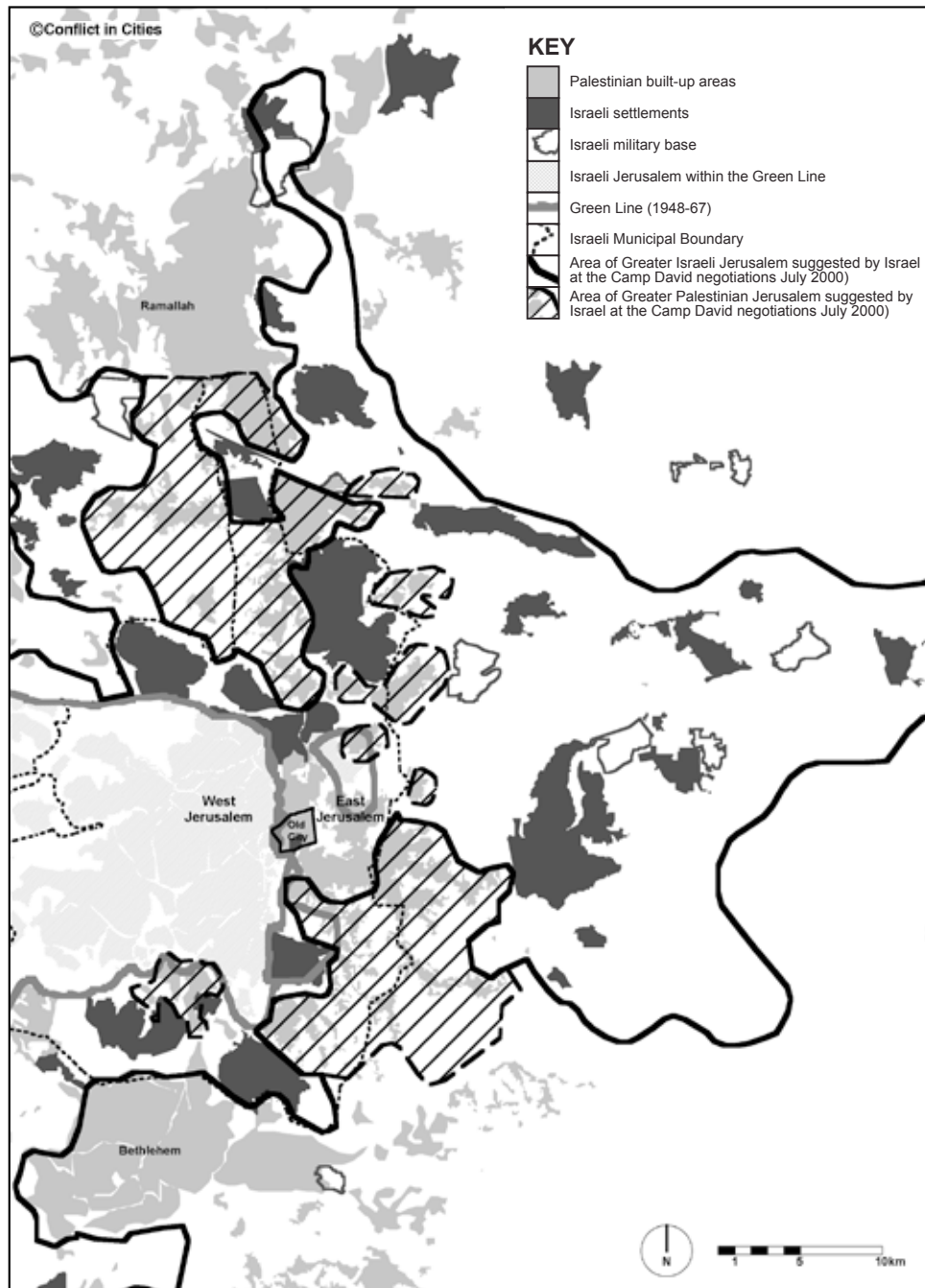


## Constructive Ambiguities?

### *Jerusalem, International Law and the Peace Process*

Mick Dumper

In the closing stages of the Camp David summit in July 2000, leaks to the media indicated that there was a flurry of proposals to bridge the differences between the Israel and Palestinian positions on Jerusalem. Particularly dramatic were the ideas of how to deal with the question of sovereignty over the Old City and the Haram ash-Sharif. These included: dividing the Old City; recognising Palestinian sovereignty over the Haram ash-Sharif but allowing a Jewish place of prayer on a part of the enclosure; suspending sovereignty for an indefinite period; attributing sovereignty to God and allocating management functions to the two parties; entrusting sovereignty to an international religious council including Turkey under the auspices of the United Nations; dividing the Haram ash-Sharif enclosure horizontally, with the Palestinian state having sovereignty over the surface to a certain depth, and the Israeli state having sovereignty over the lower reaches. The increasingly bizarre contortions which the negotiators were driven to consider was an indication of the desperation of the



Jerusalem: Camp David proposals (2000)

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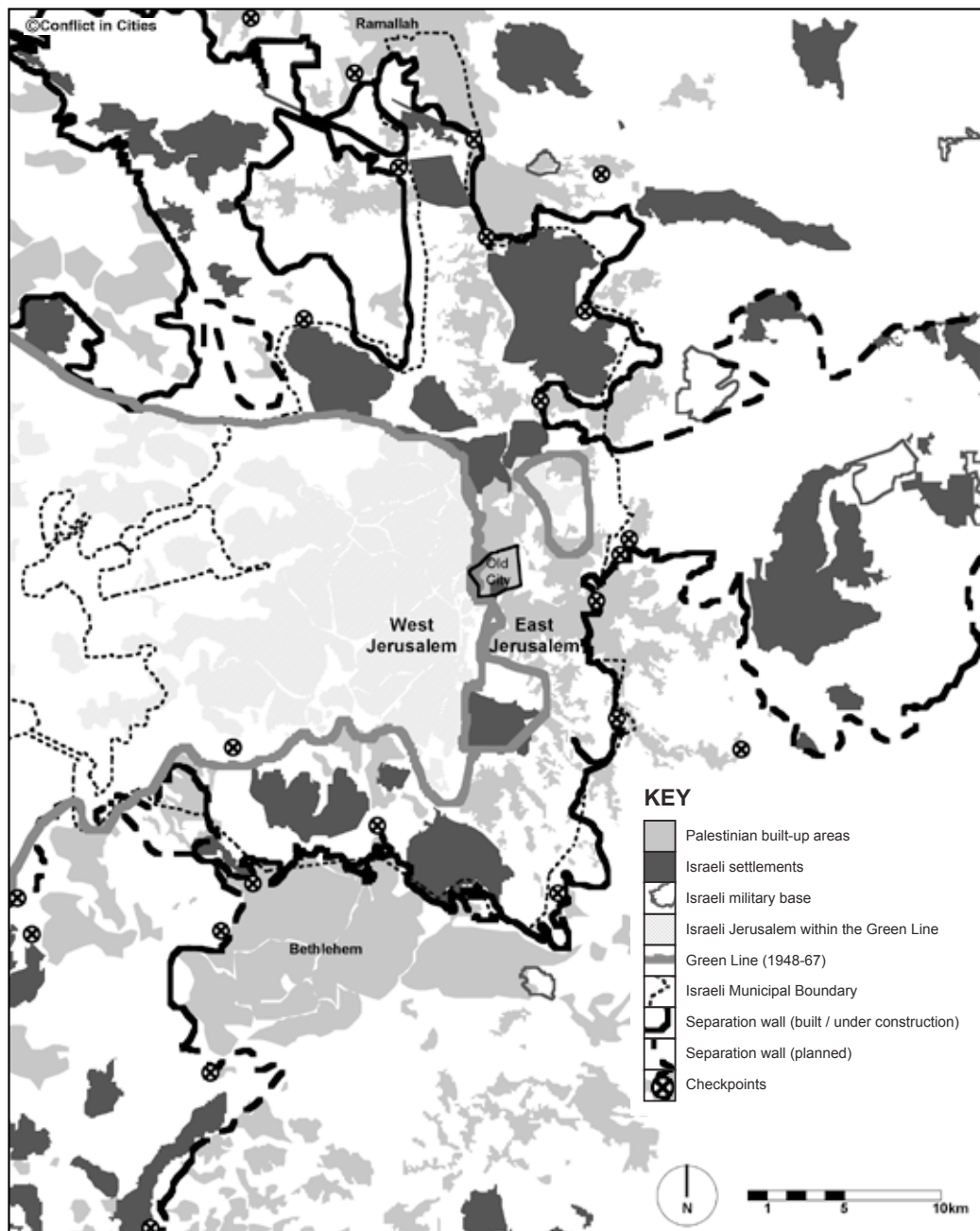
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United States mediators to secure an agreement. More importantly, however, these proposals pointed to the absence of a clear set of principles with which to approach the complexity of the Jerusalem question and the lack of clarity in international law over its resolution in a manner that respected the rights of the parties concerned.

