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Ruth Lapidoth

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Jerusalem – Some Legal Issues

Ruth Lapidoth

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A. Background

1. Jerusalem is the largest city in Israel, with an area of 126.3 square km., and 773,000 inhabitants (at the end of 2009). About 66% of the population are Jewish, and the rest are mainly Arabs, mostly Muslims (264,300) and a certain number of Christians (14,500). About a third of the Jews in Jerusalem are very religious. Jerusalem is situated at the crossroads between Israel proper and the West Bank.
2. At least in three respects Jerusalem differs from most other places: the city is holy to adherents of three religions, it is the subject of conflicting national claims by two peoples, and its population is heterogeneous to a considerable degree. These characteristics require some elaboration.
3. In the city one finds Holy Places of Christianity, since according to Christian tradition Jesus lived and was active in various locations in Jerusalem. In Jerusalem he also died and came back to life at the Holy Sepulchre. He left the world again on the Mount of Olives. Under the Islamic tradition, the al-Aksa mosque and the Dome of the Rock as well as the Temple Mount (Haram al-Sharif) on which they are situated are Holy Places, due to Muhammad's nocturnal visit. Muslims also believe that the al-Aksa is the "farthest" mosque mentioned in the Koran. For the Jewish people the whole city is holy, in particular the Temple Mount (Har ha-Bayit), because of the divine presence (the *Shekhinah*), and because the two Jewish temples stood there.
4. It has been argued that some of the events which are associated by the various religions with Jerusalem could not, from a historical point of view, have actually occurred. However, religious faith deserves respect, and historical accuracy is not relevant in this regard. Unfortunately, religious belief in the sanctity of certain sites in Jerusalem has been exploited by various individuals, States, and institutions in order to achieve political goals.

5. As for the national aspect, according to Israeli law united Jerusalem is the capital of the State of Israel, but the Palestinians also have claims on the city, at least on the eastern part thereof, and seek to make it their capital.
6. Turning to the heterogeneous nature of the population, it is sufficient to stroll through the streets of the city to realise that it indeed consists of a mosaic of many different communities. Thus, members of some 40 different religious or ethnic groups live in Jerusalem.
7. These features may explain why there are so many different opinions concerning the legal status of the city, and why it is such a thorny problem in the search for peace.

B. Some Legally Relevant Landmarks in the Recent History of Jerusalem

8. In 1517, soon after the end of the Middle Ages, Jerusalem, together with the rest of Palestine, came under Ottoman rule for a period of four hundred years. Since 1830, the majority of the city's population has been Jewish – at first merely a relative majority but subsequently an absolute one.
9. The Holy Places in the city have often been a source of conflicts. In the eighteenth and nineteenth centuries, a bitter controversy arose when certain European countries extended their protection over various Christian communities in Palestine and over the places that were holy to them. In order to regulate the status of the various communities at the Holy Places, the Ottoman government promulgated a number of edicts (*firmons*), the most important one being that of 1852. The 1852 edict concerned certain Christian Holy Places and determined that no changes should be made in the powers and rights of the various denominations regarding those places. This arrangement became generally known as the *status quo* and has been applied to the Church of the Holy Sepulchre and its dependencies, the Deir al-Sultan, the Sanctuary of the Ascension (on the Mount of Olives), the Tomb of the Virgin Mary (near Gethsemane) in Jerusalem; the Church of the Nativity, the Milk Grotto, and the Shepherds' Field near Bethlehem.

The *status quo* obtained international recognition at the 1856 Conference of Paris (after the Crimean War) and by the 1878 Treaty of Berlin for the Settlement of Affairs in the East (Article 62). It has also been reconfirmed by the 1993 Fundamental Agreement between the Holy See and Israel (Article 4) ((1994) 33 International Legal Materials – henceforth ILM, 153), as well as by the 2000 Basic Agreement between the Holy See and the Palestine Liberation Organisation (Article 4).
10. Neither the Balfour Declaration made by Britain in 1917 nor the Terms of the British Mandate for Palestine drafted by the Council of the League of Nations referred to Jerusalem. The Terms of the Mandate, however, did

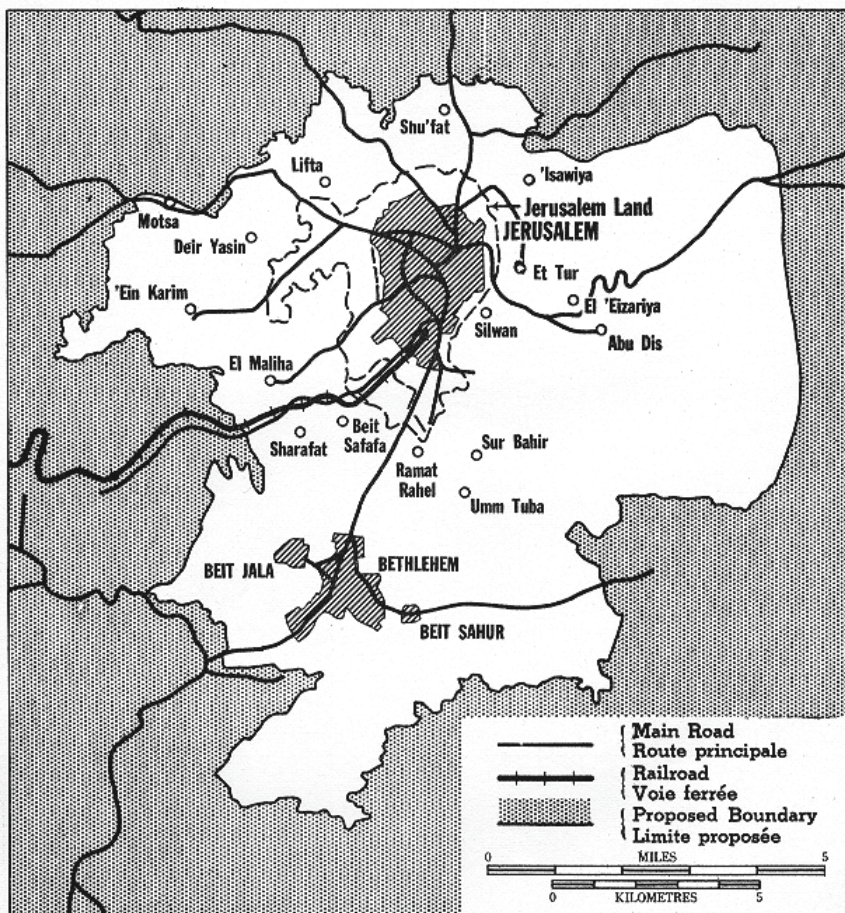
address the Holy Places. The Mandatory Power was requested to preserve existing rights in those places and to ensure free access and worship, subject to requirements of public order and decorum. A commission was to be established that would “study, define and determine” the various rights and claims in connection with the Holy Places, but it was never established because of lack of agreement among the powers about its composition and procedure.

