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## Old Jerusalem: Whose to Govern

### Keywords

Sovereignty, Israel, Settlements

# FACULTY COMMENT

## Old Jerusalem: Whose to Govern?

JOHN QUIGLEY\*

When the United Nations Security Council criticized Israel in 1990 over shootings by Israeli police in east Jerusalem, Israel rejected the condemnation, replying that east Jerusalem was Israeli territory, and therefore the Council had no authority to concern itself. Israel refused to receive investigators the U.N. Secretary-General wanted to send to inquire into the incident.<sup>1</sup>

Also in 1990, Soviet Jews immigrated to Israel in substantial numbers, and many settled in east Jerusalem. The city's Palestine Arabs protested, fearing a further solidification of Israel's control. The United States protested on similar grounds. Israel took the position that it could settle immigrants in east Jerusalem.<sup>2</sup>

In 1991, when the United States pressed Israel to negotiate with the Palestinians, Israel said it would not talk with Palestinian residents in Jerusalem. Israel feared that talks with Jerusalem Palestinians about a territorial settlement might imply that Israel did not have full sovereignty over Jerusalem.<sup>3</sup>

These controversies highlight the long-standing dispute over the status of east Jerusalem. The government of Israel views it as Israeli territory. Under Israeli law, east Jerusalem is part of a larger Jerusalem and is Israel's capital city. The Palestine Liberation Organization, on the other hand, holds that east Jerusalem should be the capital of a Palestinian state. The U.N. Security Council considers east Jerusalem to be territory

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1. See *infra* text accompanying notes 78-81.

2. See *infra* text accompanying notes 71-77. "East Jerusalem" as used in this article means the ancient walled city containing numerous holy sites, plus the surrounding area to the north, south, and east, within borders defined by a regulation of the Israeli government, see *infra* notes 54-56. It was territory under Jordanian control 1948-67. "West Jerusalem" is the area to the west of the ancient walled city. It has been under Israel's control since 1948.

3. Thomas L. Friedman, *Mideast Talks: Peace Might Be an Incidental Result*, N.Y. TIMES, July 24, 1991, at A8, col. 3.

under Israel's belligerent occupation, and therefore subject to its scrutiny.

This article examines the legal status of east Jerusalem to determine whether the United Nations may concern itself with Israel's conduct there, and whether Israel may lawfully settle immigrants there. It also examines the question of sovereignty in east Jerusalem, to sort out the conflicting claims, and to determine who has the right to govern.<sup>4</sup>

### I. HISTORICAL CONNECTIONS IN JERUSALEM

To answer these questions, it is necessary first to review the city's history and the contending parties' connections to it. A key element in any claim to territory is occupation. A state or people that can establish its occupation, to a greater degree than others, will be deemed, at least *prima facie*, the legitimate sovereign.<sup>5</sup> In the face of competing claims to Western Sahara, the International Court of Justice used effectiveness of occupation to resolve the question of sovereignty. The Court analyzed acts of occupation and dominion by the contending parties and found that the indigenous inhabitants had the strongest claim, based on long-time occupation. Morocco, which also claimed sovereignty, had played a certain role, but its acts of dominion, said the Court, were less significant.<sup>6</sup>

With Jerusalem too, an analysis of sovereignty must begin with occupation. Jerusalem historically has been a part of Palestine, and thus the question of occupation and control of Jerusalem must be considered in that context. Early in the second millennium B.C. it was a city of the Jebusites, a sub-group of the Canaanites, the earliest recorded inhabitants in Palestine.<sup>7</sup> It was first conquered by the Israelites around 1000 B.C. and became the capital of the Kingdom of Judah. It was later conquered by the Babylonians in 587 B.C., and subsequently ruled by others until Arabs from the Arabian Peninsula conquered Palestine in the seventh century A.D.. During this time, the bulk of the population remained the Canaanites.<sup>8</sup>

With the Arab conquest, the Canaanites took on the Arabic language, and most assumed its religion, Islam. Since that time they have been re-

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4. This article does not examine legal rights to territory other than east Jerusalem. The author examines rights in all of historic Palestine in JOHN QUIGLEY, *PALESTINE AND ISRAEL: A CHALLENGE TO JUSTICE* (1990).

5. R.Y. JENNINGS, *THE ACQUISITION OF TERRITORY IN INTERNATIONAL LAW* 16-35 (1963); *Minquiers and Ecrehos case* (France v. U. K.), 1953 I.C.J. 57.

6. *Western Sahara* (adv. op.), 1975 I.C.J. 3, 40-68. *See also* *Island of Palmas*, 2 U.N. REP. INT'L ARB. AWARDS 829 (1928) (In a dispute between the Netherlands and the United States over sovereignty in certain Pacific Ocean Islands, an arbiter relied on Dutch East India Company agreements with local princes relating to the islands as more significant than a United States claim that its predecessor in interest, Spain, had discovered them. The arbiter found title in the Netherlands because of its greater exertion of control).

7. Judges 19:10-12.

8. HENRY CATTAN, *JERUSALEM* 21-24 (1981).

ferred to as Arabs.<sup>9</sup> In the sixteenth century the Ottoman Empire conquered Palestine, and the area around Jerusalem became an Ottoman administrative district. Still the Arabized Canaanites formed the bulk of the population, along with a Jewish minority that remained from ancient times, numbering about two percent.<sup>10</sup> In the late nineteenth century, Jews migrated to Palestine from Europe, augmenting the Jewish minority to nearly ten percent by the end of the century. A large number of these lived in Jerusalem where they numbered half the population.<sup>11</sup>

After World War I, Great Britain assumed control of Palestine, which for the first time became a separate territorial entity, with Jerusalem as its administrative center. Britain permitted migration by European Jews, and by World War II they numbered thirty percent of Palestine's population against seventy percent Arabs. In Jerusalem, Jews numbered over half, although Arabs owned more land.<sup>12</sup>

In November 1947, in a resolution favored by the European states but opposed by most Third World states, the United Nations General Assembly recommended dividing Palestine into an Arab and a Jewish state with an economic union between them. Jerusalem would have become a *corpus separatum* under the U.N. Trusteeship Council, because of sites in the Jerusalem-Bethlehem area considered sacred in Judaism, Islam, and Christianity.<sup>13</sup> The resolution as a whole was protested by the Palestine Arabs, who staged public demonstrations and a commercial strike. They considered it unfair to split a country in which they were a seventy percent majority. The General Assembly's plan, moreover, would have given the thirty percent Jewish population over half the territory.

In December 1947, intercommunal hostilities broke out. Palestine Arab irregulars attacked convoys carrying supplies to Jewish settlements, and Jewish military units attacked Arab towns. The Jewish Agency, which represented Palestine's Jewish population at the U.N., had a regu-

9. See Arnold Toynbee, *The Middle East, Past and Present*, in THE ARAB-ISRAELI IMPASSE 41, 48 (Majdia D. Khadduri, ed., 1968) (states that by World War II, "the Palestinian Arabs had been the inhabitants of Palestine for more than 1,300 years," refers to the time of the Arab conquest of Palestine, and states that this tenure gave them "a prescriptive right").

10. Shmuel Ettinger, *The Growth of the Jewish Centre in Palestine Before the British Occupation*, in A HISTORY OF THE JEWISH PEOPLE, at 915, 916 (Ben-Sasson ed., 1976). See Julius Stone, *Peace and the Palestinians*, 3 N.Y.U.J. INT'L L. & POL. 247, 249-250 (1970) (stating, incorrectly, that Palestine under Arab and Turkish rule "was never exclusively Arab or Moslem anymore than it was exclusively Jewish or Christian, either in population or in cultural and religious concerns").

11. Ettinger, *supra* note 10, at 916-917.

12. *Supplement to the Survey of Palestine* 13 (Government Printer, Jerusalem, 1947) (giving as estimates for Dec. 31, 1946, in Jerusalem, 99,000 Jews and 65,000 Arabs). CATTAN, *supra* note 8, at 158 (map of Jerusalem in 1948 showing Arab and Jewish districts). See Stone, *supra* note 10, at 255 (arguing, incorrectly, that "no identifiable people now survives which can demonstrate any special relation to Palestine prior to the centuries for Jewish statehood there.").