There have been numerous UN resolutions passed on the Jerusalem question. This is particularly the case since 1967 where the inadmissibility of Israeli policies in the eastern part of the city has received consistent re-iteration. However, this paper will argue that despite this body of law, there is insufficient legal support for a specific resolution of the problem. Indeed, what is striking in the literature is the absence of any mention of Jerusalem in many of the key documents upon which a peace agreement can be based. There are two notable exceptions to this observation. Jerusalem featured prominently in the Partition Plan of 1947 (UNGAR 181), in which a *corpus separatum* was recommended and laid out in great detail, and it was also mentioned in the 1988 Declaration of Independence for the State of Palestine. However, Jerusalem was not mentioned in the Balfour Declaration in 1917, which was included in the Mandate Charter in 1922, nor was it mentioned elsewhere in the Charter. In retrospect, it is quite astonishing that neither was it mentioned in the Declaration of the State of Israel in 1948 nor in UNSCR 242 itself.

The absence of a specific template or set of prescriptions in the corpus of international law that can be applied to Jerusalem has led to a degree of ambiguity which is both confusing and leaves the future of the city open to a range of possibilities. This paper will attempt, firstly, to identify the main areas of confusion and the policies which have flowed from it, and, secondly, to evaluate the relative strengths and weaknesses of the possibilities left open as a result. It is important to note that such ambiguity in international law has allowed the stronger party, Israel, to exploit this situation in order to establish its control over the whole city, over both its eastern and western sections. Without a consistent and sustained position adopted in international law, and without any restraining counterforce, the Israeli government has been successfully able to assert its presence in the city. Nevertheless it has been less successful in translating this into a legitimate and recognised position by the international community.

It is in this way that the ambiguity inherent in international laws concerning the city can also be construed as “constructive”. Apart from an Israeli withdrawal to the armistice lines of June 4<sup>th</sup> 1967 contained in UNSCR 242, the prescriptions for a just resolution to the question of Jerusalem are few. This lacuna can provide an opportunity for fresh thinking in the light of the demographic and infrastructural changes that have taken place since 1948 and again in 1967. It allows for a degree of flexibility in contemplating a resolution for the Jerusalem problem. Thus the paper seeks to go beyond denunciations of the iniquities of Israeli actions in Jerusalem in order to explore how the ambiguities in international law over Jerusalem can be exploited to



The Separation wall around Jerusalem (March 2007)

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move the discussion forward so that a resolution respecting the interests of both parties can be delineated.

The possibilities opened up by recognising the ambiguity in international law can be illustrated by the role of UNSCR 242 in the negotiations and the former peace process. This paper will argue that while 242 would be an essential tool in redressing the imbalances in power between the two parties and the imbalances over the control over land and property in the city, it does not deal with a number of additional important factors which need to be addressed before a viable agreement can be signed. UNSCR 242 is clearly a determining resolution which provides the basic framework for a solution. Translated into it an agreement, it would give both Israel and the putative state of Palestine a stake in Jerusalem and lead to the formula of “two capitals in one city”. Nevertheless, it does not specify the relationship between those two halves neither does it posit approaches to handle the new conditions in the city since the Israeli occupation of the eastern half 1967. It does not take into account, for example, Palestinian concerns over access to their former properties in western part of the city (West Jerusalem) or of Israeli concerns over their access to Jewish Holy Places or of the viability of the city unless there Israeli confidence in the security arrangements on the eastern part (East Jerusalem), nor issues related to Jewish owned properties in the East. It is in this qualification or amendment of the intentions behind 242 which does allow for possible areas of agreement over Jerusalem. It may be sufficient for a framework for negotiations but as it stands it is insufficient for a durable peace agreement. It is, therefore, a prescription for the *status quo ante* and not for a viable socio-economic unit meeting the minimum political and religious aspirations of the protagonists.

Of course, hanging over this whole discussion is the brooding presence of the separation Wall cutting through Palestinian neighbours, dividing neighbourhoods from each other and isolating the central suburbs from the West Bank and Palestinian state hinterland. Comprising over twenty kilometres of concrete walls to the height of between four and nine metres with another 57 kilometres of fencing, the Wall will leave 100,000 Jerusalemites on the West Bank side of the Wall depriving them of access to families, schools, hospitals, religious sites, commercial networks. Eight out of 12 access roads from the West Bank to Jerusalem have been closed to Palestinians. In the education sphere alone, the Wall will cut off some 18,000 pupils and 800 teachers from their schools. The physical damage to the functioning of East Jerusalem is incalculable, irrespective of the emotional suffering it has caused to separated families and the political damage it has introduced into the attempts to pursue a negotiated settlement. Nevertheless, the Wall is part of an imposed settlement and not a political agreement and in this paper we are dealing with options for agreement entered into voluntarily and framed by international law and not the results of a coercive and unilateralist policy. Indeed in enclosing against their will over 100,000

Palestinians, the Wall poses as many, if not more, problems for Israel regarding the future of Jerusalem and the legitimacy of its presence there that it seeks to solve. For this reason alone, the unilateralist measures taken by the Israeli government with respect to Jerusalem are clearly temporary and provide no solution to the unstable situation it faces, and that a discussion on the utility of international law and a rights-based approach is even more urgent.

This paper comprises four sections. The first section will identify the main approaches international law scholars have employed in examining the Jerusalem question. It will attempt to establish the basis of my argument that there is a “constructive ambiguity” in the body of law. The second section will examine the opportunities and challenges that this ambiguity opens up. In particular it will outline the changing Jewish and Israeli discourse on Jerusalem which reveals a much greater flexibility than hitherto supposed. The third section will discuss different approaches to Jerusalem in the some of the key milestones in the peace process. It will refrain for suggesting another formula for an agreement but focus instead on the areas on which further progress can be made. The final section will attempt to draw together the points made and to set out a vision of what a rights-based solution to the Jerusalem issue would look like. It will attempt to identify specific instruments that would facilitate the realisation of such a vision. From this outline one should note that the author is not an international lawyer but a political scientist and therefore, the emphasis of the paper is more on the political implications of the argument.

A word should be said about terminology. It is difficult to discuss *rights* to a city in the same way as one would the rights of minorities, of refugees or of citizens. In this way trying to delineate a rights-based approach to Jerusalem will encounter conceptual and methodological problems which are beyond the scope of this paper and expertise of this author. This paper, therefore, prefers to speak in terms of *claims* and *interests* to and in the city by the key players – Israelis, Palestinians, Jordanians, Jews, Christians and Muslims. Nevertheless, the discussion of claims and interests is guided by an over-riding framework of the rights discourse on justice, equality and fairness. A further point on terminology is the use of phrases such as *new realities* and *realities on the ground*. Here the author is aware of the parallel discourse of *facts on the ground* used by some Israeli and US politicians and negotiators to argue the impossibility basing an agreement over Jerusalem upon 242 and that Palestinians will need to accept the presence of post-1967 Israeli settlements. As will be seen, this paper does not accept this view. However, the argument of the paper is partly based upon recognition that there are certain urban dynamics which will allow the city to prosper and that, even if politically possible, it would not be in the interests of the residents of the city to undergo extensive disruption and economic and infrastructural separation that a simplistic return to the Green Line would imply. The paper therefore refers to *new realities* in the sense that the city has developed in some beneficial ways since 1967

and that there are some integrative aspects of the occupation of East Jerusalem which should not be reversed without careful consideration.