Shortly after the mandate came into force, Britain adopted the Palestine (Holy Places) Order in Council of 1924, under which “no cause or matter in connection with the Holy Places or religious buildings or sites or the rights or claims relating to the different religious communities in Palestine shall be heard or determined by any court in Palestine” (Drayton Laws of Palestine Vol. 3 (1934) 2625). Although the text did not say so explicitly, these matters were to be handled by the British High Commissioner (today the Prime Minister of Israel).

11. In 1947, after the Second World War, Britain asked the United Nations (UN) General Assembly to consider the Palestinian question, and on 29 November 1947, the General Assembly adopted its famous resolution 181(II) on the future government of Palestine (usually referred to as the partition resolution)(GAOR 2nd session, 1947, 131-151). Part III of that resolution dealt with Jerusalem. The General Assembly recommended the establishment of a “*corpus separatum* under a special international regime.” The UN Trusteeship Council and a governor appointed by it would administer the *corpus separatum*. In the economic sphere, the General Assembly recommended the establishment of an economic union between Jerusalem and the Jewish and Arab States that were to be established in Palestine.
12. The General Assembly resolution received the consent of the national leadership of the Jewish community of Palestine, but the Arabs categorically rejected it and immediately initiated attacks on Jewish towns and villages, including the Jewish neighbourhoods in Jerusalem.

CITY OF JERUSALEM BOUNDARIES PROPOSED

[Annex B to resolution 181 (II) of the General Assembly,
dated 29 November 1947]



VILLE DE JERUSALEM LIMITES PROPOSEES

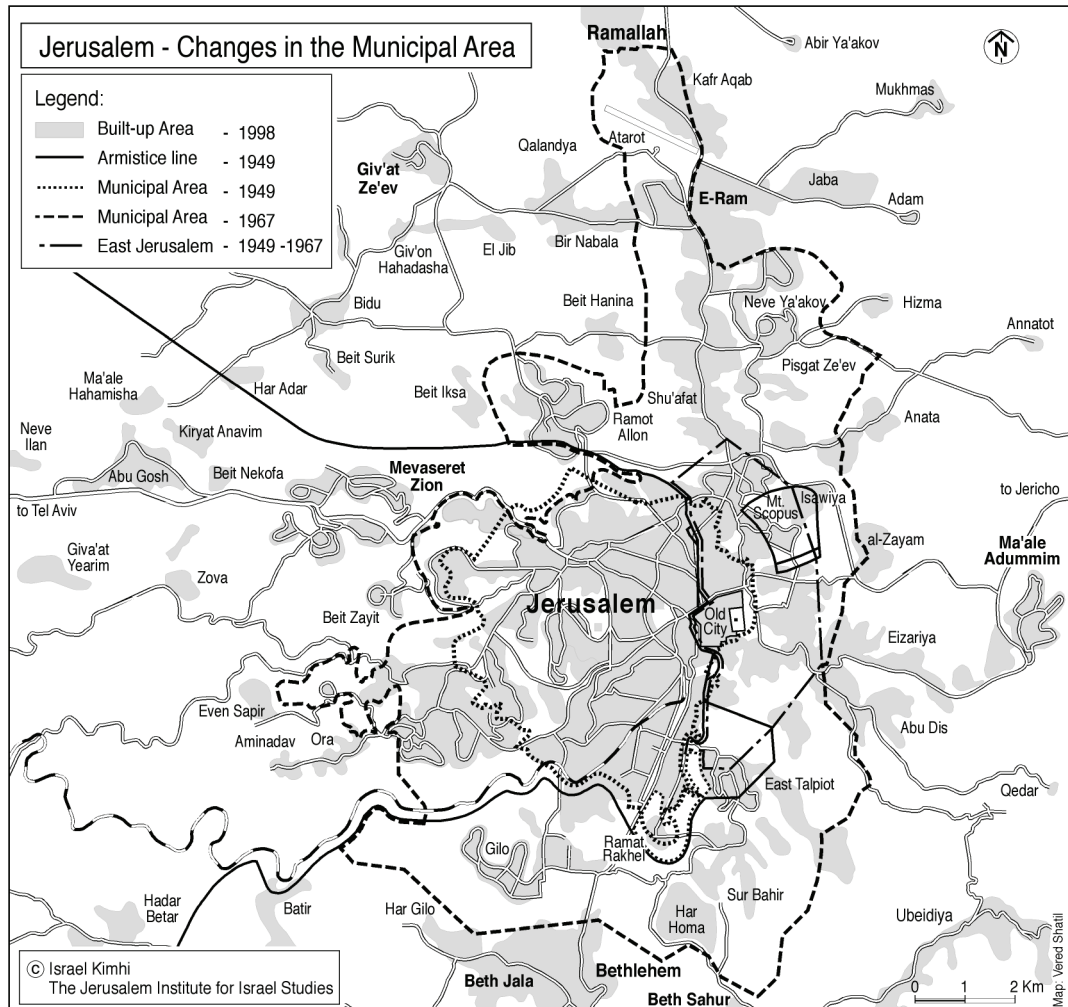
[Annexe B, résolution 181 (II) de l'Assemblée générale,
du 29 novembre 1947]