13. G.A. Res. 181, 2 U.N. GAOR Res. 131, pt. 3, U.N. Doc. A/519 (1947).

lar army, the Haganah. Other groups seeking Jewish statehood in Palestine had smaller armed contingents. Jerusalem was a prime target of an offensive undertaken in December by one of these, the Irgun. Irgun leader Menachem Begin, who later became prime minister of Israel, described how "for three days, from 11th to 13th December [1947]," the Irgun "hammered at concentrations of rioters and their offensive bases," by which he meant Arab villages. Begin recounted, "We attacked again and again in Jerusalem."<sup>14</sup>

On January 5, 1948, the Haganah set a bomb in the Semiramis Hotel in an Arab district of west Jerusalem, killing twenty-six persons. The Haganah said in justification that it had information that the hotel housed Arab irregulars. The British government, disputing that information, denounced the Semiramis bombing as terrorist and a "dastardly and wholesale murder of innocent people."<sup>15</sup>

During January and February, under the pressure of the Haganah-Irgun attacks, Palestine Arabs fled from many areas of Palestine, including Jerusalem. On February 5, 1948, David Ben-Gurion, who would become Israel's first prime minister, ordered that Jews be settled in conquered and abandoned Arab areas. The Haganah rocketed Arab neighborhoods in Jerusalem, with the apparent aim of frightening Arab residents into fleeing, and many did.<sup>16</sup>

In a February 7 speech, Ben-Gurion said, "Since Jerusalem's destruction in the days of the Romans, it hasn't been so Jewish as it is now." In "many Arab districts" in the western part of Jerusalem, he said, "one sees not one Arab. I do not assume that this will change."<sup>17</sup> On February 12, after a Jewish woman was shot in the Talbiyeh district of west Jerusalem, a Haganah loudspeaker van drove through the neighborhood ordering the Arab residents to evacuate.<sup>18</sup>

In April 1948, combatants of the Irgun and the Stern Gang (LEHI), another Jewish military force, captured the village of Deir Yassin just west of Jerusalem, and killed 250 of its civilian inhabitants. The Irgun claimed that it killed the inhabitants while taking houses by force, but witnesses said that it killed them after the fighting ended.<sup>19</sup> The Irgun drove surviving Deir Yassin inhabitants in trucks through Jerusalem as a

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14. MENACHEM BEGIN, *THE REVOLT* 337 (1951). In late January 1948, the Irgun Command selected four major Palestine Arab population centers as targets for a spring offensive: Jerusalem, Jaffa, the Lydda-Ramleh plain, and the Triangle. *Id.* at 348. These were four major Arab population centers in Palestine.

15. Sam Pope Brewer, *Britain Condemns Haganah 'Murders'*, N.Y. TIMES, Jan. 7, 1948, at A1, col. 2.

16. BENNY MORRIS, *THE BIRTH OF THE PALESTINIAN REFUGEE PROBLEM, 1947-1949* 50-52 (1987).

17. TOM SEGEV, 1949: *THE FIRST ISRAELIS* 25 (1986); MORRIS, *supra* note 16, at 52.

18. MORRIS, *supra* note 16, at 52.

19. Dana Adams Schmidt, *200 Arabs Killed, Stronghold Taken*, N.Y. TIMES, Apr. 10, 1948, at A6, col. 3; BEGIN, *supra* note 14, at 162-165.

demonstration to Jerusalem's Arabs,<sup>20</sup> and then killed these survivors.<sup>21</sup> The Haganah drove loudspeaker vans in Jerusalem announcing in Arabic, "unless you leave your homes, the fate of Deir Yassin will be your fate."<sup>22</sup>

By May, after the Jewish Agency had taken considerable territory in Palestine, and 300,000 Arabs had fled in the face of its attacks,<sup>23</sup> the Agency declared statehood for Israel.<sup>24</sup> The Arab Higher Committee, which represented the Palestine Arabs at the United Nations, saw this as a violation of the rights of Palestinian inhabitants. In the Committee's view, "the people of Palestine" were "an independent nation," while the Jewish Agency headed "a rebellious minority which has revolted against the sovereignty of the majority of the population of the country."<sup>25</sup>

Transjordan and the Jewish Agency agreed that the Agency would get the bulk of Palestine (the Mediterranean coastal area and some hinterland), and that Transjordan would get the West Bank of the Jordan River.<sup>26</sup> When the Agency declared statehood, the Transjordanian Legion occupied the West Bank but did not contest the Agency for the rest of Palestine. There was no agreement about Jerusalem, however, and over the spring and summer of 1948, the Transjordanian Legion and the Israel Defense Force (I.D.F.) fought there. As neither side prevailed, they divided the city, Israel taking the western part (by then overwhelmingly Jewish in population because of the exodus of the Arabs), and Transjordan the eastern part (overwhelmingly Arab in population).

Count Folke Bernadotte, dispatched by the U.N. as a mediator, urged that Israel permit the Arab refugees to return, and criticized Israel for the seizure of real and personal property of the Arabs.<sup>27</sup> In Jerusalem, three members of the Stern Gang assassinated Bernadotte, apparently in

20. HARRY LEVIN, *I SAW THE BATTLE OF JERUSALEM* 57 (1950).

21. MICHAEL PALUMBO, *THE PALESTINIAN CATASTROPHE* 52 (1987); AVI SHLAIM, *COLLUSION ACROSS THE JORDAN: KING ABDULLAH, THE ZIONIST MOVEMENT, AND THE PARTITION OF PALESTINE* 164 (1988).

22. Erskine Childers, *The Wordless Wish: From Citizens to Refugees*, in *THE TRANSFORMATION OF PALESTINE: ESSAYS ON THE ORIGIN AND DEVELOPMENT OF THE ARAB-ISRAELI CONFLICT* 165, 186 (Ibrahim Abu-Lughod ed., 1971).

23. Michael Akehurst, *The Arab-Israeli Conflict in International Law*, 5 *NEW ZEALAND U. L. REV.* 231, 233 (1973); CHILDERS, *supra* note 22, at 193. Benny Morris, *The Causes and Character of the Arab Exodus from Palestine: the Israel Defense Forces Intelligence Branch Analysis of June 1948*, 22 *MIDDLE EASTERN STUDIES* 5, 10 (1986), quoting I.D.F., Intelligence Branch Report, *The Emigration of the Arabs of Palestine in the Period 1/12/1947 - 1/6/1948*, June 30, 1948.

24. Declaration of the Establishment of the State of Israel, 1 *Laws of the State of Israel* 3 (1948).

25. U.N. SCOR, 292d mtg. at 26-27, U. N. Doc. S/PV.292 (1948) (statement of Issa Nakhleh, Representative, Arab Higher Committee).

26. SHLAIM, *supra* note 21, at 112-116. See also GOLDA MEIR, *MY LIFE* 209 (1975); ALEC KIRKBRIDE, *FROM THE WINGS: AMMAN MEMOIRS 1947-1951* 4 (1976).

27. *Progress Report of the UN Mediator on Palestine*, G.A. Res. 186, U.N. Doc. A/648 at 14 (1948).

reprisal for these views.<sup>28</sup> By late 1948 Jerusalem's pre-1948 Arab population of 70,000 was reduced to an estimated 3,500.<sup>29</sup>

In December 1949, after it had admitted Israel to U.N. membership, the General Assembly again proposed the internationalization of Jerusalem under the U.N. Trusteeship Council.<sup>30</sup> But neither Jordan nor Israel showed interest.<sup>31</sup>

In 1950 the government of Israel made west Jerusalem its capital city.<sup>32</sup> Jordan formally incorporated the West Bank, including east Jerusalem, into itself.<sup>33</sup> Jordan's parliament said, however, that it acted "without prejudicing the final settlement of Palestine's just case within the sphere of national aspirations, inter-Arab co-operation and international justice."<sup>34</sup> Thus, Jordan recognized Palestine's right to exist that might be effectuated at some future date.

In 1967, during a time of hostility with neighboring states, Israel captured the West Bank, including east Jerusalem. The hostilities grew out of tension between Israel and Syria. Egypt, convinced that Israel would attack Syria,<sup>35</sup> asked the U.N. to remove its peacekeeping force from the Israel-Egypt border so that Egypt could move against Israel "the moment it might carry out any aggressive action against any Arab country."<sup>36</sup> U.N. Secretary General U Thant pulled the U.N. Emergency Force (U.N.E.F.)

28. John Kifner, *2 Recount '48 Killings in Israel*, N.Y. TIMES, Sept. 12, 1988, at A3, col. 1 (The Stern Gang was headed by Itzhak Shamir, a future prime minister of Israel. Shamir denied involvement in the assassination).

29. Ian Lustick, *The Quiescent Palestinians: The System of Control over Arabs in Israel*, in THE SOCIOLOGY OF THE PALESTINIANS 64, 66 (Khalil Nakhleh & Elia Zureik eds., 1980).

30. G.A. Res. 303, U.N. Doc. A/1251 at 25 (1949).

31. Mark I. Gruhin, *Jerusalem: Legal & Political Dimensions in a Search for Peace*, 12 CASE W. RES. J. INT'L L. 169, 204 (1980); Whiteman, *Corpus Separatum: Jerusalem*, 1 DIGEST INT'L L. at 594.

32. *Jerusalem Named Capital of Israel*, N.Y. TIMES, Jan. 24, 1950, at A1, col. 2. Emergency Regulations (Land Requisition - Accommodation of State Institutions in Jerusalem) (Continuance in Force of Orders) Law, 4 *Laws of the State of Israel* 106 (1950).