## **Jerusalem and International Law**

The essence of the conflict over Jerusalem is that a number of parties – both within Israel/Palestine and internationally - have claims over the city or over parts of the city. All draw on various expressions of international law to reinforce their claim. Yet it is not always clear where the roots of that claim lie and from what source an assertion of sovereignty can be derived. As Rodman Bundy has summed up the issue: “The problem with Jerusalem...is that none of the traditional roots of title that lawyers often use, fit the situation very well. Indeed, Jerusalem is in many respects judicially unique”.

This paper will not run through the evolution of international law pertaining to Jerusalem. This has been adequately covered by scholars much more competent in legal history than this author. Box 1 highlights the key landmarks in this history and readers should refer to this to provide some context to the discussion that follows. Instead the paper will focus on four main approaches to the question of the legal status of Jerusalem: state succession, self defence, *de facto* authority and UN sovereignty. When discussing Jerusalem in international law we should recall that there are at least two main phases – the pre-1967 and the post 1967 phase – and two geographical areas – an east and a west Jerusalem.

### ***State Succession and Self-determination***

The first approach combines the principles of state succession and self-determination. The first argues that Israeli and Palestinian claims are based on the premise that sovereignty is handed on as one state is replaced by another over a given territory. In the case of Palestine it is not clear which is the successor state following the termination of the Ottoman Empire. This in turn affects legitimacy accorded to the state successor state or states after the termination of the British Mandate. For example, there is debate as to whether British control over Palestine rose to the level of exercising sovereignty or whether sovereignty resided with the League of Nations or, indeed, with either. If it is not clear which is the new state that succeeded the Ottoman Empire neither is it clear to whom succession was passed on. Was it Israel, Jordan or the state-to-be Palestine to whom was sovereignty passed in 1948? In the case of Jerusalem the lack of clarity is further complicated by the fact that the will of the international community was expressed in the Partition Plan of 1947 which clearly called for the creation of two states but with Jerusalem as a separate entity as

an internationalised city. There is an argument that this position has fallen in abeyance over the passage of time and has been superseded by 242 which, however, as we have indicated, was not specific on the subject of Jerusalem.

Nevertheless, there are those who argue that despite the lack of clarity, it is the Palestinian Arabs who have legal sovereignty over the whole of Palestine. This position is based upon the notion that sovereignty is with the people. As self-determination is a right enshrined in the UN Charter (Article 1 (2)) and that the Palestinians have this right, their historical presence in Jerusalem also gives them a basis to claim the city as Palestinian and if they so wish as their capital. However, this view has not received a general consensus. Thus lack of clarity concerning the question of state succession and the lack of consensus on the applicability of self-determination as a principle for Palestinian claims to East Jerusalem, makes these approaches inconclusive in guiding us towards an answer on Jerusalem.

### ***Self-Defence and the Sovereignty Vacuum***

Closely related to the notion of state succession has been the view that Israel acquired title to Jerusalem by a lawful act of self-defence. This view holds that a sovereignty vacuum arose as a result of hostilities against Israel and it was obliged to occupy West Jerusalem in 1948 and again East Jerusalem in 1967. This view also regards that such occupations have, over time, given additional strength to Israeli claims. The Israeli government argues that its claims to East Jerusalem are stronger than those of Jordan, since Jordan had occupied Jerusalem illegally in 1948 and thus its claims to sovereignty are not valid. Setting aside the interpretation of what happened in 1948 and 1967 as acts of aggression against Israel, and thus that it acted in self defence, there is the issue as to whether filling a sovereignty vacuum is a sufficient basis upon which to base a claim for sovereignty or legal title. In addition, in the light of opposing claims to the city, the self-defence approach is also open to alternative interpretations. For example, a long term perspective on the issue of filling the sovereign vacuum out of self defence, would argue that such a position constitutes more correctly a “guardianship” or a “temporary authority” pending a peace agreement to resolve the status of the city, rather than that of legal title.

### ***De-facto Authority***

A third approach recognises that Israel has exercised *de facto* political authority over West Jerusalem since 1948 and the same over East Jerusalem since 1967, and that Jordan similarly exercised *de facto* political authority over East Jerusalem between 1948 and 1967. On one hand a claim to sovereignty put forward on this basis is

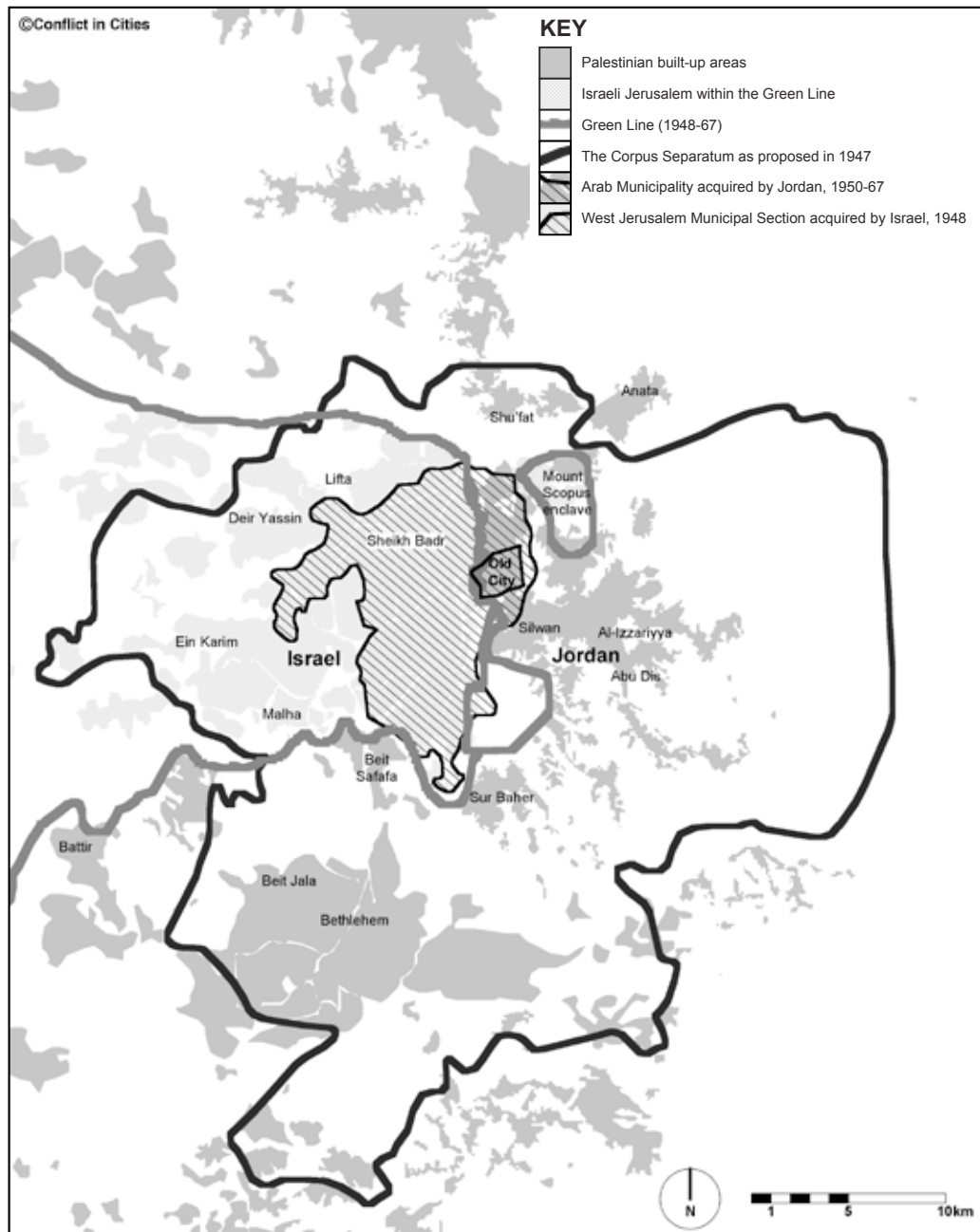


dubious due to the fact it occurred as a result of the use of force. On the other hand, with regard to Israeli sovereignty over West Jerusalem this approach has received a modicum of recognition and is tolerated by the international community by virtue of its acceptance of the borders of the Armistice Agreement with Jordan. In addition, implicit recognition is also contained in the international community's support for UNSCR 242 which calls for withdrawal of territories occupied in 1967 with no mention of West Jerusalem, acquired by Israeli in 1948.