13. On 14 May 1948, when the British mandate over Palestine was about to end, representatives of the Jewish community in Palestine adopted the Declaration of the Establishment of the State of Israel. The declaration does not mention Jerusalem, but it declares that Israel “will safeguard the Holy Places of all religions” ((1948) Laws of the State of Israel, Translation 3). Immediately after the establishment of the State, the armies of six Arab States invaded Israel. The armies of Jordan (or Trans-Jordan as it was then called) and Egypt operated in the Jerusalem region. The battle for Jerusalem was fierce, in part because, for a time, the Jewish areas were cut off from the coastal plain. The battle for the Old City ended with the surrender of the Jewish quarter to the forces of the Jordanian Arab legion (on 28 May 1948).
14. Even before the fighting abated, Jordan and Israel reached a special agreement under the auspices of the UN regarding the Jewish enclave on Mount Scopus (UN Doc. S/3015 of 25 May 1953). The parties agreed to neutralise this area as well as the adjoining area of the Augusta Victoria hospital, which was under Jordanian control, and to assign these areas to UN protection.
15. When the fighting ended, Jordanian forces were in control of the eastern parts of the city, whereas the western sector was under Israeli control. In November 1948, a truce came into force throughout the city, and on 3 April 1949 Jordan and Israel signed a general armistice agreement (42 UNTS, 304-320).
16. A proclamation made by the Israeli Minister of Defence on 2 August 1948, and the Area of Jurisdiction and Powers Ordinance of 5708-1948 ((1948) Laws of the State of Israel, Translation 64) applied Israeli law to west Jerusalem. That ordinance provided that the law in force in the State of Israel should also apply to any part of Palestine that the Minister of Defence would designate by proclamation as under occupation of the Israel Defence Forces.

17. At the end of 1949, following the renewed debate on Jerusalem in the UN General Assembly, Prime Minister David Ben-Gurion of Israel announced in the Knesset (Israel's parliament) that Jerusalem was an "inseparable part of the State of Israel" and its "Eternal Capital" (Record of the Knesset Proceedings, Dec. 1949 vol.3, p. 220-226 and 281-287). The Knesset approved this position, and decided that government offices and the Knesset should be moved to Jerusalem.
18. In 1948 and 1949, a conference of dignitaries from areas conquered by Jordan in 1948 convened in Jericho. The participants expressed their wish to be part of Jordan, and consequently the king of Jordan and the Jordanian parliament proclaimed the annexation (or unification, in their words) of the West Bank, including east Jerusalem, to the kingdom.
19. During the years 1948-52, a number of debates took place at the UN on the future of Jerusalem, and the Trusteeship Council prepared a draft statute for the city (UN Doc. A/1286), but from 1952 until the Six Day War in 1967, no significant debates occurred.
20. When the Six Day War broke out, Jordan attacked west Jerusalem, despite Israel's promise that if Jordan refrained from attacking Israel, Israel would not attack Jordan. A few days later, Israel Defence Forces recovered the area taken by the Jordanian army ("Government House", formerly the seat of the British High Commissioner) and expelled the Jordanian army from east Jerusalem and the West Bank. Opinions have differed between Israeli (and most Western) lawyers on the one hand and Arab lawyers on the other as to which party was the aggressor in the Six Day War.
21. Soon after the fighting ceased, Israel sought to include east Jerusalem under its jurisdiction. The Knesset passed the Law and Administration Ordinance (Amendment No. 11) Law of 5727-1967, which authorizes the government to apply the law, jurisdiction, and administration of Israel to areas formerly part of mandatory Palestine ((1966-7) 21 Laws of the State of

Israel, Translation 75). Similarly, the Municipalities Ordinance (Amendment No. 6) Law, 5727-1967, authorized the extension of the municipal boundaries where Israel's jurisdiction had been applied in accordance with the above amendment (ibid. 75). The government of Israel issued an appropriate order to apply Israeli law to the eastern sector of Jerusalem, which also was included within the jurisdiction of the Jerusalem municipality. Israeli law and administrators, however, have granted east Jerusalemites certain facilities by establishing special arrangements, inter alia, by virtue of the Legal and Administrative Matters (Regulation) Law (Consolidated Version) of 5730-1970. The most conspicuous example of the differences between the principles applied in Israel and in east Jerusalem is the system of education. Schools in the eastern neighbourhoods have taught the Jordanian curriculum and later switched to the Palestinian one. They have refused to adopt the curriculum of the Arab schools in Israel. Even Israel's Supreme Court has recognized that in practice the law applied in east Jerusalem differs somewhat from Israeli law.

22. The Palestinian residents of east Jerusalem have the status of permanent residents of Israel – a status which confers upon them the right to have an Israeli identity card and to enjoy the social benefits under Israeli law, namely, social security and national health insurance. They may freely move around Israel and work anywhere. The status of permanent resident can be withdrawn if the person settles in another country, or has not visited Jerusalem for 7 years, without a plausible reason.
23. As to Israeli citizenship, it has not been imposed on the residents of east Jerusalem, but they can acquire it by applying for it in accordance with the rules of naturalization. So far, however, only a small number of residents of the eastern sector of the city have applied for Israeli citizenship. The participation in elections for the municipality is not limited to citizens of Israel, and hence the permanent residents of the eastern sector may vote in the municipal elections. So far only few have actually cast their votes.