33. *The International Status of Palestine*, 90 JOURNAL DU DROIT INTERNATIONAL 964, 980-982 (1963); Yehuda Blum, *The Missing Reversioner: Reflections on the Status of Judea and Samaria*, 3 ISRAEL L. REV. 279, 289 (1968).

34. Albion Ross, *Amman Parliament Vote Unites Arab Palestine and Transjordan*, N.Y. TIMES, Apr. 25, 1950, at A1, col. 2.

35. DAVID KIMCHE & DAN BAWLY, *THE SANDSTORM: THE ARAB-ISRAELI WAR OF JUNE 1967: PRELUDE AND AFTERMATH* 91 (1968); ARTHUR LALL, *THE UN AND THE MIDDLE EAST CRISIS, 1967 7-8* (1968). On May 12 Prime Minister Levi Eshkol threatened Syria. Charles W. Yost, *The Arab-Israeli War: How it Began*, 46 FOREIGN AFF. 304, 307 (1968); *Weekly News Bulletin* (Government of Israel), May 9-15, 1967, at 20, in Amos Shaira, *The Six-Day War and the Right of Self-Defence*, 6 ISRAEL L. REV. 65, 66 (1971). Syria complained to the Security Council. U.N. SCOR 22d Sess., at 90 U.N. Doc. S/7885 (1967). (U.N. SCOR 22d Sess. Supp. for April, May & June 1967) (letter of Syria to President of Security Council, May 15, 1967).

36. MAJ. GEN. INDAR JIT RIKHYE, *THE SINAI BLUNDER: WITHDRAWAL OF THE UNITED NATIONS EMERGENCY FORCE LEADING TO THE SIX-DAY WAR JUNE, 1967* 16 (1978) (Rikhye was the U.N. commander and received this communication from Egypt).



out of Egypt, and asked Israel to accept the U.N.E.F. on its side of the border as a guard against a possible attack by Egypt, but Israel declined.<sup>37</sup>

Egypt announced it would close the Straits of Tiran to Israeli flag vessels, and to any vessels carrying strategic goods to Israel.<sup>38</sup> Again Egypt said it acted to prevent Israel from preparing for an attack on Syria.<sup>39</sup> Egypt moved troops to the Israel-Egypt border to deter Israel from attacking Syria.<sup>40</sup> The I.D.F. understood that Egypt meant to intervene only if Israel attacked Syria.<sup>41</sup> The United States did not expect Egypt to attack absent an Israeli invasion of Syria, and it so informed Israel.<sup>42</sup> On May 30, Egypt concluded a defense treaty with Jordan.

On June 4, Israel's cabinet authorized an invasion of Egypt,<sup>43</sup> and the next day Israel's air force bombed Egyptian aircraft on the ground at their bases and attacked by land into the Sinai Peninsula.<sup>44</sup> Jordan retaliated by shelling into Israel around Jerusalem.<sup>45</sup> In the Security Council, the United Arab Republic charged Israel with aggression,<sup>46</sup> but Israel claimed that Egypt struck first.<sup>47</sup> Israel told the Council, "Egyptian forces engaged us by air and land, bombarding the villages of Kissufim, Nahal-Oz and Ein Hasheloha," and "approaching Egyptian aircraft appeared on our radar screens."<sup>48</sup> In fact Egypt did not bombard the villages, and its aircraft did not leave their bases. In its advance against Jordanian forces, the I.D.F. captured east Jerusalem.

On July 7 Prime Minister Levi Eshkol acknowledged that Israel

37. REPORT OF THE SECRETARY-GENERAL ON THE WITHDRAWAL OF THE UNITED NATIONS EMERGENCY FORCE, U.N. GAOR 5th Sess. at para. 21, U.N. Doc. A/6730/Add.3 (1967).

38. Kenneth M. Lewan, *Justifications for the Opening of Hostilities in the Middle East*, 26 REVUE ÉGYPTIENNE DE DROIT INTERNATIONAL 88 (1970).

39. 16 KESING'S CONTEMP. ARCHIVES 22065 (1967).

40. Akehurst, *supra* note 23, at 240.

41. NADAV SAFRAN, FROM WAR TO WAR: THE ARAB-ISRAELI CONFRONTATION, 1948-1967 307 (1969).

42. LYNDON B. JOHNSON, THE VANTAGE POINT: PERSPECTIVES OF THE PRESIDENCY 1963-1969 293 (1971). Alfred J. Hotz, *Legal Dilemmas: The Arab-Israeli Conflict*, 19 S.D.L. REV. 242, 264 (1974).

43. Asher Wallfish, *Meir Reveals Text of War Decision*, JERUSALEM POST, June 5, 1972, at 1, col. 2. EDGAR O'BALLANCE, THE THIRD ARAB-ISRAELI WAR 35 (1972); JANICE G. STEIN AND RAYMOND TANTER, RATIONAL DECISION-MAKING: ISRAEL'S SECURITY CHOICES, 1967 241 (1980); Howard Koch, *June 1967: The Question of Aggression*, 14 ARAB WORLD 10-13 (June 1969); KIMCHE & BAWLY, *supra* note 35, at 156.

44. PIERRE-MARIE MARTIN, LE CONFLIT ISRAËLO-ARABE: RECHERCHES SUR L'EMPLOI DE LA FORCE EN DROIT INTERNATIONAL PUBLIC POSITIF 153-54 (1973). See generally, Tom J. Farer, *Law and War*, in 3 THE FUTURE OF THE INTERNATIONAL LEGAL ORDER: CONFLICT MANAGEMENT 15, 41 (Cyril Black & Richard Falk eds., 1971)

45. O'BALLANCE, *supra* note 43, at 181.

46. U.N. SCOR, 22d Sess. 1347th mtg. at 2, U.N. Doc. S/PV.1347 (1967).

47. U.N. SCOR, 22d Sess. 1347th mtg. at 3 U.N. Doc. S/PV.1347 (1967) (communication of Israel to President of Security Council).

48. U.N. SCOR, 22d Sess. 1348th mtg. at 15, U.N. Doc. S/PV.1348 (1967) (statement of Foreign Minister Abba Eban, Israel).

struck first, but said it had done so in "legitimate defense," because it anticipated an imminent Egyptian attack.<sup>49</sup> As proof of Egypt's intent, Israeli officials cited Egypt's request for the departure of U.N.E.F., its closure of the Straits of Tiran, its positioning of troops near Israel, its alliance with Jordan, and verbal threats by Egyptian President Gamal Abdul Nasser.<sup>50</sup>

Israeli officials said later, however, that Israel had not expected an imminent attack.<sup>51</sup> Chief of Staff Itzhak Rabin said that "the two divisions" Egypt sent to the border "would not have been enough to unleash an offensive against Israel. He knew it and we knew it."<sup>52</sup> Menachem Begin, later as Prime Minister, said that "the Egyptian Army concentrations in the Sinai approaches do not prove that Nasser was really about to attack us. We must be honest with ourselves. We decided to attack him."<sup>53</sup>

The government moved quickly to change the status of east Jerusalem. The Knesset (parliament) enacted a statute stating that "the law, jurisdiction and administration of the state" of Israel "shall extend to any area of Eretz Israel [the Land of Israel] designated by the Government by order."<sup>54</sup> Using this statute, the government declared Israeli law applicable to an area that included east Jerusalem, plus adjacent West Bank territory of approximately equal size.<sup>55</sup> The government merged the newly enlarged east Jerusalem area with west Jerusalem.<sup>56</sup> This extension of ju-

49. *Admission on Attack*, THE TIMES (London), July 8, 1967, at 3, col. 7 (stating that Eshkol "buried the often-repeated statement that Egyptian [air] and land forces attacked Israel before she launched her devastating lightning offensive on June 5").

50. ALLAN GERSON, ISRAEL, THE WEST BANK AND INTERNATIONAL LAW 71 (1978); 1967 U.N.Y.B. 1967, 195-196; Stephen M. Schwebel, Comment, *What Weight to Conquest?*, 64 AM. J. INT'L L. 344, 346 (1970); Shaira, *supra* note 35, at 76.

51. HEINZ WAGNER, DER ARABISCH-ISRAELISCHE KONFLIKT IM VÖLKERRECHT 434 (1971); Joseph L. Ryan, *The Myth of Annihilation and the Six-Day War*, WORLDVIEW, at 38-42 (Sept. 1973).

52. *Le général Rabin ne pense pas que Nasser voulait la guerre*, LE MONDE, Feb. 29, 1968, at 1, col. 6 (Rabin said that Nasser did not think Israel would attack Syria, but that Nasser put troops on the border to give the appearance of being the "savior of Syria").

53. *Excerpts from Begin Speech at National Defense College*, N.Y. TIMES, Aug. 21, 1982, at A6, col. 5.