Nevertheless, this is weak recognition since it is to some extent counter-balanced by the great reluctance of the international community to situate embassies in West Jerusalem and its practice of conducting as much diplomatic business as is convenient in Tel Aviv. Some, such as Watson, argue this has less to do with the reluctance to recognise Israeli sovereignty over West Jerusalem and more to do with a reluctance to confer recognition to Israeli sovereignty over East Jerusalem. Yet, the Israeli insistence on the integrity of the city make consideration of such motivational nuances rather tendentious. With respect to East Jerusalem a claim based upon this approach is no longer seriously advanced. The UN Security Council has repeatedly declared that Jerusalem is occupied territory and subject to 1949 Fourth Geneva Conventions. Indeed, UN resolutions and EU declarations rarely make any distinction between East Jerusalem and the other territories occupied in 1967. Clearly a Palestinian claim on this basis cannot be entertained but this impossibility does not necessarily strengthen the legitimacy of the Israeli claim to either part of the city.

### ***UN Corpus Separatum***

A fourth approach argues that the status of Jerusalem is determined by the Partition Plan of 1947 and thus the responsibility of the UN. UNGAR 181 recommended the creation of an international zone, or *corpus separatum*, around Jerusalem to be administered by the UN for a ten-year period after which there would be referendum to determine its future. (See Map 2) This approach applies equally to both West and East Jerusalem and is not affected by the occupation of East Jerusalem in 1967. To a large extent it is this approach that still guides the diplomatic behaviour of states and thus has greater force in international law than many of the other approaches. At its core, this approach can be characterised by the refusal to accept the claims of any of the parties to sovereignty over the city at the exclusion of the others. The problem with it however, is, as we have already noted, the degree to which the resolution is still active or has fallen in abeyance and has been superseded by 242. Some have argued that it is still active even if subsumed by subsequent Security Council and General Assembly resolutions. There is also the issue of the status General Assembly resolutions which are recommendations as opposed to Security Council resolutions which are legally binding. The different interpretations on the status of UNGAR 181



International Zone of Jerusalem as laid down in the Partition Plan (1947) & borders laid down by the Armistice Agreements (1949)

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make it difficult to turn to for a basis to determine title. Indeed the ten-year trusteeship over the city by the UN confirms the temporary nature of the status and thus does not provide a long-term prescription for the city.

From this brief overview one can see how there is a lack of consensus over the legal approaches and hence the validity of claims to title over Jerusalem. It should be noted that apart from the general Israeli view that were the victims of hostilities in 1948 and 1967 and therefore acted in self-defence, the lack of consensus occurs also within lines of national affiliation of the scholars and one cannot correlate any of the above approaches to a clear Jordanian, Israeli, or Palestinian position. There was a grudging acceptance over time by the international community that between 1948 and 1967 Israel exercised political control in West Jerusalem and Jordan did the same in East Jerusalem, and that in the event of a peace agreement between these two parties on the basis of the borders of the Armistice agreements, recognition would be forthcoming. However, since 1967 there has been an overwhelming consensus that the continuing and prolonged Israeli occupation of East Jerusalem in the post-1967 period does not lead to title and that an Israeli withdrawal (*pace* 242 ) remains the basis for negotiations over the city. The legal status of East Jerusalem as occupied territory has not been in question in international law.

In addition, what is also very clear is that international law in itself does not prescribe a detailed formula for dealing with the Jerusalem issue as a whole. What is required is a series of political decisions between the two parties, Israel and the PLO, in the context of an overall peace agreement. For this decision to have the support of the respective constituencies it needs to be based less on the balance of power now or that to come, but on fairness and the respect for religious and cultural rights, within an overall package. While fraught with difficulties, such a situation is also provides opportunities for development of a viable and functionally integrated city for the future which goes beyond the constraints of international law.

## **Opportunities and Challenges of Constructive Ambiguity**

In this section I want to show how that in the absence of a clear prescription by international law on the future of Jerusalem, there is a degree of flexibility in the way a peace agreement can be addressed. As already mentioned, there is a downside to the lack of prescription in that the party with *de facto* political authority, Israel, is able to strengthen its position on the ground unilaterally in many ways. The most controversial and far-reaching has been the intensive colonisation programme of building Israeli settlements in East Jerusalem which since 1967 has succeeded in creating a demographic revolution. Over 180,000 Israeli Jews now live in settlements constructed in East Jerusalem with the result that there are now more Israeli Jews



living in East Jerusalem than there are Palestinians. (See Map 4) The colonisation programme has also had a dramatic impact on property ownership and land use with 35 % of East Jerusalem now expropriated or under effective Israeli control and 80% placed beyond use of Palestinians through planning and zoning decisions. Closely connected to these policies has been the stifling of political, social and economic life through the stringent application of security considerations which have restricted residency and access of Palestinians to East Jerusalem. The erection of the separation wall between some of the inner and outer suburbs of East Jerusalem is the culmination of a “closure” policy which has been in existence since 1992. Taken together these acts have assisted in consolidating the Israeli physical control over Jerusalem, both west and east. In addition, the position of the US government that the final status of Jerusalem is to be determined by negotiations and the willingness of the international community to fall in line with this creates no pressure on Israel to reconsider its policies.

### **Box 1 Legal landmarks in the modern history of Jerusalem**

1922	British Mandate for Palestine: Provisions concerning the Holy Places
1947	UNGAR 181 (II) ( C : Part III ) The City of Jerusalem. Recommending an international zone to be administered by the UN for 10 years.
1948	Resolution of the 2 <sup>nd</sup> Palestine Arab Conference, Jericho. Proclaiming unity of Palestine, including East Jerusalem, and the Hashemite Kingdom of Jordan.
1949	Jordan-Israel: General Armistice Agreement. Unofficial map of armistice lines dividing Jerusalem.
1967	Application of Israeli Law to East Jerusalem: Law and Administration Ordinance (Amendment 11) Law; Municipal Ordinance (Amendment No. 6) Law; Protection of Holy Places Law.
1967	UNGAR 2253 calling upon Israel to rescind all measures which alter the <i>status quo</i>
1967	UNSCR 242. Concerning the withdrawal of Israeli armed forces and the termination of belligerency.
1968	UNSCR 252. Considers all Israeli legislative measures altering the status of Jerusalem as invalid.
1968	UNESCO General Conference Resolution 15C/3.343 concerning the preservation of cultural property in Jerusalem.
1978	Camp David. Letters of President Sadat, Prime Minister Begin and President Carter stating their positions on Jerusalem attached to the final statement.
1980	European Council Venice Declaration. (1.1.6.Middle East. 8) Not accepting changes to the status of Jerusalem.

1980	Israel' Basic Law: Jerusalem as Capital of Israel.
1982	Arab League Summit, Fez. Calling for creation of Palestinian state with Jerusalem as its capital.
1993	Declaration of Principles on Interim Self-Government Arrangements between Israel and the PLO. Permanent Status Negotiations and Jerusalem (Art. V) Right to participate in elections (Annex 1)
1993	Peres-Holst letters. Confirming the essential role of East Jerusalem institutions.
1995	Palestinian Election Law. Eligibility of East Jerusalemites to vote in Palestinian elections.

However, this paper will also argue that the lack of prescription in international law also creates an opportunity for a resolution on Jerusalem that can encompass more inclusive political arrangements. Before doing so we need to lay out of number of building blocks for the argument. These can be consolidated into two main points: first, the often overlooked fact that Jewish, Zionist and Israeli perspectives on Jerusalem have not been immutable and been subject to political and contextual changes.