24. Israel has increased the municipal boundaries of Jerusalem to extend from Atarot in the north to a point not far from Rachel's Tomb in the south, and from Ein Kerem in the west to the eastern slopes of Mount Scopus.
25. Various UN bodies have sharply criticised the measures Israel has taken in Jerusalem. Did these acts constitute annexation of the eastern parts of Jerusalem? In July 1967, then-Minister of Foreign Affairs Abba

Eban informed the UN Secretary-General in writing that these acts did not constitute annexation but only administrative and municipal integration (UN Doc. A/6753). Israel's Supreme Court, however, has held, at first somewhat hesitantly, in a number of decisions that under Israeli law the eastern sectors of Jerusalem had become a part of the State of Israel.

26. Immediately after the fighting in Jerusalem ended in June 1967, Prime Minister Levi Eshkol convened the spiritual leaders of various communities and reassured them of Israel's intention to protect all Holy Places and to permit free worship. A few days later, the Knesset passed the Protection of the Holy Places Law, 5727-1967, which ensures protection of the Holy Places against desecration as well as freedom of access thereto ((1966-7) 21 Laws of the State of Israel, Translation 76). Soon after Israel was in control of east Jerusalem including the Old City, the government returned the administration of the Temple Mount to the Muslim authorities (the *Waqf*).
27. Security Council Resolutions 242 and 338 of 22 November 1967, and 22 October 1973, respectively, did not mention Jerusalem. Nor did Jerusalem feature in the 1978 Camp David accords between Israel and Egypt (A Framework for Peace in the Middle East and Framework for the Conclusion of a Peace Treaty between Egypt and Israel, 1138 UNTS 39-56) because of fundamental differences of opinion between the parties on the issue. Each of the participants in the Camp David conference, however, stated his position in a letter sent to the other via the President of the United States. Prime Minister Menachem Begin of Israel stated that, in accordance with legislation from 1967, "Jerusalem is one city, indivisible, the Capital of the State of Israel". President Anwar Sadat of Egypt, on the other hand, stated that "Arab Jerusalem is an integral part of the West Bank, ...[and] should be under Arab sovereignty". President Sadat determined that "[e]ssential functions in the City should be undivided, and a joint municipal council composed of an equal number of Arab and Israeli members can supervise the carrying out of these functions". He added that "in this way, the City shall be undivided." (on the letter by President Carter, see below, para. 50).

28. In 1980, the Knesset adopted a new law concerning Jerusalem – the Basic Law: Jerusalem, Capital of Israel ((1979-80) 34 Laws of the State of Israel, Translation, 209). This law states that “Jerusalem, complete and united, is the capital of Israel” (Sec.1), that it is “the seat of the President of the State, the Knesset, the Government, and the Supreme Court” (Sec. 2). It states further that the Holy Places shall be protected (Sec. 3) and that the government and other authorities have to provide for the development and prosperity of Jerusalem (Sec. 4). In fact, the contents of the law do not include any innovation. Although originally its provisions were not entrenched, in November 2000 two entrenched sections were added to the statute: the transfer of any powers, whether permanently or provisionally, concerning Jerusalem in its 1967 boundaries, requires the consent of a majority of the members of the Knesset (namely, sixty-one). This provision relates to any power entrusted by Israeli law to the government or to the municipality of Jerusalem. ((2000-2001) Book of Statutes, 28- no official translation yet published). The new restrictions were adopted because the Knesset wished to make sure that the then Prime Minister Ehud Barak would not reach an agreement with the Palestinians against the will of the majority in the Knesset.

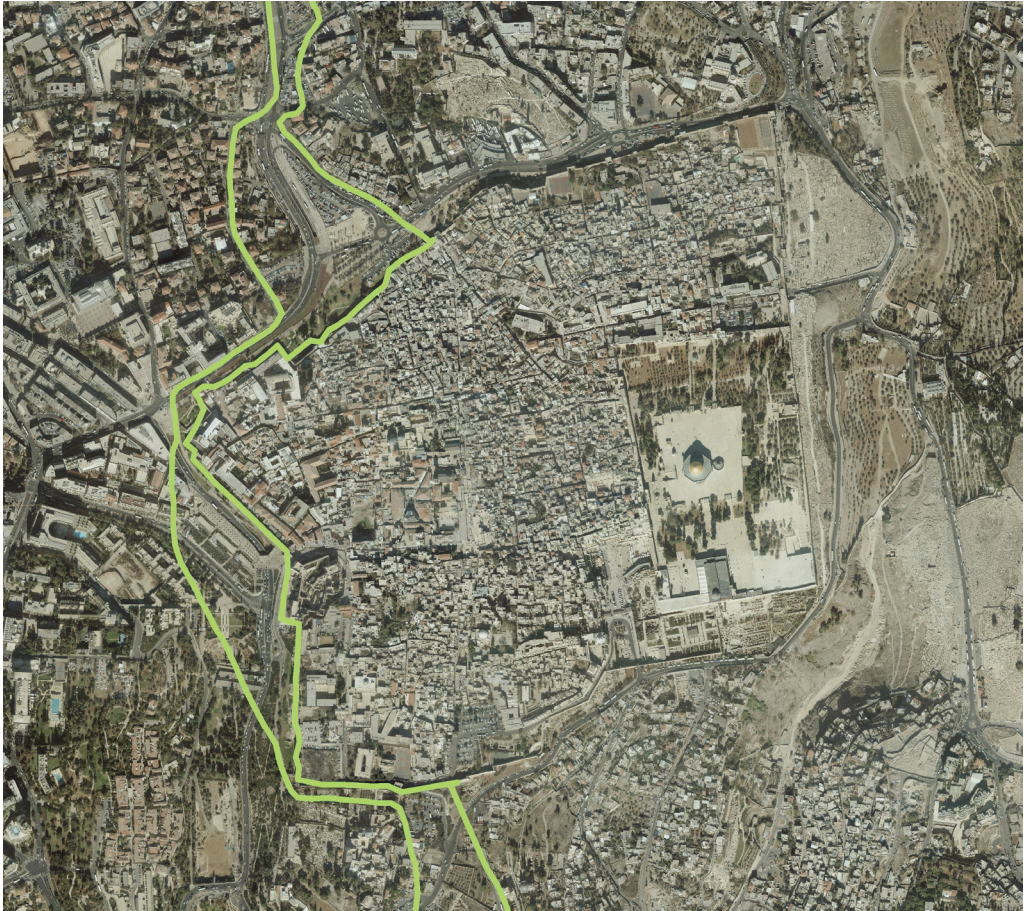
In this context one should also mention a law of 1999 which deals with areas to which Israeli law, jurisdiction and administration apply. A resolution by the government to end such application in a certain area requires the approval of the Knesset by a majority of 61 members, and a referendum. The rules on referenda under this provision were laid down by the Knesset in 2010. The relevant 2010 law also provides that if the approval was given by 80 members of the Knesset, there is no need for a referendum (the Knesset has 120 members)