54. Law and Administration Ordinance (Amendment No. 11) Law, 21 *Laws of the State of Israel* 75 (1967). By a simultaneous law, the Knesset gave the Minister of the Interior the right to extend the boundaries of a municipality to include the area designated by government order issued under this amendment. Municipalities Ordinance (Amendment No. 6) Law, 21 *Laws of the State of Israel* 75 (1967). By order, the Minister of the Interior expanded the borders of east Jerusalem, KOVETZ HA'TAKANOT (Official Gazette), No. 2063, June 28, 1967, at 2670.

55. KOVETZ HA'TAKANOT (Official Gazette), No. 2064, June 28, 1967, at 2690; Sabri Jiryis, *Israeli Laws as Regards Jerusalem*, in THE LEGAL ASPECTS OF THE PALESTINE PROBLEM WITH SPECIAL REGARD TO THE QUESTION OF JERUSALEM 181, 182 (Hans Koechler ed., 1981). See also KIMCHE & BAWLEY, *supra* note 35, at 215.

56. *Municipalities Ordinance (Declaration on the Enlargement of Jerusalem's City Limits)*, KOVETZ HA'TAKANOT (Official Gazette), No. 2065, June 28, 1967, at 2694, reprinted in *Order Unites Holy City*, JERUSALEM POST, June 29, 1967, at 1, col. 6.

risdiction, which amounted to a *de facto* annexation of east Jerusalem,<sup>57</sup> was condemned by the U.N. Security Council and General Assembly as a violation of the rights of the Palestine Arabs and of the law of belligerent occupation.<sup>58</sup> It was not recognized by other states.<sup>59</sup>

The government built large apartment complexes in east Jerusalem, insulating it from the dense areas of Arab population.<sup>60</sup> This created a Jewish-populated buffer zone between east Jerusalem and the West Bank.<sup>61</sup> In 1973 the Knesset made east Jerusalem residents eligible to vote in Jerusalem municipal elections,<sup>62</sup> but few did so, because of their objection to Israel merging east Jerusalem with west Jerusalem.<sup>63</sup>

In 1980 the Knesset declared "Jerusalem, complete and united" to be "the capital of Israel." The Knesset denominated this law a "basic law," giving it quasi-constitutional rank.<sup>64</sup> The Security Council and General Assembly declared the 1980 law a nullity.<sup>65</sup>

In 1988 the Palestine National Council, a parliamentary body of the Palestine Arabs,<sup>66</sup> laid plans to declare statehood for a Palestinian state. Jordan renounced its 1952 incorporation of the West Bank, including east Jerusalem, Jordan's King Hussein explaining, "We respect the wish of the P.L.O.<sup>67</sup> for an independent Palestinian state."<sup>68</sup> The Palestine National Council then proclaimed "the establishment of the State of Palestine in the land of Palestine with its capital Jerusalem."<sup>69</sup> The Council projected

57. GERSON, *supra* note 50, at 211.

58. S.C. Res. 252, 23 U.N. SCOR Res. & Decs. 9, U.N. Doc. S/INF/23/Rev.1 (1968). S. C. Res. 267, 24 U.N. SCOR Res. & Decs. 3, U.N. Doc. S/INF/24/Rev.1 (1969). G.A. Res. 2253, 5 (emerg. spec. sess.) U.N. GAOR Res. 4, U.N. Doc. A/6798 (1967).

59. JOHN DUGARD, RECOGNITION AND THE UNITED NATIONS 111-115 (1987); Antonio Casese, *Legal Considerations on the International Status of Jerusalem*, 3 PALESTINE Y.B. INT'L L. 13, 28-32 (1986).

60. Sarah Graham-Brown, *The Economic Consequences of the Occupation, in OCCUPATION: ISRAEL OVER PALESTINE* 167, 205 (Naseer Aruri ed., 1983).

61. RAFIK HALABI, *THE WEST BANK STORY* 42 (1982); W. THOMAS MALLISON & SALLY V. MALLISON, *THE PALESTINE PROBLEM IN INTERNATIONAL LAW AND WORLD ORDER* 234 (1986).

62. Local Authorities (Elections)(Amendment No. 6) Law, 27 *Laws of the State of Israel* 170 (1973).

63. ORI STENDEL, *THE MINORITIES IN ISRAEL* 135-136 (1973). Henry Kamm, *Most Arabs Boycott Jerusalem Election*, N.Y. TIMES, Jan. 1, 1974, at A2, col. 4.

64. Basic Law: Jerusalem, Capital of Israel, 34 *Laws of the State of Israel* 209 (1980).

65. S.C. Res. 478, 35 U.N. SCOR Res. & Decs. 14, U.N. Doc. S/INF/36 (1981). G.A. Res. 35/169(E), 35 U.N. GAOR Res. & Decs. 28, U.N. Doc. A/35/48 (1981).

66. Members are selected by Palestine Arab communities and organizations. DAVID GILMOUR, *DISPOSSESSED: THE ORDEAL OF THE PALESTINIANS* 156 (1982).

67. Palestine Liberation Organization, an administrative-executive body operating under the authority of the Palestine National Council.

68. John Kifner, *Hussein Surrenders Claims on West Bank to the P.L.O.*, N.Y. TIMES, Aug. 1, 1988, at A1, col. 6.

69. Palestine National Council, Declaration of Independence, Nov. 15, 1988, U.N. GAOR, 43d Sess., Annex 3, Agenda Item 37 at 15, U.N. Doc. A/43/827, S/20278 (1988), reprinted in 27 I.L.M. 1668 (1988); *Al-Fajr Jerusalem Palestinian Weekly*, Nov. 28, 1988, at 5, col. 1 (official English translation).

its state for the Gaza Strip and the West Bank, including east Jerusalem.<sup>70</sup> Thus, the reference to Jerusalem as capital was to east Jerusalem.

In 1990 large numbers of Jews from the Soviet Union began to immigrate to Israel, and the government announced plans to build new housing for them. Substantial numbers settled in east Jerusalem.<sup>71</sup> U.S. President George Bush said that Israel should create no "new settlements" in east Jerusalem.<sup>72</sup> The State Department reaffirmed its position that east Jerusalem was part of the West Bank, not of Israel.<sup>73</sup> This new settlement activity concerned east Jerusalem's Palestine Arabs, who feared that it would solidify Israel's hold.<sup>74</sup> A statement by Simcha Dinitz, head of the Jewish Agency which organizes and finances Jewish immigration to Israel,<sup>75</sup> fed these fears. Dinitz said that the Soviet immigrants would "give Israel the numbers it needs to go to the negotiating table from a position of strength."<sup>76</sup> The statement suggested that the immigration would help Israel resist demands for the establishment of a Palestine state.

The United States promised Israel a \$400 million loan to build housing for Soviet Jews but demanded an assurance that Israel would not settle the immigrants in east Jerusalem, or elsewhere in the West Bank. After several months of negotiations, Israel refused to give the assurances, but the United States still released the \$400 million.<sup>77</sup>

In October 1990 a shooting incident occurred in east Jerusalem near

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70. See Letter dated November 16, 1988 from the Deputy Permanent Observer of the Palestine Liberation Organization to the United Nations addressed to the Secretary General, U.N. GAOR 43d Sess., Annex 2 Agenda Item 37 at 7, U.N. Doc. A/43/827, S/29278 (1988).

71. Herb Keinon & Walter Ruby, *Warsaw Now Transit Point for Soviets*, JERUSALEM POST (int'l ed.), June 9, 1990, at 3, col. 1 (U.S. Reps. William Lehman and Peter Defazio reporting statements by Israeli officials that 1400 had settled in and around east Jerusalem from mid-1989 to mid-1990).

72. *Excerpts of President Bush's Remarks at News Conference at End of Talks*, N.Y. TIMES, Mar. 4, 1990, at A22, col. 1. See also Thomas Friedman, *Bush Questions Israeli Claims to East Jerusalem, Creating Uproar*, N.Y. TIMES, Mar. 9, 1990, at A8, col. 3.

73. Joel Brinkley, *Labor Party Rejects Likud Terms for Palestinian Talks*, N.Y. TIMES, Mar. 6, 1990, at A3, col. 3 (statement of Margaret Tutwiler, spokesperson).

74. *PLO Radio Broadcasts Intifadah Call No. 58*, British Broadcasting Corp., Summary of World Broadcasts, June 18, 1990, pt. 4, at ME/0793/A/1 (quoting text of Call No. 58 issued by Unified National Leadership of the Uprising).

75. Herb Keinon & Eitan Milgram, *Cabinet Gives Sharon Emergency Powers*, JERUSALEM POST (int'l ed.), July 7, 1990, at 1, col. 1 (Jewish Agency agreed to pay \$362 million over three years to absorb new immigrants); Garry Abrams, *Homeward Bound: Operation Exodus Lends Support to Soviet Jews in Their Return to Israel*, L.A. TIMES, June 11, 1990, at E1, col. 2 (Mendel Kaplan, Chairman, Jewish Agency Board of Governors, saying that the Agency provides all transportation cost to Israel for Soviet immigrants plus total living expenses for their first six months).