At this stage one should make clear that by drawing attention to the possibility of a variety of icons and sacred foci and their changing nature, is not to enter into the debate over whether which religious community has greater rights to the city. Instead it serves more to emphasize more the fluidity of positions. A similar case can be made for changing perspectives in Muslim, Christian, Palestinian and Arab discourses. For example, there is a debate pertaining to Muslim discourses on the holiness of Jerusalem based on the revival in the early 20<sup>th</sup> century of the al-Buraq legend. In this legend the Prophet Muhammed's horse is tethered to the Western Wall during his Night Journey to Jerusalem. Similarly, in the Christian tradition there are denominational variations over the location of Golgotha and the Garden Tomb, with some Protestant sects establishing rival sites outside the city walls. The focus in this paper, however, is on the Jewish, Zionist and Israeli discourses, since by virtue of the political and military superiority of Israel these are the discourses which matter in trying to identify room for negotiations.

The second building block to my argument is that the Israeli state's *de facto* authority over East Jerusalem has been a much more nuanced, scattered and diluted an authority than most policy-makers and the public are aware of. This creates a situation in which Israelis have actually less and the Palestinians have had more political control in East Jerusalem than the formal positions declare.

## *Changing Jewish, Zionist and Israeli Perspectives*

The first point to be established is that Jerusalem was not always so central in Jewish and Zionist political and religious discourse as it has been since 1967. While clearly the religious link between Judaism and Jerusalem is very strong, there is also much evidence to suggest that this has undergone some changes. For example, the current emphasis on the centrality of the Western (Wailing) Wall has to be set alongside the prevalence in the 15<sup>th</sup> century of Jewish rituals which encompassed Mount Zion and the Mount of Olives from where lamentations over the destruction of the Temple took place. Similarly the official Israeli history of the Western (Wailing) Wall refers to the absence of a mention of the Wall in the written sources of the medieval period.

It is also very much accepted among historians that Jerusalem played a secondary place in Zionist discourse, and that in fact it was considered as a burden in their pre-state strategies. Associated with the past and with decadent orientalist imagery, it did not fit into the vision of the brave new world of the kibbutz and the metropolis of Tel Aviv. As a consequence it did not receive so much attention in the settlement planning of the first and second *aliyas*. Indeed, some have even argued that the Zionist leadership was prepared to sacrifice Jerusalem in its pursuit of the establishing a state.

More recently there has been an examination of the nature of the Israeli consolidation over Jerusalem which has indicated a number of ambiguities in its position. Studies by Lustick have drawn attention to the fact that Israel seems to have refrained from fully annexing the eastern part of the city by virtue of not imposing citizenship on the inhabitants in the same way as it did so in areas outside the 1949 borders in Galilee and the Little Triangle ceded from Jordan in the Armistice Agreements. Furthermore, as he points out, the Basic Law of 1980 declaring Jerusalem as the “complete and united” capital of Israel omitted referring to any specific boundaries. Indeed his analysis is that the ambiguity over annexation is a deliberate act of policy designed to avoid international censure and to maintain internal unity over the question of Jerusalem. In 2000 an amendment was passed to the Basic Law whereby it could not be repealed without a two-thirds majority in of the Knesset. While clearly an attempt to consolidate Israeli hegemony it merely serves to underline its fragility and lack of consensus.

One important effect of this ambiguity and changing perspective is the failure to construct a hegemonic presence in East Jerusalem. Despite the huge investment in housing, infrastructure, political and diplomatic capital, despite the marginalisation of Palestinian representation, the expense and deployment of military personnel, East Jerusalem is still regarded by the international community as occupied territory by its own citizens and by many, if not most Israelis as not quite Israel. Poll findings routinely identify most areas of East Jerusalem as dispensable in the eyes of Israelis

if it is in the interests of a broader peace agreement with the Palestinians. A recent poll indicates that up to 55% of adult Israelis are willing to relinquish the Palestinian neighbourhoods in return for a peace agreement with Palestinians. Indeed, on closer examination, the ambiguities of Israeli policy in East Jerusalem add up to what can be referred to as the “multiple borders of Jerusalem” in which Israeli political control and claims to sovereignty are undermined by a range of lacunae and anomalies.

### ***The Multiple Borders of Jerusalem***

At the Camp David summit in 2000 the Israeli offers were based upon a perception of their political control and presence in East Jerusalem which did not accord with the reality on the ground. When Israel occupied East Jerusalem in 1967, one of the first laws it passed extended the West Jerusalem municipality to encompass the Jordanian Arab Jerusalem municipality and to areas around it. (See Box 1) On the same day, however, it passed a law, the Law and Administration Ordinance Law (see Box 1.) whose ostensible purpose was to integrate East Jerusalem into the Israeli legal system. A significant part of this law was actually the exemptions it contained to make the Israeli presence less intrusive in East Jerusalem and has led to the “multiple borders of Jerusalem”. For example, East Jerusalem was exempted from many health and safety regulations, from labour laws and from those concerned with the registration of businesses and money-changers. As a result, the Palestinian Arab commercial system was allowed to continue to follow practices of the Jordanian era. Significantly, the draconian Israeli Absentee Property Law of 1950 was amended to exempt the residents of East Jerusalem from its provisions who as Jordanian, and therefore technically “enemy”, were liable to have their property confiscated. The same law also prevented them from claiming their property in West Jerusalem.

In the same vein, concessions were made to the Muslim and Christian religious establishments which allowed a significant degree of autonomy in their internal administrative arrangements over the Muslim and Christian Holy Places. One should recall that significant parts of East Jerusalem and, in particular, the Old City are owned and administered by the churches or an Islamic foundation, the known as the Awqaf Administration. The Awqaf Administration during most of the period since 1967 was funded by the Jordanian government who also appointed most of the senior personnel. So we had a situation where there was a semi-autonomous administration employing several hundreds of people and carrying out significant building works and communal activities and being directed by both the Jordanian government and the PLO in the heart of the territory that Israel was claiming as its capital.

The Israeli presence in East Jerusalem is limited in other ways. For example, the education system and curricula in Palestinian schools in Jerusalem is almost



identical to that in the West Bank and under Palestinian jurisdiction; the water supplied to the northern Palestinian suburbs is piped by the Palestinian Ramallah Water Undertaking while electrical power in all Palestinian areas is supplied by the Palestinian owned East Jerusalem Electricity Company. These factors should also be seen in the context of the wholesale neglect of the Palestinian residential areas by both the Israeli Municipality of Jerusalem and the central government. According to a 1994 report, while Palestinians made up 28% of the city's population, they only received between 2 and 12% of the municipal budget across the various departments. Another report detailed discrepancies such as the 680 kilometres of roads in West Jerusalem in contrast to only 86 kilometres in East Jerusalem, 1,079 public gardens in West Jerusalem and only 29 in East Jerusalem and 650 kilometres of sewage lines in West Jerusalem as opposed to only 76 kilometres in East Jerusalem. Gaps in services between the two communities of over 500% have been identified. Indeed, the disproportion of investment is possibly even greater than these figures suggest when one realises that funds for Route One, one of the city's major road projects and for the Jerusalem football stadium in west Jerusalem were taken from funds targeted for the Palestinian Arab sector.

These policies have led to a seriously inadequate provision of basic municipal services, infrastructural development and welfare programmes in the Palestinian areas of East Jerusalem. In an attempt to fill the vacuum left by the Israeli state, Palestinian and foreign charitable associations, religious organisations, the PLO and the Jordanian government have all stepped in. The result is that East Jerusalem consists of a series of Palestinian enclaves detached to some extent from the Israeli polity. It is significant that many of these enclaves have seen the revival of customary and tribal law among the Palestinian residents. After nearly forty years of occupation the only element of the Israeli state that is visible in these areas is the restrictive planning laws and the security forces. This could not have been the vision and the intention of those who passed the various laws of absorption in 1967 and indeed of the Basic Law in 1980.