The adoption of the 1980 law aroused resentment in the international community. The Security Council condemned it as “a violation of international law” and called on member States with embassies situated in Jerusalem to withdraw them from the city (S.C. Resolution 478 (1980)). Thirteen embassies left the city following that resolution. In 1982, however, the embassy of Costa Rica returned to west Jerusalem, followed in 1984 by that of El Salvador, but in 2006 they too were removed.

29. It was also in the summer of 1980 that the European Community (at that time including only 9 members) adopted its Venice Declaration, which provided with regard to Jerusalem (para. 8):

“The Nine recognize the special role played by Jerusalem for all the parties concerned. The Nine stress that they will not accept any unilateral initiative designed to change the status of Jerusalem and that any agreement on the city’s status should guarantee freedom of access for everyone to the Holy Places” (Bulletin of the European Community, 6-1980, 10).

The Old City of Jerusalem



30. In the early 1980s, Jordan requested to register the Old City and its walls in the World Heritage List, established under the 1972 UNESCO Convention for the Protection of the World Cultural and Natural Heritage (1037 UNTS 151). Although by that time Jordan was not anymore in control of the Old City, its request was granted. In the following year the Old City was registered in the list of sites in danger.
31. Jerusalem was not on the agenda of the Madrid Conference on Peace in the Middle East (1991). It was dealt with to a certain extent in the 1993 and 1995 agreements between Israel and the PLO, and in the Israel-Jordan Peace Treaty of 1994 – to be discussed below (para. 57, 58, 60).
32. The United States Congress adopted in 1995 the Jerusalem Embassy Act (Public Law 104-45 [S. 1322]. This statute called for the recognition of united Jerusalem as the capital of Israel, and requested the Administration to move the U.S. Embassy from Tel Aviv to Jerusalem by 1999. The provision foresees budgetary consequences in case of non-implementation. However, the President of the U.S. was authorized to delay the implementation of this statute by periods of six months if in his opinion “it is necessary for the national security interests of the United States”. So far (2011) the President has consistently used this power of suspension. Opinions among U.S. lawyers differ on whether or not this statute conforms to the division of powers between Congress and the President. A similar controversy relates to a later follow-up statute that ordered the U.S. consul in Jerusalem to register American children born in Jerusalem as born in “Jerusalem, Israel” if the parents so wish. So far the consul has refused to comply with this order, and he continues to register them as born in “Jerusalem” (Section 404 of the Consolidated Appropriations Act, 2004). The matter is still being examined in the U.S. courts (2011).
33. In 1996 the Palestinians of east Jerusalem were permitted to vote for the Ra’ees and Council of the Palestinian Authority. They also participated in the vote for the Palestinian Ra’ees in 2005 and for the Palestinian Legislative Council in 2006 (see also para. 57 below).

34. The attitude of the Palestinian Legislative Council was expressed in the 2002 law on the capital, to be discussed below (para. 56).

In 2002 the government of Israel decided to construct a security fence between Israel and the West Bank in order to prevent the infiltration of terrorists into the country, and in 2003 it was decided to establish such a barrier also around Jerusalem. In principle, the barrier was intended to surround the municipal area of Jerusalem, but in few locations there is a slight deviation. In certain areas, with a dense population, a wall has been built instead of the fence because a wall takes up less space. The fence (and the wall) have a considerable number of gates for people and for goods. The barrier has reduced the number of infiltrations by terrorists, but it has caused economic, personal and legal problems.

In its Advisory Opinion of 2004 on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories (2004 ICJ Reports 136), the International Court of Justice stated, that wherever the fence or the wall is situated beyond the 1949 armistice line, it is illegal. On the other hand, Israel's Supreme Court has been of the opinion that in principle the barrier is lawful, but in certain parts it has to be moved to another location in order to avoid disproportional hardship on the population. In certain locations the Supreme Court decided that the gates and the passage through them have to be improved. In the Jerusalem area too the courts have intervened on similar grounds.