76. Herb Keinon, *Finland Gives Go-ahead to Fly Jews to Israel*, JERUSALEM POST (int'l ed.), July 14, 1990, at 3, col. 2.

77. Allison Kaplan, Alisa Odenheimer & David Makovsky, *U.S. Gave Loan Guarantees Without the Facts It Sought*, JERUSALEM POST (int'l ed.), Mar. 2, 1991, at 1, col. 4.

the Al-Aqsa mosque, in which Israeli police killed seventeen Palestine Arabs. The U.N. Security Council condemned the killings and asked the Secretary General to report on appropriate measures to be taken. It reaffirmed, as the basis for international action, its previous position that east Jerusalem was under belligerent occupation.<sup>78</sup>

Israel rejected the resolution on the grounds that east Jerusalem was under its sovereignty and therefore rules of belligerent occupation did not apply. It also refused admission to a team the Secretary General wanted to send to investigate. It explained to the Secretary General, "Jerusalem is not, in any part, 'occupied territory;' it is the sovereign capital of the State of Israel. Therefore, there is no room for any involvement on the part of the United Nations in any matter relating to Jerusalem."<sup>79</sup> Thus, Israel's position was that east Jerusalem was territory under Israel's sovereignty.

The Council adopted a follow-up resolution, "expressing alarm" at Israel's rejection of the previous resolution.<sup>80</sup> The Secretary General issued his report, without being able to conduct an on-site inquiry, and proposed a permanent U.N. role to monitor Israel's treatment of the Palestine Arabs in the Gaza Strip and West Bank, including east Jerusalem.<sup>81</sup>

## II. SELF-DETERMINATION

In the twentieth century, a new norm has emerged in international law that is relevant to the status of Jerusalem. The concept of self-determination gave a people under foreign control a right to decide its political destiny. Self-determination found its first manifestation in the mandate system established by the League of Nations after World War I. The League's Covenant required the states that took territory in World War I to promote the well-being of its people as a "sacred trust of civilization."<sup>82</sup>

The mandate system was directly relevant for Jerusalem because the League gave Great Britain a mandate to administer Palestine. The League made the mandate of the "Class A" variety, meaning that Palestine was provisionally recognized as independent.<sup>83</sup> At the same time, the

78. S.C. Res. 672, U.N. Doc. S/RES/672 (1990), reprinted in *Text of Resolution Adopted by U.N. Council*, N.Y. TIMES, Oct. 14, 1990, at A10, col. 2.

79. David Makovsky, *Israel Won't Cooperate with UN Envoys*, JERUSALEM POST (int'l ed.), week ending Oct. 20, 1990, at 1, col. 5. See also Shamir statement quoted in *Report Submitted to the Security Council by the Secretary-General in Accordance with Resolution 672*, U.N. Doc. S/21919 at 3 (1990), reprinted in AL-FAJR JERUSALEM PALESTINIAN WEEKLY, Nov. 12, 1990, at 8, col. 1, excerpted in *Report by U.N. on Arabs*, N.Y. TIMES, Nov. 2, 1990, at A10, col. 1.

80. U.N. SCOR (2949th mtg.) U.N. Doc. S/RES/673 (1990), reprinted in *U.N. Resolution on Israel*, N.Y. TIMES, Oct 26, 1990, at A11, col. 1.

81. *Report Submitted to the Security Council*, supra note 79, at 3-5.

82. LEAGUE OF NATIONS COVENANT art. 22, ¶ 1.

83. LEAGUE OF NATIONS COVENANT art. 22, ¶ 4.

League acknowledged Britain's commitment to promote the development of a Jewish national home in Palestine, a fact that clouded the scope of Britain's obligation to promote independence.<sup>84</sup>

Self-determination received more thorough treatment in the United Nations Charter, which stated that the organization would "develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples."<sup>85</sup> Some commentators concluded from the drafting history that this concept lacked normative force. One argued that the Charter "acknowledge[d] the right of colonial States to continue administering the non-self-governing territories," and that it did not make self-determination a norm of law.<sup>86</sup>

Although the U.N. Charter did not call for immediate termination of colonialism, it required member states to regard their control over colonies as a "sacred trust" and to transmit periodic reports regarding their administration of them to the United Nations.<sup>87</sup> It thus extended to all administering states the obligations that under the League Covenant had applied to states administering mandate territories.

The Charter referred to self-determination as a "principle" in the Chinese, Spanish, English, and Russian texts.<sup>88</sup> Some commentators argued that "principle" was less than a "right." One said that self-determination is an aspiration of the United Nations but "can hardly be regarded as an absolute, either in international law or in international politics."<sup>89</sup>

But the French text, instead of "principle," said "right" (*droit d'auto-détermination*).<sup>90</sup> Treaty texts that vary in different official languages must be reconciled if possible.<sup>91</sup> "Principle" can mean legal entitlement, or something less. Since "principle" is ambiguous, it must be read to mean "right."<sup>92</sup>

84. Mandate for Palestine, art. 2, 8 LEAGUE OF NATIONS, *O. J.* 1007 (1922), *See also* TERMS OF LEAGUE OF NATIONS MANDATES: REPUBLISHED BY THE UNITED NATIONS, U.N. Doc. A/70 (1946), reprinted from *Permanent Mandates Commission* No. 466, League of Nations Doc. C.529 M.314 1922 VI and C.667 M.396 1922.VI. *See also* Convention between the United States and Great Britain Concerning Palestine, Dec. 3, 1924, 44 Stat. 2184.

85. U.N. CHARTER art. 1, ¶ 2.

86. NATHAN FEINBERG, *STUDIES IN INTERNATIONAL LAW WITH SPECIAL REFERENCE TO THE ARAB-ISRAELI CONFLICT* 462 (1979).

87. U.N. CHARTER art. 73.

88. U.N. CHARTER art. 1.

89. Eugene V. Rostow, *Palestinian Self-Determination: Possible Futures for the Unallocated Territories of the Palestine Mandate*, 5 *YALE J. WORLD PUBLIC ORDER* 147, 154 (1979). *See also*, Note, *Palestinian Arab Self-Determination and Israeli Settlements on the West Bank: An Analysis of Their Legality Under International Law*, 8 *LOY. L.A. INT'L & COMP. L.J.* 551, 555 (1986).

90. U.N. CHARTER art. 1, ¶ 2.

91. Vienna Convention on the Law of Treaties, art. 33, ¶ 3, opened for signature May 23, 1969, U.N. Doc. A/CONF. 39/27, reprinted in 63 *AM. J. INT'L L.* 875, 886 (1969), reprinted in 8 *I. L. M.* 679, 693 (1969) (treaty terms are presumed to have the same meaning in each official language).

92. "Principle" is often used in a normative sense in treaties. *See, e.g.*, Wolfgang

The International Court of Justice has found the Charter provision on self-determination to import legal entitlement. In a 1971 case concerning Namibia; which, like Palestine, had been under a League of Nations mandate, the Court explained that the League Covenant gave a right of self-determination to peoples under mandates, and that the U.N. Charter expanded this right to peoples of all non-self-governing territories.<sup>93</sup> The General Assembly referred to self-determination, as found in the Charter, as a right.<sup>94</sup>

The existence by 1947 of a right to self-determination meant that as Britain announced its intent to withdraw, the people of Palestine had a right to statehood. By that time Britain and France, the two states that held mandate territory in the region, had given independence to the other mandate territories — Lebanon, Syria, and Iraq. The people of Palestine — Arabs with a Jewish minority — were similarly entitled to independence. When the Jewish Agency tried by force to prevent them from achieving statehood, the Palestine Arabs, as the putative sovereign, could lawfully defend themselves.<sup>95</sup>

### III. THE INTERNATIONALIZATION OF JERUSALEM

The U.N. General Assembly proposed to treat Jerusalem separately from the rest of Palestine. In proposing a partition of Palestine, as indicated, the Assembly called for Jerusalem to be a "*corpus separatum*" between a Jewish state and an Arab state.<sup>96</sup>

However, the resolution was only a recommendation and was never put into effect. The resolution said that the Assembly "considers that the present situation in Palestine is one which is likely to impair the general

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Benedek, *Progressive Development of the Principles and Norms of International Law Relating to the NIEO: The UNITAR Exercise*, 36 ÖSTERREICHISCHE ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT UND VÖLKERRECHT, 289, 307-311 (1986). The use of "principle" elsewhere in the Charter indicated that the Charter drafters used it in a normative sense. See, e.g., U.N. CHARTER art. 2, para.4 (provision designated as a "principle" prohibiting use of force between states).

93. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276, 1971 I.C.J. 16, 31.