One could also argue that the Israeli failure to impose citizenship, and the persistent boycott of Israeli institutions and municipal elections by Palestinian residents, the collapse of the neighbourhood council schemes during the first *intifada*, led to a network of alternative representative bodies and a drift towards referring internal issues to the Palestinian National Authority and its appointees thus ignoring the Israeli institutions such as the Knesset and Municipal council. An attempt was made by the Netanyahu government after 1996 to shut down this avenue by the closure of PLO-run Orient House and professional organisations such as the Jerusalem Chamber of Commerce. However, in their place we have seen the emergence of the Awqaf Administration and church leadership, al-Quds University and a myriad of smaller research and social institutions trying to take up the mantle of representation rather than an recourse to Israeli institutions, (albeit since the death of Faisal Hussein,

KEY



Palestinian utility companies supplying electricity



KEY



Palestinian utility companies supplying water



KEY



Palestinian control over schools' curriculum and  
Palestinians voting in Palestinian Presidential  
and Legislative council elections



The multiple borders of Jerusalem (2006)

GENERAL KEY



Palestinian built-up areas

Israeli settlements

Israeli military base

Israeli Jerusalem within the Green Line

Green Line (1948-67)

Israeli Municipal Boundary



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coordination has been reduced). The failure of Israeli channels of representation to take root has only been exacerbated by the Palestinian electoral law agreed with Israel under the Oslo Accords which allowed East Jerusalemites to participate in Palestinian Presidential in legislative council elections. The election of Jerusalem parliamentarians while ineffective in delivering benefits to their constituencies has formalised the exclusion of Palestinians from the Israeli polity. (Klein, 2001)

It is important not to overstate this argument. We should recognise, for example, that the health and National Insurance system in East Jerusalem is a prime motivation for many East Jerusalemites, who had sought residency in the outlying suburbs in the seventies and eighties, to try and return to the central Israeli-controlled parts of the city in the nineties. Nevertheless, taken as a whole, these exemptions, lacunae, anomalies, passive resistances add up to the city having numerous sub-political borders. (See Map 5) For sure, we have a formal political or municipal border, but there are religious borders which ignore both the Armistice lines and the post 1967 borders, there is a commercial and banking border and an educational border which comes right up to the Green Line, a water border that includes parts of East Jerusalem into the West Bank, a electricity border that does the same, a service provision border that creates neglected enclaves within the city, an electoral border which runs down to the Green Line also. Finally and conclusively, since the first *intifada*, there has been a separate security border which has not been congruent with the municipal borders and which now form the basis of the separation Wall running through Jerusalem referred to earlier. While changing significantly the points of access between the outer suburbs and the centre of Jerusalem, the overall point that this new security border is also not congruent with the state borders, municipal provision borders established in 1967. Trying to identify which parts of East Jerusalem are fully under Israeli jurisdiction, or are as Israeli as the pre-1967 Israel parts are Israeli, is a complex if not impossible task.

## **Jerusalem and the Peace Process**

The previous two sections have established that there is greater flexibility in both the corpus of international law on the future of the city and in the antecedents and discourse of the dominant Israel/Jewish party to the conflict. In this section we turn to an examination of how the future of Jerusalem has been dealt with in discussions among policy makers and academics prior to and in the course of what has been termed the peace process since the Oslo Accords in 1993. In essence, we consider what have been the attempts to operationalise the different perceptions of international law on this issue. From this point we can then turn to consider what would be the main elements of a rights-based approach to the Jerusalem issue and how and if it differs from previous suggestions.

Peace proposals on Jerusalem are not thin on the ground. A publication in 1995 listed 63 of the main ones, and there have been scores more put forward since that date. In general the peace proposals can be placed on a continuum between two poles, with one pole emphasizing the unity and integrity of the city and the other emphasising its binary nature and diversity. An example that can serve as a template for the unity end of the continuum is that contained in the UNGAR 181 and the *Draft Statute for Jerusalem* prepared by the UN Trusteeship Council in 1950. In the Statute, the city would be internationalised and placed under a UN-appointed governor for a period of ten years after which a referendum would be conducted to determine its final status. A legislative council with equal numbers from each religious community would be appointed and a judicial system be made responsible to the Trusteeship council. Municipal functions would be delegated to autonomous units but policing arrangements would be the prerogative of the Governor.

At the opposite end lies the position enunciated by President Sadat in his letter attached to the Camp David Agreement in 1978. Here the President summed up the Arab and PLO position of the time which was that East Jerusalem would be under Arab (Palestinian) sovereignty and an integral part of the West Bank. All Israeli measures altering the *status quo* would be rescinded but access to and internal administration of the Holy Places would be respected. A joint municipal council would oversee the essential functions of the city and in this way the city would be undivided.

The most well-known of the proposals which can be placed somewhere between these extremes are those of Professor Walid Khalidi who proposed a “joint inter-state Great Municipal Council”, and Drs. Sari Nuseibeh and Mark Heller who suggested devolving some aspects to neighbourhood councils and others to a “metropolitan” government. A sub-set of these proposals which can be placed along this continuum, but is of different nature are proposals which focus on the internationalisation or the “extra-territorialisation” of the Holy Places. In essence, religious sites are placed under a separate regime in so that the international community can be assured that access and their protection is safeguarded. The latter has been, until the Camp David summit of 2000, the consistent Israeli position and most of its subsequent positions are derived from this starting point. A variant of this approach was put forward by the Jordanian Ambassador to the UN, Adnan Abu Odeh who argued for the extra-territorialisation of the Old City.

The above illustrate the positions prior to the commencement of the peace process. As the process proceeded we can see some variations which explore the notion of a dual capital in more detail. One of these is the “non-paper” agreement between the former Israeli Justice Minister Yossi Beilin and at that time PLO General Secretary Mahmud Abbas (Abu Mazen) known as the Abu Mazen-Beilin Plan. The Plan was never officially published and it always remained a document for discussion. However, the detailed and wide-ranging nature of the plan and its status as the basis

for Israeli and American proposals during the Camp David summit in July 2000 has made it a reference point and starting point for serious negotiation. The plan proposed a Joint Higher Municipal Council and an Israeli and Palestinian sub-municipality, responsible for the municipal concerns of their respective citizens and their property. The Plan also proposed a special regime for the Old City and the “preservation of the unique character of the Old City” was to be referred to a Joint Parity committee appointed by the two sub-municipalities. In this plan Palestinians would have extraterritorial sovereignty over the Haram ash-Sharif. The significance of this point is that the Palestinian sub-municipal areas did not come up to the 1967 borders, thus detaching the Old City and some of the Palestinian suburbs from the Palestinian sub-municipality and capital.

In 2000, the Camp David summit between Israel and the PLO and hosted by the US President Clinton did not produce the hoped-for breakthrough. Although there was no formal record of the talks, from media leaks and post-mortems we can discern a number of proposals and counter-proposals. Here we actually see the Israeli party offering less than in the Abu Mazen-Beilin plan. Palestinian counter-proposals based upon UNSCR 242 were rejected out of hand by the Israelis as politically unfeasible. The Israeli proposals comprised two main elements: first, they would relinquish control over the northern Palestinian dominated suburbs of the city to the Palestinian Authority and devolve administration in the central areas of East Jerusalem to Palestinian bodies. Second, Israel would retain overall sovereignty and security control over East Jerusalem including the Old City. As these came nowhere close to Palestinian aspirations and did not take into account 242 in any meaningful way, it was not surprising that they were rejected. Indeed, as we can see from the previous section, from a Palestinian perspective, the Israelis were not offering them much more than they already had. However, as the former Israeli Deputy Mayor of Jerusalem, Meron Benvenisti, declared: “A taboo has been broken and Israel has participated in talks on Jerusalem that were focused on a partition of the city, even if the word ‘partition’ was not explicitly used. These two facts have created an irreversible situation.”

In the attempt to rescue the peace process, US President Clinton suggested a framework, which has become known as the “Clinton Parameters”, which would have led to the partition of the city, including the Old City, on demographic criteria. He further recommended Palestinian sovereignty over the Haram ash-Sharif and Israeli sovereignty over the Western Wall and special arrangements for excavations underneath the Haram.