C. Opinions on the Legal Status of Jerusalem

35. Many statesmen as well as experts in international law have expressed their opinions on the status of Jerusalem. This chapter reproduces only opinions of the *lex lata*. (For the summary of various proposals *de lege ferenda*, see Hirsch, Housen-Couriel and Lapidoth, Whither Jerusalem? Nijhoff, 1995, 25-144.) Only the most representative ones are presented here, and I only state those opinions, without analysing the pros and cons. Because the western parts of Jerusalem have not changed significantly since 1949, opinions on their status can be analysed without a temporal division. The eastern sectors changed hands, however, in 1967, and therefore it may be useful to divide the discussion accordingly.
36. There have been four basic opinions on west Jerusalem. According to the first, Israel lawfully acquired sovereignty in 1948: When Britain left the area, a vacuum of sovereignty ensued that could be validly filled only by a lawful action. Because Israel acquired control of west Jerusalem in 1948 by a lawful act of self-defence, it was entitled to fill that vacuum and thus became the lawful sovereign (e.g. Elihu Lauterpacht, Jerusalem and the Holy Places, London, 1968).
37. Under a second opinion, sovereignty over Jerusalem has been suspended until a comprehensive settlement is agreed on (H. Bin Talal, A Study on Jerusalem, London, 1979, 24-27).
38. According to a third theory, the Palestinian Arab people have had and still have “legal sovereignty” over the whole of Palestine, including Jerusalem, since the mandatory period (Henry Cattán, Jerusalem, N.Y. 1981, 64).
39. Proponents of the fourth opinion have maintained that the status of Jerusalem is still subject to the UN General Assembly resolution of 1947, which recommended the establishment of a *corpus separatum* under a special international regime and administered by the UN (Antonio Cassese, ‘Legal Considerations on the International Status of Jerusalem’ (1986) 3 Palestine Yearbook Int. L. 13).

40. Most foreign States have not adopted a clear-cut policy on the status of west Jerusalem. Although their approaches differ, certain similarities emerge with regard to basic questions. Foreign States were not prepared to recognize the legality of Jordanian or Israeli rule over zones of Jerusalem under their respective control. One manifestation of this attitude has been that foreign consuls stationed in the city have refused to apply to Jordan or Israel for exequatur – permission to carry out their functions in the city. The refusal to recognize Israeli rule over the western sector was apparent, for example, in the 1952 civil case Jerusalem 208/52 *Heirs of Shababo v. Roger Heilen, the Consulate General of Belgium and the Consul General of Belgium in Jerusalem*. In that case, a driver of the Belgian consulate had been involved in a road accident that caused the death of Mr. Shababo. Family members of the deceased sued the driver, the consulate, and the consul general, claiming damages. The incident was the subject of several judgments of the Jerusalem District Court ((1953) 20 International Law Reports 391). In the first hearing, the driver and his principals challenged the jurisdiction of the Israeli courts over the accident because it had taken place in Jerusalem. The court dismissed that argument.
41. Despite this non-recognition of Israeli sovereignty, most States have nevertheless accepted the de facto applicability of Israeli law, and none has so far demanded that the laws of occupation, including the 1949 Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, be applied. The European Union supports the idea that Jerusalem is still subject to the *corpus separatum* status. Thus in 1999 the Ambassador of the Federal Republic of Germany (at that time holding the presidency of the EU) wrote in a diplomatic note: "... The EU reaffirms its known position concerning the specific status of Jerusalem as a *corpus separatum*..." (cited at <<http://www.isranet.org/picks b.htm>> (9 December 2007)).
42. There have also been four main opinions on the status of east Jerusalem for the period 1949-67 (the time it was under Jordanian rule). According to the first opinion, during that time the area was under a vacuum of sovereignty: Britain had abandoned the area, but Jordan could not fill this gap because it had occupied east Jerusalem by an illegal act of aggression (Elihu Lauterpacht 1968, op. cit., 46-48).

43. Under a second theory, similar to the parallel one concerning west Jerusalem, the Palestinian Arab people have had and continue to have title to “legal sovereignty” over the whole of Palestine, including east and west Jerusalem (Henry Cattán, *op. cit.*, 64).
44. A third opinion recognized Jordanian sovereignty over east Jerusalem, derived from the exercise of the right of self-determination by the inhabitants, in view of their wishes expressed by the resolutions that the notables adopted in Jericho in 1948 and 1949 (Y. Dinstein, “Autonomy”, in Dinstein, ed., *Models of Autonomy*, New Brunswick, 291-304, at 300, 1981).
45. Finally, proponents of the fourth opinion have claimed that the *corpus separatum* solution still applies to both east and west Jerusalem (Antonio Cassese 1986, *op. cit.*, 13).
46. How did the changes that occurred in 1967 influence these opinions? Under the first opinion, the vacuum of sovereignty existed until Israel occupied east Jerusalem by a lawful act of self-defence and thus was entitled to fill the gap (Lauterpacht 1968, *op. cit.* 46-48). Under a slightly different interpretation, Israel has the strongest relative title to the area in the absence of a lawful “sovereign reversioner” because of Jordan’s lack of valid sovereignty (Y. Blum ‘The Missing Reversioner: Reflections on the Status of Judea and Samaria’ (1968) 3 *Israel Law Review* 279).
47. The Six Day War did not have any effect on the opinion according to which the Palestinian Arab people have legal sovereignty over the whole of Palestine, irrespective of the factual situation (Cattán 1981, *op. cit.*, 73).
48. If Jordan acquired sovereignty over east Jerusalem by virtue of the principle of self-determination, Israel has been a lawful belligerent occupant in those sectors. If, as the Arab States claim, Israel was an aggressor in 1967, it has been an illegal occupant, but if Israel has occupied the area in an act of self-defence, it has been a lawful occupant (Dinstein 1981, *op. cit.*, 300). The *corpus separatum* theory was not affected by the war (Cassese 1986, *op. cit.*, 13).