94. G.A. Res. 421 V (D), 5 U.N. GAOR Supp. (No. 20) at 43, U.N. Doc. A/1775 (1950), Vote: 30-9-13 (referring to "ways and means which would ensure the right of peoples and nations to self-determination"). See also G.A. Res. 545 VI, 6 U.N. GAOR Supp. (No. 20) at 36-37, U.N. Doc. A/2119 (1952), Vote (on quoted paragraph): 40-4-10 (referring to Resolution 421(D) by saying that there the Assembly "recognized the right of peoples and nations to self-determination as a fundamental human right"). The International Covenant on Civil and Political Rights, which, according to its preamble, is based on the Charter, defines self-determination as a right. International Covenant on Civil and Political Rights, art. 1, Dec. 19, 1966, 999 U.N.T.S. 171.

95. DEREK BOWETT, *SELF-DEFENCE IN INTERNATIONAL LAW* 56 (1958). See generally Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1626 (1984).

96. G.A. Res. 181, U.N. GAOR, U.N. Doc. A/519, at 146 (1947).

welfare and friendly relations among nations."<sup>97</sup> The phrases "general welfare" and "friendly relations" are drawn from a Charter provision that gives the Assembly the power of recommendation.<sup>98</sup> This indicated that the Assembly, in keeping with its powers, understood that it was making only a non-binding recommendation.

Member states understood that the resolution was only a recommendation.<sup>99</sup> Britain told the Security Council that it would not implement partition so long as Arab or Jewish authorities objected.<sup>100</sup> The United States said that the resolution carried only "moral force."<sup>101</sup> When it became clear that the resolution would not be implemented, the United States suggested the possibility of a temporary U.N. trusteeship over Palestine.<sup>102</sup> The Council asked the Assembly to explore solutions other than partition, but the Assembly had no success.<sup>103</sup>

As for Jerusalem, after the partition idea failed, the General Assembly reiterated its call for internationalization.<sup>104</sup> Although the city was never internationalized, its status was never resolved. Though various nations recognized Israel as a state, they did not recognize Israeli sovereignty over west Jerusalem.<sup>105</sup> In explanation, the United States and others cited the General Assembly resolutions proposing an international status for Jerusalem.<sup>106</sup> Few states located embassies in west Jerusalem, placing them instead in Tel Aviv.<sup>107</sup> After more than four decades of Israeli *de facto* control of west Jerusalem, most states continue to consider the status of Jerusalem (east and west) to be unresolved.

97. *Id.* at 131.

98. U.N. CHARTER art. 14.

99. HANS Kelsen, *THE LAW OF THE UNITED NATIONS: A CRITICAL ANALYSIS OF ITS FUNDAMENTAL PROBLEMS* 195 (1950).

100. 3 U.N. SCOR (253d mtg.) at 271-272, (1948) (statement of Mr. Creech Jones, U.K.).

101. 3 U.N. SCOR (253d mtg.) at 265, (1948)(statement of Mr. Austin, U.S.), *reprinted in* 18 DEPT. ST. BULL. 294 (1948).

102. 5 *Foreign Rel. U.S. 1948* 801 (1976), 3 U.N. SCOR (271st mtg.), at 31-32 (1948); *Declaration by Austin on Palestine Situation in the Security Council*, N.Y. TIMES, Mar. 20, 1948, at A2, col. 3.

103. S.C. Res. 44, 3 U.N. SCOR Res. & Decs. 16 (1948).

104. G.A. Res. 194, U.N. GAOR Res. at 21, U.N. Doc. A/810 (1948); G.A. Res. 303, U.N. GAOR Res. at 25, U.N. Doc. A/1251 (1949). Gruhin, *supra* note 31, at 204-205.

105. G.I.A.D. Draper, *The Status of Jerusalem as a Question of International Law*, in *THE LEGAL ASPECTS OF THE PALESTINE PROBLEM*, *supra* note 55, at 154, 160.

106. Harry Howard, *The Development of United States Policy in the Near East, South Asia, and Africa During 1953: Part II*, 30 DEPT ST. BULL., Jan. 4 - June 28, 1954, at 328, 329; *Corpus Separatum: Jerusalem*, *supra* note 31, at 595; *The International Status of Palestine*, *supra* note 33, at 976; Shlomo Slonim, *The United States and the Status of Jerusalem 1947-1984*, 19 ISRAEL L. REV. 179-252 (1984).

107. Antonio Cassese, *Legal Considerations on the International Status of Jerusalem*, in *THE LEGAL ASPECTS OF THE PALESTINE PROBLEM*, *supra* note 55, at 144, 148-149. *See also Corpus Separatum: Jerusalem*, *supra* note 31, at 595.



## IV. EAST JERUSALEM AND THE USE OF FORCE

To justify Israel's 1967 extension of jurisdiction over east Jerusalem,<sup>108</sup> Prime Minister Eshkol said that "Israel without Jerusalem is Israel without a head."<sup>109</sup> But the 1967 legislation and decree did not claim sovereignty. In a letter to the Secretary-General at the time, Foreign Minister Abba Eban said, "The measures adopted relate to the integration of Jerusalem in the administrative and municipal spheres, and furnish a legal basis for the protection of the Holy Places of Jerusalem."<sup>110</sup> He said that the term "annexation," which was being used at the U.N. to criticize the measures, was "out of place." The government argued that the 1967 action was not an annexation and therefore did not violate the law of belligerent occupation.<sup>111</sup>

Eban's argument was weak, because there was no need to apply Israeli law to protect the holy sites. This could have been done just as easily by applying Jordanian law, which Israel applied elsewhere in the West Bank. Further, the law of belligerent occupation precludes the annexation of occupied territory and, short of annexation, forbids the substitution of the occupier's law for the law previously in force.<sup>112</sup>

Gradually the government moved closer to claiming sovereignty over east Jerusalem. The 1980 statute stating that Jerusalem (both halves) was the capital of Israel implied a claim of sovereignty over east Jerusalem.<sup>113</sup> While the statute did not mention sovereignty directly, if a state claims a territory as part of its capital city, it must be claiming sovereignty. In 1990, during the controversy over the U.N. investigation of the Al-Aqsa mosque killings, the government explicitly asserted sovereignty over east Jerusalem.<sup>114</sup>

Israel claimed that its control of east Jerusalem, like its control of the entire West Bank, was legally justified. It argued that it took the West Bank, including east Jerusalem, by using force in self-defense. Thus, Elihu Lauterpacht wrote:

Territorial change cannot properly take place as a result of the *unlawful* use of force. But to omit the word 'unlawful' is to change the substantive content of the rule and to turn an important safeguard of

108. See *supra* notes 54-57.

109. *Israel without a Head*, N.Y. TIMES, July 10, 1967, at A16, col. 1.

110. *Measures Taken by Israel to Change the Status of the City of Jerusalem*, Report of the Secretary-General, July 10, 1967, U.N. Doc. A/6753 at 3, reprinted in 6 I. L. M. 846, 848 (1967) (giving text of letter by Minister of Foreign Affairs Abba Eban).

111. ELIHU LAUTERPACHT, JERUSALEM AND THE HOLY PLACES 50 (1968).

112. Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, Annex: Regulations Respecting the Laws and Customs of War on Land, art. 43, 36 Stat. 2277, 2306 (1907); see also Bevens, TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA 1776-1949 631 (1968); Convention Relative to the Protection of Civilian Persons in Time of War, art. 64, Aug. 12, 1949, 75 U.N.T.S. 287, at 328 (1950).

113. See *supra* note 64.

114. Report Submitted to the Security Council, *supra* note 79, at 5.

legal principle into an aggressor's charter. For if force can never be used to effect lawful territorial change, then, if territory has once changed hands as a result of an unlawful use of force, the illegitimacy of the position thus established is sterilized by the prohibition upon the use of force to restore the lawful sovereign. This cannot be regarded as correct or reasonable.<sup>115</sup>

Lauterpacht's argument confused two separate situations. The first is aggression by State A against State B, where State B in defending itself enters the territory of State A and remains there. In this situation, State B may remain only so long as is necessary to repel the attack initiated by State A. The second is aggression by State A against State B, where State A enters and occupies territory in State B. The question becomes whether State B may initiate new hostilities to drive State A out of its territory. Opinion on this issue is divided, but on the first question it is uniform, to the effect that State B may use only such force as is necessary to repel State A's attack and may remain in occupation only so long as is necessary to ensure that State A will not resume its attack.

A state that takes territory while acting in self-defense is obliged to withdraw once it has protected itself from the danger.<sup>116</sup> It may not retain territory it takes while repelling an attack. If Israel had acted in self-defense, that would not justify its retention of the West Bank.<sup>117</sup> Under the United Nations Charter, there can lawfully be no territorial gains from war, even by a state acting in self-defense.<sup>118</sup> The response of other states to Israel's occupation showed a virtually unanimous opinion that even if Israel's action was defensive, its retention of the West Bank was not justified.<sup>119</sup>

Lauterpacht's argument was premised on the assumption that Israel acted in self-defense in 1967. As indicated above, however, Israel did not think that Egypt was about to attack.<sup>120</sup> Even if Israel was concerned that Egypt might attack at some future time, preemptive strikes are not permitted under the United Nations Charter.<sup>121</sup> The Charter characterizes armed force as defensive only if it is used in response to an "armed at-

115. LAUTERPACHT, *supra* note 111, at 52. See also MARTIN, *supra* note 44, at 261-265 (arguing that Israel may retain the territories it took in 1967, on the theory that it took them defensively).