Both sides have agreed that the subsequent talks at Taba in 2001 built on the Clinton parameters and that there was further progress over the question of Jerusalem. As at Camp David, there was no formal agreement reached, but a record of the meetings at Taba, compiled by the EU Envoy Ambassador Miguel Moratinos, indicate a number

of important developments. Both sides agreed that Jerusalem would be the capital of two states. In addition, Palestinians were willing to discuss Israeli sovereignty over Israeli settlements in East Jerusalem and to accept Israeli sovereignty over parts of the Old City. For their part Israel accepted Palestinian sovereignty over Palestinian suburbs up to the Green Line. There was no final agreement on the Holy Places but only agreement to continue discussions on the concept of a Holy Basin to encompass religious sites and special arrangements regarding the Haram ash-Sharif. These were important steps towards on one and actualising UNSCR 242 yet, on the other hand, recognising that it could not be the basis of a long-term agreement which met the interests of both sides simultaneously.

The most recent public negotiations between the two sides which have taken place on Jerusalem were the Geneva Initiative (sometimes known as the Geneva Accords) whose interim plan was launched in December 2003. Although having no official status they comprised many of the leading figures in or advised the negotiating teams that met in Camp David and Taba. The Initiative illustrated that further progress on a number of key issues was achievable and it mapped out possible trajectory for future official negotiations. A key instrument in the Geneva Accord is third party intervention and monitoring. It proposes, significantly, a number of channels for external intervention and involvement. For example, an Implementation and Verification Group and an interfaith council would be established and a central reference for activities in the Old City would be UNESCO with its protocols on conservation and heritage. This suggests a growing recognition on the Israeli side of the positive role the international community can play.

Like Taba, the Geneva Initiative proposes two capitals for two states with two municipalities responsible for their respective areas. There would be coordination committee appointed by the municipalities to oversee the economic development of the city as a whole. As opposed to a Holy Basin idea, discussed in Taba, there would be special regime for the Old City and there would be Israeli sovereignty over the cemetery on the Mount of Olives and the Western (Wailing) Wall. Palestinian sovereignty over the Haram will be phased in according to an agreed timetable. On the central issue of the areas of respective sovereignty the Accords are not clear as they refer to a map which has not been published. With respect to the settlements in and around Jerusalem the Initiative proposes their evacuation according to an agreed timetable and to territory exchanges.

The Geneva Accords was greeted by some caution by the Palestinian leadership and outraged scepticism by their Israeli counterparts, but most of the ire on both sides were directed at the clauses concerning the refugee issue and not the Jerusalem issue. Taken together with the Camp David summit and the Taba talks what these trends in negotiations reveal is a gradual movement away from the maximalist Israeli

positions prior to the peace process and towards UNSCR 242 in the form of an Israeli withdrawal and Palestinian sovereignty over large areas of East Jerusalem, and a tacit parallel acquiescence on the part of Palestinians to the new realities in Jerusalem. The fact that this movement is limited and incremental cannot disguise the fact that from being “non-negotiable” in the eighties (pre-Oslo), Jerusalem became “negotiable-at-some-deferred-stage” in the nineties (Oslo) to “negotiable-in-detail”, including territorial exchanges, in the 21<sup>st</sup> century (post Camp David and Taba).`

The current alteration to the landscape and physical use of the city by the construction of the separation Wall and the unilateralist policies of the current Israeli government does not, for the time being, alter this trend. In this paper we are discussing a peace agreement that has some chance of being durable rather than an imposed political settlement kept in place through coercion. If negotiations are to be resurrected they are unlikely to advance on the basis of Israeli physical control over East Jerusalem that the separation Wall delineates. Indeed, in line with Lustick’s argument over the failure by Israeli to attain a hegemonic status over Jerusalem, referred to in the previous section, one should note that recent developments in Israeli political discourse are indicating a reversal of the previous Israeli position. A new consensus is building up on a much less maximalist position. While Israeli Prime Minister Ehud Olmert declared he “will never, never agree to a compromise on the complete control over the Temple Mount [al-Haram ash-Sharif]. And not only the Temple Mount but also the Old City, Mount of Olives and every place that is an inseparable part of Jewish history”, he went on to add, “We don’t pray facing Bir Naballah or Issawiya, or any of the other Palestinian neighbourhoods that have been added to Jerusalem by someone who drew a map one day.”

Further illustration of this shift can be seen in the proposals by Knesset member Otniel Schneller, advisor to Olmert but also, more significantly, a former leading figure in the settler movement. He suggested that while Israel would retain the Old City and immediate environs, it would not seek to hold onto some of the Palestinian suburbs. Thus while the construction of the separation barrier is clearly an impediment to the resumption of peace negotiations it should obscure the fact that there has been an unravelling of the Israeli consensus on Jerusalem since 1993, and that a return to the 1967 border (UNSCR 242) subject to some critical territorial exchanges is not as distant a prospect as it was 10 years ago.

## **A Rights-Based Approach**

The context and facts presented above bring us to the conclusion that the solution to the Jerusalem issue is less encumbered by international legal prescriptions and political discourses than it might first appear. The Palestinian acceptance of UNSCR

242 as a basis for negotiation for Jerusalem is already a major concession by the Palestinian leadership in that it implies an acceptance of the loss of Palestinian land in West Jerusalem. Indeed, it is a concession that has not been fully reciprocated by the Israeli side, but as we have seen, the grounds for refusing such a reciprocation are much weaker than asserted. The Israeli claim to title over East Jerusalem has not been accepted by the international community and its de facto authority has, despite nearly 40 years of occupation, actually diminished. In this broad context, setting aside the immediate unstable conditions, the scope for a negotiated solution is still very much a possibility. In this section I first consider what the principles are which will help frame a solution to the question over the future status of the city. I then consider how Israeli and Palestinian interests will impact upon that framework and how they may be accommodated. I conclude by arguing that while the separation Wall dramatically alters the current configurations on the ground, it also brings into sharp relief many unresolved questions over the status of East Jerusalem as part of Israel, and that ultimately it offers no solutions to Israel. Instead a rights based approach based on international law can have more opportunities than first appears.

A solution for Jerusalem will need to be based upon a framework encompassing four overarching principles: compatibility, reciprocity and both a retrospective and a prospective perspective. By compatibility I refer to the overall negotiating context. Whatever is agreed on Jerusalem should be both consistent and compatible with agreements in the other final status negotiations such as borders and security, refugee, settlements. Border permeability, employment and residency rights, economic and fiscal arrangements, security and policing cooperation should all be compatible with other arrangements negotiated. For example, it would be unworkable to agree to 'hard' or impermeable borders between most of the West Bank and Israel, but have 'soft' or permeable borders for the areas between East Jerusalem and West Jerusalem. Militants opposed to the agreement on both sides could make use of this disjunction to enter each other's territory via Jerusalem. Permeability of the borders would have to be consistent in one way or another. However, the principle of compatibility need not be absolute. For example, as a result of the unique status of the city as the site of Holy Places for three religions and of two national capitals, the requirement for compatibility should not exclude some special arrangements for Jerusalem. The agreement would need to address questions over access to holy places, taxation on religious property and the operations of embassies in a way which reflects this special status. Issues such as the settlements and refugee property restitution or compensation would need to have this same mix of compatibility with the broader agreement and some special arrangements for the Jerusalem case.

The second principle of reciprocity may appear implausible, particularly in the current balance of power between the two parties, but in reality provides considerable flexibility. Here, issues such as the ceding of title to land, the recognition of restitution



claims, of access and the transfer of legal jurisdiction from one side to the other side would all be in exchange for other 'goods'. In this way each metre shift in the border, each municipal service transferred, and each legal jurisdiction obtained by the Israeli side, would be accompanied by a *quid pro quo* for Palestinians, and vice versa. However, it is not often understood that there is a degree of flexibility in the principle of reciprocity. To put it simply, the 'goods' exchanged need not be the same goods. Clearly territorial exchanges will play an important role if negotiators seek to avoid excessive further political and social disruption from the evacuation of settlements. But land can be exchanged for other goods, such as international monitoring of security procedures, guarantees of access, economic development, and environmental cooperation. In addition, goods can be disaggregated both physically and temporally so that particularly contentious exchanges of goods can be phased in over an extended period. Some settlements, for example, can be parcelled up and evacuated over an agreed period. Clearly, this principle can only be implemented if premised on UNSCR 242 and a Palestinian acceptance of Israeli sovereignty over West Jerusalem that is met by a reciprocal Israeli recognition of East Jerusalem as the Palestinian capital by Israel. Despite the weakness of their overall position, the Palestinians are stronger than Israel in one area that is vital for Israel: it is only through an agreement with the Palestinians on Jerusalem that Israel can obtain international legitimacy of their presence in the city and recognition of West Jerusalem as Israel's capital. Similarly, the Israeli aspiration for an "end of conflict" clause in a peace agreement with Palestinians offers the Palestinians another form of "goods" which can be exchanged.