49. In practical terms, the international community has not recognized the sovereignty of either Jordan (in the past) or Israel at any point. Moreover, since 1967, the UN including the Security Council, has repeatedly stated that east Jerusalem is occupied territory subject to the 1949 Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War.
50. The attitude of the U.S. administration was expressed, inter alia, in the context of the 1978 Camp David Accords in a letter President Carter sent to both Egypt and Israel. The President wrote that the position of the United States remained as stated by Ambassador Arthur Goldberg at the UN General Assembly in 1967 and subsequently by Ambassador Charles Yost at the Security Council in 1969. There is, however, a difference between the speeches of the two ambassadors. Although they both emphasized that the actions of Israel in Jerusalem were merely provisional and that the problem of the city's future should be settled by negotiations, Ambassador Yost added that east Jerusalem was occupied territory to which the 1949 Fourth Geneva Convention applied. This position, however, did not prevent the United States from asking Israel to extradite a person who lived in the eastern sector of the city, although the 1962 Extradition Convention between Israel and the U.S. applies only to persons "found in [their] territories".
- The U.S. Congress has adopted an attitude quite different from that of the administration, as shown above, in para. 32.
51. The attitude of the European Community can be inferred from the 1980 declaration of Venice on the Middle East, cited above (para. 29), and the 1999 Note of the German Ambassador quoted above (para. 41).
52. The International Court of Justice, in its 2004 Advisory Opinion on the "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory" spoke of east Jerusalem as "occupied Palestinian territory" ((2004) ICJ Reports 136, para. 78; supra para. 34).
53. The Israeli courts, on the other hand, have held, at first somewhat hesitantly, that the eastern sectors of Jerusalem have become part of the State

of Israel. One of the earlier cases on this question is H. Ct. 283/69 *Ruidi and Maches v. Military Court of Hebron*. This case involved antiquities dealers from Hebron who transferred antiquities from Hebron to east Jerusalem without first obtaining an export licence, as required by the Jordanian antiquities law that applies on the West Bank (including Hebron). One of the questions dealt with in the hearings in the Supreme Court concerned the status of east Jerusalem at the critical date namely, whether it was “abroad” vis-à-vis the West Bank. The majority of the Court expressed the opinion that east Jerusalem had become part of Israel and hence was “abroad” with regard to Hebron (Piskei-Din 24(2) 419).

54. Perhaps the most comprehensive discussion of the status of Jerusalem under Israel law as well as under Jewish law is included in Justice Menachem Elon’s judgment in the case of H. Ct. 4185/90, *The Temple Mount Faithful Association et al. v. Attorney General et al.*, decided in 1993 (Piskei-Din 47(5) 221). In this case, the petitioners requested the Supreme Court sitting as the High Court of Justice to order the Attorney General and various other Israeli authorities to prosecute the Waqf (Muslim religious trust) for having undertaken on the Temple Mount certain works without the necessary permit. The High Court decided not to interfere in the discretion of the relevant authorities. In reaching its conclusion, the Court emphasized that the Temple Mount is part of the territory of the State of Israel and that the sovereignty of the State extends over unified Jerusalem in general and over the Temple Mount in particular. Hence, all laws of Israel apply to the Temple Mount, including those laws guaranteeing freedom of religion, right of access to, and protection against desecration of the Holy Places.

Nevertheless, despite this principle, the Supreme Court has abstained in several cases from the full implementation of Israeli law on the Temple Mount because of the religious and political sensitivities involved.

55. As stated in an earlier chapter, under the 2000 amendment to the Basic Law: Jerusalem Capital of Israel of 1980, any change in the area of Jerusalem and any transfer of powers requires the consent of an absolute majority of the members of the Knesset (*supra*, para. 28).

56. The attitude of the Palestinians was expressed *inter alia* in 1988 and 2002. When the Palestine National Council proclaimed in November 1988 the establishment of a Palestinian State, it asserted that Jerusalem was its capital. In October 2002 the Palestinian Legislative Council adopted the Law on the Capital, which stipulates that Jerusalem is the capital of the Palestinian State, the main seat of its three branches of government. The State of Palestine is the sovereign of Jerusalem and of its holy places. Any statute or agreement that diminishes the rights of the Palestinian State in Jerusalem is invalid. This statute can be amended only with the consent of two-thirds of the members of the Legislative Council. The 2003 Basic Law also asserts that Jerusalem is the capital of the State of Palestine.

The differences among the various opinions on the status of Jerusalem can explain the controversy over the question whether Israelis may build houses and neighbourhoods in east Jerusalem. According to the attitude of the government of Israel, since Israel was entitled to fill the sovereignty gap at the departure of Great Britain, Israeli law, jurisdiction and administration apply lawfully to the whole city (*supra*, para. 21), and Israelis may build there subject to the relevant Israeli legislation. Others claim that east Jerusalem is an occupied territory and therefore subject to the Fourth 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War, which *inter alia* provides that “[t]he Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies” (Article 49, para. 6).

D. Jerusalem and the Recent Stages of the Peace Process

57. In 1993, the PLO and Israel conducted secret negotiations near Oslo, Norway. As a result, certain letters were exchanged, and the Declaration of Principles on Interim Self-Government Arrangements was initialed at Oslo and later signed in Washington, D.C., on 13 September 1993 (Declaration of Principles (1993) 32 ILM 1535). This text constituted a turning point in the attitude of the two parties on the question of Jerusalem. The parties agreed that Jerusalem would not be included in the interim self-government arrangements – a concession by the Palestinians. Israel, on the other hand, conceded that Jerusalem would be one of the subjects to be dealt with in the framework of the negotiations on the “permanent status” to start in 1996 (Declaration of Principles, Articles 4, 5(3), and Agreed Minutes). In addition, it was agreed that “Palestinians of Jerusalem who live there will have the right to participate in the election process” for the Interim Self-Government Authority for the West Bank and Gaza (Declaration of Principles, Annex 1, para. 1).
58. These provisions have raised several issues, e.g. what are the confines of Jerusalem? Who is a Palestinian? What criteria should be used to determine whether he “lives there”? Do the Jerusalemites have only the active right to vote, or also the right to be elected? Where should they vote? Most of these questions were solved by several additional documents: the 1995 Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, Annex II (Collection of Treaties of the State of Israel, vol. 33, 1), by the Agreement on the Initial Registration Canvass of 1995, and by the 1995 Palestinian law on elections. The elections took place on 20 January 1996, under international supervision. Most of the Jerusalemites voted in Abu-Dees – a village just beyond the municipal borders of the city, within the Palestinian constituency of Jerusalem. Only few voted in post offices in east Jerusalem.
59. About a month after the signing of the Declaration of Principles, in October 1993, then Foreign Minister Shimon Peres sent a letter concerning