116. JENNINGS, *supra* note 5, at 55-56.

117. J.R. GAINSBOROUGH, *THE ARAB-ISRAELI CONFLICT: A POLITICO-LEGAL ANALYSIS* 149, 158 (1986); MALLISON & MALLISON, *supra* note 61, at 259.

118. Quincy Wright, *The Palestine Conflict in International Law*, in MAJOR MIDDLE EAST PROBLEMS IN INTERNATIONAL LAW 13, 27 (M. Khadduri ed., 1972); Quincy Wright, *The Middle East Problem*, 64 AM. J. INT'L L. 270 (1970).

119. S.C. Res. 476, 35 U.N. SCOR Res. & Decs. 13, U.N. Doc. S/INF/36 (1980); DUGARD, *supra* note 59, at 113; Munkman, *Review of Jerusalem and the Holy Places (Elihu Lauterpacht)*, 43 BRIT. Y.B. INT'L L. 306, 310 (1968-69).

120. See *supra* notes 51-53.

121. Akehurst, *supra* note 23, at 241. See also John L. Hargrove, *Abating the Middle East Crisis Through the United Nations (And Vice Versa)*, 19 KAN. L. REV. 365, 367 (1971).

tack."<sup>122</sup> "Armed attack" means that an attack must actually be in progress, or so near that the reality of the attack is evident.

Although neither the General Assembly nor the Security Council ever adopted a resolution on the responsibility for the June 1967 hostilities, both have called on Israel to withdraw from the territory it occupied.<sup>123</sup> Regardless of who was responsible for the 1967 hostilities, Israel is precluded from retaining the territory it took.

Another thesis put forward to justify Israel's retention of the West Bank, including east Jerusalem, was that Israel's taking of it was necessary and proportional in relation to its security needs, and that this necessity did not immediately subside.<sup>124</sup> But even if Israel had responded to an imminent attack in 1967, it quickly eliminated any threat to itself. At that point its defensive right would have ceased, and it would have been obligated to withdraw.<sup>125</sup>

Some analysts asserted that Israel might retain the West Bank, including east Jerusalem, pending a peace agreement between itself and the Arab states.<sup>126</sup> Others argued that it might lawfully retain them permanently, because Jordan had not held lawful title and therefore that there was no sovereign to whom the territories could revert. Israel, it was said, particularly because it took the territories defensively, had a better claim to title than anyone else.<sup>127</sup> That argument ignored, however, the generally recognized proposition that uncertainty over sovereignty provides no ground to retain territory taken in hostilities. Even if Jordan held the West Bank on only a *de facto* basis, Israel could not, even acting in self-defense, acquire title.<sup>128</sup> The argument also overlooked the fact that the Palestine Arabs collectivity had a sound claim to the West Bank on the basis of their right of self-determination.

Israel's claim of self-defense was false. Jordan's responsive military action against Israel was lawful, as collective self-defense under U.N. Charter Article 51.<sup>129</sup> Israel's use of force against Jordan was part of its aggression against Egypt, and was therefore unlawful. This means that Israel took east Jerusalem through aggression. Under the U.N. Charter,

122. U.N. CHARTER art. 51.

123. S.C. Res. 242, 22 U.N. SCOR Res. 8, U.N. Doc. S/INF/22/Rev.2 (1967); S.C. Res. 476, 35 U.N. SCOR Res. & Decs. 13, U.N. Doc. S/INF/36 (1980); G.A. Res. 3414, Dec. 5, 1975, 30 U.N. GAOR, Supp. (No. 34) U.N. Doc. A/10034 (1975).

124. John Norton Moore, *The Arab-Israeli Conflict and the Obligation to Pursue Peaceful Settlement of International Disputes*, 19 KAN. L. REV. 403, 425 (1971).

125. Hargrove, *supra* note 121, at 367.

126. Akehurst, *supra* note 23, at 242.

127. Yehuda Blum, *The Missing Reversioner: Reflections on the Status of Judea and Samaria*, 3 ISRAEL L. REV. 279, 294 (1968); Schwebel, *supra* note 50, at 346; Stephen Schwebel, *Remarks*, 1 ISRAEL Y.B. ON HUMAN RIGHTS 374 (1971); JULIUS STONE, *ISRAEL AND PALESTINE: ASSAULT ON THE LAW OF NATIONS* 52 (1981).

128. Cassese, *supra* note 59, at 24.

129. See *supra* note 45. See also O'Brien, *International Law and the Outbreak of War in the Middle East*, 1967, 11 ORBIS 692, 703 (1967).

territory may not be taken by aggression, and once taken must be returned.<sup>130</sup>

Hostilities between Jordan and Israel resulted from Israel's attack on Egypt, with whom Jordan had a defensive alliance. Israel's attack on Egypt in June 1967 constituted aggression, and Jordan's participation on Egypt's side was justified as collective self-defense.<sup>131</sup> Therefore, Israel's military action against Jordan, during which it took east Jerusalem, constituted aggression.

One other argument has been made to justify Israeli sovereignty in east Jerusalem. It relies on the General Assembly's 1947 resolution on partition and on the resolution's provision for the internationalization of Jerusalem. Since internationalization was not effected, the argument runs, Jerusalem became open to occupation by whichever of the beneficiaries of the 1947 resolution might do so. Thus, Jerusalem was legally open to occupation by Israel, which it occupied in 1967.<sup>132</sup> This argument is defective, however, because the 1947 resolution, as indicated above, was merely a recommendation and, since it was not accepted, it created no rights.<sup>133</sup> In addition, the self-determination right of the Palestine Arabs meant that east Jerusalem could not be considered open to occupation by Israel.

#### V. SETTLEMENT IN EAST JERUSALEM

The West Bank, including east Jerusalem, is under Israel's belligerent occupation. This is so because Israel came into control through international hostilities. The government of Israel acknowledges that it holds the West Bank under belligerent occupation but does not acknowledge that status for east Jerusalem. Israel treats the two territories differently under its legislation. East Jerusalem is part of Israel administratively; it is governed by a city administration for all of Jerusalem. For the remainder of the West Bank, however, Israel has established a military government that is the executive and legislative authority. Whereas east Jerusalem is policed by Israeli police, the remainder of the West Bank is policed by the Israel Defense Force.

The applicable law differs as well. For example, Israel's penal code is used in east Jerusalem, and crimes are prosecuted in ordinary Israeli courts. For the West Bank (outside east Jerusalem), on the other hand, Israel uses the law in force at the commencement of the occupation, namely, the law of Jordan, supplemented by military decrees issued by Israel's military government. Most serious crime is prosecuted in Israel's courts-martial, although some is handled, as are civil matters, in Jordanian courts. Israel's Supreme Court uses the law of belligerent occu-

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130. U.N. CHARTER art. 2, ¶ 4.

131. *Supra* note 122.

132. Gruhin, *supra* note 31, at 206-207.

133. *See supra* notes 97-103.

pation in resolving controversies between the military government and Palestine Arab residents of the West Bank.<sup>134</sup>

For east Jerusalem, as indicated, the Knesset has authorized residents to vote in municipal, though not in national elections.<sup>135</sup> The government of Israel issued identity cards to east Jerusalem residents, but they have in the main retained their Jordanian citizenship, and Israel has never considered them to be citizens of Israel.

Israel's view on the status of east Jerusalem has been rejected by all other states that have expressed a view on the issue.<sup>136</sup> They do not find Israel authorized to apply its own law in east Jerusalem. Nor do they find Israel authorized to settle its own citizens there.<sup>137</sup> East Jerusalem is under belligerent occupation, and the law of belligerent occupation forbids an occupier to transfer its own population into the occupied territory.<sup>138</sup> This is a manifestation of the more general norm that an occupier may not change the character of the occupied territory.<sup>139</sup> Israel has encouraged its citizens to settle in east Jerusalem, in particular by building apartment complexes there, and this activity increased in 1990 with the arrival of the Soviet immigrants.<sup>140</sup>

Settlement involves a major change in the character of occupied territory. An occupier is required to preserve the territory intact pending return of the territory. If it inserts its own population into the territory and if that new population views itself as permanent, as is the case with the Israeli settlers in east Jerusalem, the likelihood that the territory will be returned is substantially reduced. Further, the insertion of the occupant's population violates the rights of the inhabitants if their land is taken, as it typically is, in order to provide space for the settlers.<sup>141</sup>

The 1967 and 1980 statutes asserting an Israeli claim to east Jerusalem are irrelevant in this regard. Whatever status east Jerusalem occupies

134. RAJA SHEHADEH, *OCCUPIER'S LAW: ISRAEL AND THE WEST BANK* 76-102 (1985). The Court, like Israel's government, does not acknowledge the applicability of the Geneva Civilians Convention, on the theory that the West Bank was not under Jordan's sovereignty prior to 1967, but they do acknowledge the applicability of customary humanitarian law. Their view regarding the Geneva Civilians Convention is rejected by scholars and by other states. MALLISON & MALLISON, *supra* note 61, at 252-262; Jordan Paust, Gerhard von Glahn & Günter Woratsch, *Report of the ICJ Mission of Inquiry into the Israeli Military Court System in the Occupied West Bank and Gaza*, 14 HASTINGS INT'L & COMP. L. REV. 1, 7 (1990).