The third principle is that of retrospective-ness. By this I mean that most agreements comprise an element of making good what was wrong in the past. This can encompass a range of issues from the withdrawal of armed forces, the recognition of a grievance hitherto unaddressed through to reparations for the harm done during the course of the conflict. To a large extent 242 and subsequent UNSCR resolutions on Jerusalem provide the basis for some this, but not all. Both sides have concerns that predate 1967 and UNSCR 242. For the Israeli side, there are concerns about the Jewish holy places, including the cemetery on the Mount of Olives, and concerns for the property in the Jewish quarter of the Old City, in Silwan and the surrounding area. There are similar concerns on the Palestinian side. These issues need addressing in either the broader negotiations concerning property restitution and compensation, or as part of the Jerusalem ones.

The final principle is of prospective-ness. Here we are looking forward, to see what is required from the agreement to allow the city to prosper for both sides. What is required is an agreement which provides some economic viability to the city and that allows its urban fabric and infrastructure to develop to meet the needs of the residents on both sides, as well as to the thousand of visitors which will surely come to Jerusalem after a peace agreement. It will need to sensitively accommodate cross-

border cultural and religious attachments. In addition, the agreement will need to take into account the highly charged nature of a politically shared city with such huge religious symbolism contained within it with some extra security cooperation and guarantees. Thus it appears that an agreement which is intended to establish a stable basis for the city in the future will require a significant degree of joint activity, high level consultation across a range of issues and a degree of third party involvement, at least for the early stages. With these four principles in mind, we can now discuss ways in which a right-based approach can accommodate both Israeli and Palestinian interests in the city

Four major Israeli interests can be identified in their claims to Jerusalem. The first would be the international recognition of Jerusalem as its capital and the legitimacy of national institutions in the city from the president's residence, the Knesset, the Supreme Court of Justice and the Israeli municipality and the application of its laws in an agreed territory. Whatever agreement is reached, a *sine qua non* of Israeli acceptance would be the acknowledgement of its place in Jerusalem by the international community, including by countries of the Arab and Islamic world. If Palestinians were satisfied with other aspects of an agreement, this would be forthcoming.

A second important interest is that of access and control over the Jewish holy places. Specifically, this would include Israeli sovereignty over the Western Wall and the cemetery on the Mount of Olives under an extraterritorial arrangement. Special arrangements could also be negotiated over an Israeli enclave in the Jewish quarter of Old City stopping short of full sovereignty but according Israeli residents there great latitude, depending upon the kind of administrative framework established for the Old City and Holy Places. Connected to the question of the Holy Places is recognition that excavated sites will be accorded respect and be conducted with transparency in line with international standards.

The third major interest is the right to pursue good governance in terms of cooperation with Palestinians in service provision, regional and urban planning and the safeguarding of security of Israeli residents. This would require a strategic administrative cooperative structure, such as a metropolitan council, close cooperation on legislation and extradition, and a partnership with Palestinian security forces involving some Israeli presence outside its sovereign territory, such as the monitoring of access points to Jerusalem in an interim phase.

Finally, in view of the length of time elapsed since the construction of settlements, the position of Israeli residents in East Jerusalem should be considered. Their status as citizens can be addressed either through territorial exchanges, which will allow some of the settlements to remain under Israeli sovereignty or by a phasing in of Palestinian

sovereignty to provide them with time to evacuate in an orderly way. An offer of Palestinian citizenship and compensation for relocation should also be offered under the terms of the agreement.

On the Palestinian side, the rights are identical with those of the Israelis with respect to the first three: international recognition of the city as the Palestinian capital, access and control over Holy Places and good governance and security. The Palestinian side, in addition, can legitimately claim some additional rights with regard to refugee property in West Jerusalem. The way to address these concerns would be to decouple the issue of sovereignty from that of ownership to allow either restitution or compensation. This was the approach followed by the signatories of the Dayton Peace Agreement which included far-reaching provisions to deal with the refugee issue. Although it was not adopted, this approach also informed the Annan Plan for Cyprus, and has set a benchmark for international norms on reparations. Both these approaches allowed for a significant degree of redress but in a manner which is framed by the overall political structures. It is also important to recognise that for the Palestinian side, any territorial exchanges and cooperation over security and economic activities envisaged in both East and West Jerusalem would need to be supplemented by two further rights: the right to reverse the planning decisions and land expropriations of the past 40 years and to establish contiguity between East Jerusalem and the West Bank.

In a situation where political instability and short-term security consideration override longer term perspectives on the future of the city, the distance to travel from where we are now to that envisaged above is considerable. The gradual fragmentation of the PLO and Palestinian Authority and the unilateralism of the Israeli government suggest that no negotiations will bear fruit in the coming few years. In this event, the 'hard' border in the form of the separation Wall being constructed by the Israeli government will impinge harshly on Jerusalem. In essence, the harder the border between Israel and Palestine, the further east of Jerusalem it will likely to be.

In this sense the Wall runs absolutely counter to the settlement policy of the past. That policy was designed to pre-empt an Israeli withdrawal by making the separation between the two communities impossible, and in order to isolate East Jerusalem from the West Bank hinterland. That objective has now been abandoned by the unilateralist policies of Israel. The Wall now has to encircle Palestinian suburbs but not Israeli settlements so that it twists and turns around the hills of East Jerusalem and has to go further east to incorporate the settlements.

If this is to be the new permanent border between Israel and the putative Palestinian states then it will pose several dilemmas to the new Israeli government. It will have to deal with the multiple borders issue and the changing Zionist discourse on Jerusalem which recognises that not all of Jerusalem is Jewish Jerusalem, discussed above. For

example, if it decides to impose citizenship on the Palestinian East Jerusalemites on the Israeli side of the border, this would alter the demography of Israel and have electoral consequences that would enhance the influence of Palestinian Arab parties. In addition, it will raise the dormant issue of their rights to property in West Jerusalem. If it decides to leave them in the current state of legal limbo this would undermine its authority and its claim to sovereignty in the eyes of the international community and delay once again its objective of international recognition. Furthermore, the separation Wall will re-ignite the struggle over the education curriculum in the Palestinian sector which took place in the 1980s with its accompanying strikes and rioting students. It may oblige the Israeli government to try again to coopt the religious leadership in an international political climate where there are increased sensitivities to religious interference and where there is a much greater degree of pan-Islamic and pan-Christian organisation that will be able to resist these attempts. Finally, the separation Wall will oblige the municipality to re-establish its role as the primary service provider in East Jerusalem with the huge costs that entails. In sum, the separation Wall and the current policy of unilateralism will create even more problems for Israel with regard to Jerusalem.

These dilemmas confronting Israeli policy-makers make the discussion of a rights based approach relevant and urgent. They also strongly confirm that a solution can only be based along the lines outlined in this paper: that of recognition of the centrality of international law and its appropriate amendment to take into account changes on the ground and the wider negotiation context. This paper has illustrated that international law lack both a clear prescription over the future of Jerusalem and a degree of ambiguity that allows for greater room for negotiation that is often recognised. It has also sought to demonstrate that the political discourse on Jerusalem, despite the polarity that exists in policy and practice, is much less entrenched than in the pre-Oslo period. By combining these two observations and introducing the discourse of a rights-based approach this paper has also shown how a resolution can be arrived at. By recognising the rights, claims and interests of both sides of the conflict in the context of legal flexibility and changing elite aspirations, it is possible to delineate the basic prerequisites of an agreement.

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