Palestinian institutions in east Jerusalem to the Foreign Minister of Norway, Johan Jorgen Holst (Text in The Jerusalem Post, 11 June 1994). The letter was kept secret for some time, and its discovery aroused much criticism in Israel. According to this letter, “all the Palestinian institutions of East Jerusalem, including the economic, social, educational, cultural, and the holy Christian and Moslem places, are performing an essential task for the Palestinian population...” and “will be preserved...” The meaning of this text and its effect raise difficult questions of interpretation.

60. Once the ice was broken between Israel and the Palestinians, the road was open for progress in the negotiations between Israel and Jordan. First a “Common Agenda” was agreed upon (14 September 1993), then a joint declaration was adopted (25 July 1994) and on 26 October 1994, a Peace Treaty was concluded ((1995) 34 ILM 43). This Treaty includes inter alia, a promise by Israel “to respect the present special role of the Hashemite Kingdom of Jordan in Muslim Holy shrines in Jerusalem,” and “when negotiations on the permanent status will take place, Israel will give high priority to the Jordanian historic role in these shrines” (Article 9(2)). According to some press reports, in 1996 Jordan promised to transfer the custody of the Holy Places to the Palestinians once the latter acquire control of the city in the framework of the permanent status to be negotiated later. However, the status of the Muslim Holy Shrines in Jerusalem is of interest and concern not only to Jordan, the Palestinians, and Israeli Muslims.
61. In the wake of the improved relations with the Palestinians and with Jordan, several other countries have established or re-established diplomatic relations with Israel. Of particular interest in this regard is the normalization of relations between Israel and the Holy See, foreseen by the Fundamental Agreement of 30 December 1993 ((1994) 33 ILM 153) (supra, para. 9). This document does not deal expressly with Jerusalem, but some of its provisions are relevant to the city, e.g., the commitment to favour Christian pilgrimage to the Holy Land, and the right of the Catholic Church to establish schools and to carry out its charitable function. The parties affirmed their “continuing commitment to maintain and respect the ‘status quo’ in the Christian Holy Places to which it applies...” – a reference to the *status quo* established in

the 18th and 19th centuries by the Ottoman Empire in order to regulate the rights of various competing Christian churches at certain Holy Places in Jerusalem and Bethlehem.

62. The negotiations on the permanent status started in May 1996, but were suspended after a few hours. They were resumed in 1999 and led to the July 2000 Camp David summit. These intensive negotiations failed to a large extent because of disagreement over the future of Jerusalem, in particular over the Old City and the Temple Mount. Some of the Palestinian leaders, including Arafat, even claimed that there had never been a Jewish Temple on the Temple Mount in Jerusalem. Neither did the January 2001 meeting in Taba lead to a breakthrough, nor did the intensive negotiations in 2007.
63. Several proposals have been drafted concerning the search for a resolution to the Israel-Palestinian dispute including Jerusalem (e.g. President Clinton, 2000; Ayalon-Nusseibeh, 2002; the Arab States Peace Initiative, 2002 and 2007; Beilin-Abed Rabbo – the Geneva initiative, 2003), but so far (2011) none has been adopted by the parties. On the other hand, the 2003 Road Map, sponsored by the U.S., Russia, the UN and the EU (the “Quartet”) has been accepted by the parties. It foresees that the conflict should be resolved in stages. With regard to Jerusalem, it states that in the third stage, the parties should negotiate and reach an agreement that includes a resolution of the status of Jerusalem that takes into account the political and religious concerns of both sides, and protects the religious interests of Jews, Christians, and Muslims worldwide. Unfortunately, however, so far (June 2011) the implementation of the Road Map has not progressed much. Moreover, the Hamas group which has won the elections to the Palestinian Legislative Council in 2006, and is in full control of the Gaza Strip since 2005, has so far distanced itself from previous commitments of the Palestinian Authority (although under international law every new government has to comply with commitments of its predecessors).

E. Concluding Remarks

64. Although the Jerusalem question is basically a political one, legal aspects are also relevant for several reasons. First, some of the questions are in fact of a legal nature. Second, the parties base their claims on legal arguments. And third, when a compromise is reached, it will be included in a document of a legal nature.
65. When looking for a solution to the dispute about Jerusalem, one has to take account of various aspects: the symbolic and religious significance of the city, its heterogeneity as well as its geographical location. A compromise has to deal with very difficult matters, e.g. sovereignty (should it be divided? or shared? or suspended? or cooperative? or functional? or belong to God?); borders (should the borders of the city be redrawn? Or should it be enlarged so that it can include both an Israeli and a Palestinian capital?); Holy Places (their definition and their status), municipal structure, planning and conservation, economics, security, possible international involvement, infrastructure (e.g. water, sewage, access roads), settlement of disputes, relations with the adjoining areas (how to preserve the close relationship with the surrounding areas in matters of culture and economics, irrespective of political borders), etc.
66. Some of these issues are very difficult. But if the parties really want peace, it may be hoped that they may reach a solution to the question of Jerusalem.

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