135. *See supra* note 62.

136. S.C. Res. 478, 35 U.N. SCOR Res. & Decs. 14, U.N. Doc. S/INF/36 (1981). G.A. Res. 35/169(E), 35 U.N. GAOR Res. & Decs. 28, U.N. Doc. A/35/48 (1981).

137. S.C. Res. 452, 34 U.N. SCOR Res. & Decs., U.N. Doc. S/INF/35 (1980) (calling on Israel to cease the establishment of settlements "in the Arab territories occupied since 1967, including Jerusalem").

138. Convention Relative to the Treatment of Civilian Persons in Time of War, Aug. 12, 1949, Occupied Territories, art. 49, 75 U.N.T.S. 287 (1950).

139. *Supra* note 112, art. 43.

140. *See supra* notes 60-61, 71.

141. MALLISON & MALLISON, *supra* note 61, at 262.

as a matter of Israeli law, it is territory under belligerent occupation from the standpoint of international law. A belligerent occupant may not encourage its citizens to settle in occupied territory. Moreover, the settlement activity has potentially grave consequences for resolution of sovereignty in east Jerusalem.

## VI. SOVEREIGNTY OVER EAST JERUSALEM

Sovereignty in east Jerusalem belongs to its original inhabitants, on the basis of their long-time occupation.<sup>142</sup> The seizure of east Jerusalem in 1967 cannot defeat that right. The right of east Jerusalem's inhabitants is based on self-determination, which is assertable against any belligerent occupier, regardless of how it came into occupation.

The Palestine Arabs have a right to statehood in accordance with the Declaration of Independence of 1988. That right is valid for the territory contemplated for the Palestine state, namely, the Gaza Strip and the West Bank, including east Jerusalem. This conclusion finds ample basis in the international-legal principles relating to sovereignty over territory, principles that include self-determination and non-aggression. East Jerusalem is part of the territory in which the people of Palestine are entitled to exercise their right of self-determination by establishing a state.

The arguments that have been made by the government of Israel in support of its continuing control of east Jerusalem are weak. Territory taken during hostilities does not thereby fall under the sovereignty of its occupier. Israel cannot claim east Jerusalem on the grounds that no other state has a stronger claim, as the Palestine Arabs clearly have a strong claim. Nor can Israel claim east Jerusalem on grounds of Israel's security. That is simply not a basis for a claim to territory.

The status of east Jerusalem should be resolved as part of an overall resolution of the Palestinian-Israeli conflict. East Jerusalem, or Jerusalem as a whole, cannot be considered in isolation from the surrounding territory.

The right of a people to achieve self-determination, or to oust an aggressor from its territory, may be realized by armed force if other avenues are exhausted. The Security Council's practice in cases involving use of force by liberation movements in Africa during the 1970s and 1980s suggests that when all else fails a people denied self-determination may resort to forcible self-help to remove from its territory the state that is holding it in dependence.<sup>143</sup> In an International Court of Justice case involving Namibia, Judge Fouad Ammoun shared that view. Citing the

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142. John Quigley, *Palestine's Declaration of Independence: Self-Determination and the Right of the Palestinians to Statehood*, 7 B.U. INT'L L. J. 1 (1989).

143. Derek Bowett, *Reprisals Involving Recourse to Armed Force*, 66 AM. J. INT'L L. 1, 36 (1972). See also S.C. Res. 268, 24 U.N. SCOR Res. & Decs. 7, U.N. Doc. S/INF/24/Rev.1 (1970); S.C. Res. 273, *id.* at 9. S.C. Res. 290, 25 U.N. SCOR Res. & Decs. 13, U.N. Doc. S/INF/25 (1971).

French national movement under Nazi German occupation, and the Polish, Czech, and Slovak peoples under the Austro-Hungarian Empire, he said that a people has a right to armed struggle to achieve self-determination. "In law, the legitimacy of the peoples' struggle cannot be in any doubt," he said, "for it follows from the right of self-defence, inherent in human nature, which is confirmed by Article 51 of the United Nations Charter."<sup>144</sup>

Armed force, however, is not an optimal means or a solution of first use. It is a last resort. The international community, as required by the U.N. Charter,<sup>145</sup> should assist the Palestine Arabs in achieving self-determination by peaceful means.

## VII. AN INTERNATIONAL ROLE IN EAST JERUSALEM

Pending a settlement of east Jerusalem's status, the fact that the Palestine Arabs' sovereignty right remains to be effectuated has important immediate consequences. At present, east Jerusalem, along with the rest of the West Bank, is non-self-governing. Under the U.N. Charter, the United Nations has oversight powers to determine whether states administering non-self-governing territories are fulfilling their responsibilities to the inhabitants.<sup>146</sup> The General Assembly has never analyzed east Jerusalem (or the West Bank) from this standpoint, probably because the notion of non-self-governing territories was developed for classic overseas colonies. However, a territory under a long-term belligerent occupation is not self-governing, and therefore falls within the non-self-governing category. The U.N. Charter requires an administering state to report regularly on the status of the territory and to promote self-government and free political institutions.<sup>147</sup>

Further, east Jerusalem remains an area under belligerent occupation, since it was taken by Israel during international hostilities. On this basis as well the international community has a legitimate role. The Geneva Civilians Convention regulates belligerent occupation and requires all parties to ensure respect for the Convention whenever and wherever it is applicable; 165 states are parties.<sup>148</sup> Thus, all these states are under an obligation to ensure that Israel does not settle its citizens in east Jerusalem, or physically abuse residents.

The Security Council has responsibility under the U.N. Charter for situations of breach of the peace, and hostilities led to Israel's control over east Jerusalem.<sup>149</sup> Following the October 1990 shooting incident near the Al-Aqsa mosque, the Security Council viewed a videotape taken by a

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144. *Supra* note 93, at 70 (separate opinion).

145. U.N. CHARTER art. 1., ¶ 2.

146. U.N. CHARTER art. 73.

147. U.N. CHARTER art. 73(e).

148. Convention Relative to the Treatment of Civilian Persons in Time of War, Aug. 12, 1949, General Provisions, art. 1, 75 U.N.T.S. 287 (1950).

149. U.N. CHARTER chap. 7.

Palestine Arab bystander and concluded that Israeli police had shot and killed Palestine Arabs without justification. As indicated, it condemned the shooting and asked the Secretary General to report on the incident.<sup>150</sup>

The Security Council has jurisdiction to deal both with the day-to-day situation in east Jerusalem and with proposals for a permanent settlement. Its powers, as demonstrated in the Security Council's 1990-91 action in the Persian Gulf, are extensive.<sup>151</sup> The Security Council may use economic sanctions and, if those were insufficient, military force, to effect a settlement. The Security Council has every ground for using these powers to force Israel to withdraw from east Jerusalem.<sup>152</sup>

On the several indicated bases there exist ample reasons for a strong international role in east Jerusalem. The status of east Jerusalem is likely to continue to be a source of contention. The international community bears a responsibility to monitor developments there and to promote a solution consistent with the legitimate claims of the contending parties. From the standpoint of territorial right, as this notion is understood in international law, the Palestine Arabs have a valid claim to east Jerusalem. That does not mean they could not agree to a settlement whereby the city would be internationalized, or whereby Jerusalem in its entirety was controlled jointly by Israel and a Palestine state.<sup>153</sup> But no territorial settlement for east Jerusalem can be imposed against their will.

The Security Council and outside states must, however, be guided in the proposals they make by a consideration of the legal rights of the parties. If the United Nations or any other proponent of a settlement departs too drastically from legal entitlement, it runs the risk of a settlement that will not last. Legitimate grievances may be swept under a rug temporarily, but they have a way of seeping out. Any solution for east Jerusalem that does not recognize the right of the Palestine Arabs would be fraught with danger.

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150. *Supra* note 78.

151. S.C. Res. 678, U.N. Doc. S/RES/678 (1990).

152. MALLISON & MALLISON, *supra* note 61, at 239 (pointing out that the failure of the Council to utilize these powers quickly after 1967 permitted Israel to solidify its control in east Jerusalem).

153. See, e.g., John V. Whitbeck, *Two States, One Holy Land: A Framework for Peace*, MIDDLE EAST INTERNATIONAL, June 14, 1991, at 18 (proposing Jerusalem as a joint capital of Israel and Palestine).