will comprise the force.

E. Summary and Conclusions

As has been detailed in this chapter, international involvement could constitute an important component in a future regime in the Historic Basin. If it enjoys the trust of the parties, such international involvement could alleviate their fears regarding the implementation of the agreement and strengthen the credibility of the agreement reached by the parties. Such international involvement might also make it easier for the parties to reach an agreed arrangement. As a general

¹⁸⁴ The Russian force in Abkhazia numbers some 1,500 persons; its function is to monitor the ceasefire reached after successful rebel attacks against the Georgian army in Abkhazia in the summer of 1992, and the pressure applied by the Russian government: "Russians Leave Gorge in Georgia", *International Herald Tribune*, 15 April 2002, p.3). For a discussion of the background to the Russian intervention in this region and the fighting in Abkhazia in the summer of 1992, see: Bruno Coppieters, "Western Security Policies and the Georgian Abkhazian Conflict," in Bruno Coppieters, David Darchaishvili and Natella Akaba (eds.) *Federal Practice Exploring Alternatives for Georgia and Abkhazia* 21, 22-25, 1999, <http://poli.vub.ac.be/publi/orderbooks/federal/01coppieters.pdf>.

rule, the greater the parties' trust that an arrangement will indeed be enforced in its letter and spirit, the greater their willingness to agree to painful concessions. It is apparent, however, that international intervention – even if it is managed successfully – does not in itself guarantee the successful implementation of the agreement between the parties. International intervention is just one factor influencing implementation, alongside other important factors (political, military, and so forth).

This article discussed several key authorities that the parties to the conflict may grant an international force (monitoring and supervision, administrative functions, and enforcement). It should be noted, however, that the extensive experience accumulated by the operations of international forces over the years shows that the personnel who staff such forces may also be given additional functions that can be applied in the context of the Historic Basin. Examples include the participation of international forces in disarming armed groups, monitoring elections, training special police forces of either side, and, in some cases, rehabilitating public institutions (particularly in “failed states.”)

International forces have traditionally been disinclined to use force and, in most cases, they do so only in self-defense (this is particularly true in the case of UN forces).¹⁸⁵ However, several international forces have used force against individuals and groups that have attempted to thwart implementation of an agreement. The considerable attention attached to exercising authorities of coercion should not detract attention from the other operations of international forces, which may influence the actions of the parties to the conflict and those of third parties. Thus, for example, it is apparent that publishing information regarding serious violations of the agreement by one of the parties may have a significant influence on the steps taken by the parties in the future; the same applies to the reactions of other countries and international organizations. The recommendations that might be issued from time to time by the force leadership may have a similar effect. Such recommendations regarding the resolution of conflicts that erupt between the parties are not legally binding, but they would influence international public opinion and international organizations, creating normative pressure on the parties to the agreement.

¹⁸⁵ Regarding the operations of UN forces, see: *The UN Charter: A Commentary*, supra, at 663, 682.

One of the basic principles of international intervention is the consent of the parties to such intervention.¹⁸⁶ Israel and the Palestinians may agree to grant an international force certain functions in the Historic Basin and secure the potential benefits such operations can bring (such as enhancing the agreement's credibility). It must be recalled, however, that international intervention necessarily limits the parties' freedom of action in delineating and applying their policies in the Historic Basin. Israeli policy makers must consider the full range of advantages and disadvantages relating to international involvement and decide whether to agree to such involvement and, if so – what type of involvement is best and most preferable for Israel.

This article discussed key aspects of international intervention. It must be emphasized, however, that the article does not constitute an exhaustive study of all the aspects involved in the operation of international forces. Detailed discussion of this complex issue requires more comprehensive research that addresses additional issues that may influence the success of such intervention (immunity of the force and its soldiers relative to the authorities of the parties to the conflict; judicial authority of the soldiers in the force; relations between the country sending forces and the parties to the conflict; financing of the force and its international obligations to third parties, and so forth). Further studies in these and other areas may cast a different light on the potential functions and functioning of an international force in the future regime in the Historic Basin.

¹⁸⁶ See: *ibid.*, pgs. 662-663.