

# JERUSALEM LETTER

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## ISRAEL'S POSITION ON JERUSALEM AND INTERNATIONAL NORMS FOR THE HOLY PLACES

Enrico Molinaro

### **The Political and Territorial Dimension / The Incorporation of Eastern Jerusalem / The Religious Dimension / The Binding Legal Effect of Unilateral Declarations / The Hypothesis of an "Objective Regime"**

[Editor's Note: The following piece was prepared by a young Italian legal scholar who has been doing research on the status of Jerusalem in international law. His work reflects a sympathetic European perspective and is also notable for its emphasis on shifting international law issues from questions of sovereignty to questions of jurisdiction, one of the new trends in international law that has become particularly appropriate as modern statism gives way to globalization and the intertwining, in a variety of different ways, of what were once considered the sovereign powers of separate states.]

Looking at the Israeli position on Jerusalem from the aspect of international law involves two major dimensions: the political one, dealing with questions of boundaries and territorial jurisdiction, as well as the rights of the religious communities in Jerusalem, with special reference to the Holy Places. This review considers the question of the legitimacy of the present Israeli control of the city and then focuses on the religious dimension of Jerusalem.

### **The Political and Territorial Dimension**

Is the international legal condition of Jerusalem one of a unitary body or two separate sections? Looking at Israeli policy vis-à-vis the status of Jerusalem after 1967, Israel attempts to view the city as a single territorial unit, as it always had been during the thousands of years of its history; the only exception was during the period 1948-1967, from the first Arab-Israeli war to the Six-Day War during which its eastern part was administered by the Kingdom of Jordan, the western part by Israel.

On 27 June 1967, in order to include east Jerusalem in Israel's jurisdiction, the Knesset passed the Law and Administration Ordinance (Amendment No. 11) Law, 1967, authorizing the government to apply the law, jurisdiction, and administration of Israel to any area which was formerly part of Mandatory Palestine. The official English translation of the Law is as follows: "The law, jurisdiction and administration of the State shall extend to any area of Eretz Israel designated

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by the Government by order."

On the same day, the Municipalities Ordinance, 1936 (originally enacted under the British Mandate), was amended to allow the Minister of Interior to enlarge, by proclamation, the area of a particular municipality by the inclusion of an area to which Israeli law, jurisdiction, and administration had been extended.

The following day, the government issued an appropriate order applying Israeli law, jurisdiction, and administration to the municipal neighborhoods of Jerusalem that had been under Jordanian control prior to June 1967, as well as to other adjacent areas outside the municipal boundaries of the city. The Minister of Interior then enlarged, by proclamation, the municipal area of the city of Jerusalem to include those neighborhoods and areas.

### The Incorporation of Eastern Jerusalem

Let us first consider the Israeli position on the legitimacy of the incorporation of the eastern part of the city; indeed, should the control exercised by Israel of that section of the city be considered lawful, then, *a fortiori*, it seems that one may not object to the Israeli right to administer its western section, controlled by Israel since 1948. Those who maintain that Israel lawfully exercises its sovereignty over the whole of the city claim that Israel occupied eastern Jerusalem by a lawful act of self-defense and thus was entitled to fill the "vacuum of sovereignty" which existed until then. But how does one apply the principle of self-determination to this case?

If we consider the fact that between 1948 and 1967 Jerusalem had been divided, the question may be raised whether the principle of self-determination should be applied to the city as a single territorial unit, considering the nearly twenty years of division as just a long, irrelevant, aside. In fact, one may find it difficult to distinguish the status of any annexed section of Jerusalem after 1967 from that of any other part of the territory administered by Israel as a result of the Six-Day War, the only difference being established by the border of the Jerusalem municipality and the Israeli attitude vis-à-vis the two sections of the territory.

From this perspective, Yehuda Blum, professor of international law as well as former Israeli Ambassador to the United Nations, maintained that "The legal standing of Israel in Judea and Samaria (West Bank) is thus that of a State which is lawfully in control of territory in respect of which no other States can show a better title." The author refers thus to "other States," i.e., Jordan, which, according to his point of view,

having acted aggressively both in 1948 and 1967, "is not entitled to reversionary rights of a legitimate sovereign."

Moreover, if one has to appraise the relative strength of the opposing claims to sovereignty, even the mere actual and effective military control of the State of Israel on the territory in question may be taken into account. As Professor Robert Jennings has noted: "When we come to look more closely at the various modes which international law recognizes as creating a title to territorial sovereignty we shall find that all have one common feature: the importance, both in the creation of title and of its maintenance, of actual effective control."

Not all Israeli scholars share Prof. Blum's opinion on the legal status of Jerusalem in international law. According to Professor Yoram Dinstein,

Jordan has accepted the idea of the PLO negotiating with Israel on behalf of the Palestinians in the occupied territories, but any agreement regarding their permanent status will require Jordanian endorsement. Certainly, any alteration of Israel's frontiers beyond the 1949 Armistice Line must be premised on Jordanian approval. One of the fundamental principles of law is *nemo dat quod non habet*: a valid transfer of sovereignty to Israel presupposes consent by the former sovereign, i.e., Jordan.

From this perspective, according to Dinstein, "the Washington agreement [concluded on 25 July 1994 between Israel and the Kingdom of Jordan] as such does not resolve the future of the West Bank, let alone East Jerusalem," and neither does the Peace Treaty with Jordan of 26 October 1994.

In this context, it is interesting to note that the whole question of "Jerusalem" — and not only "East Jerusalem" as it was called in the letter that Israeli Foreign Minister Peres sent to Norway's Foreign Minister Holst — has been put on the agenda of the Israeli-Palestinian negotiations following the Declaration of Principles (DOP) initialed in Oslo and signed in Washington, D.C. on 13 September 1993. By this agreement, Israel accepted the inclusion of Jerusalem in the agenda of the negotiations on the permanent status: "It is understood that these (permanent status) negotiations shall cover remaining issues, including: Jerusalem, refugees, settlements, security arrangements, borders, relations and cooperation with other neighbors, and other issues of common interest."

These provisions raise a few legal issues. First and foremost, what is meant in this context by the term

"Jerusalem" — only the territory occupied as a result of the Six-Day War ("East Jerusalem"), or the whole area included in the present municipal boundaries? Moreover, how should the wording of the whole article be interpreted? It may be construed as an obligation on the part of Israel to negotiate the issue of Jerusalem, but, even in this case, what is the specific content of such an obligation? Does it mean that, in order to reach an agreement on the permanent status negotiations, Israel is obliged to compromise on Jerusalem? This seems to be the interpretation of PLO negotiator Nabil Shaath: "[T]he Israelis up to this agreement never accepted that the final status of Jerusalem be on the agenda of the permanent status negotiations...thus (the DOP) calls into question the legality and finality of their annexation."

This is not the view expressed by Dore Gold, advisor on foreign affairs to Israeli Prime Minister Netanyahu. According to Gold,

a solution to the Jerusalem question that is acceptable to all parties in the Middle East, including Israel and the Palestinians, is highly unlikely.... Failure to resolve Jerusalem will not necessarily shackle Arab-Israeli understandings. If Israel and the U.S. come to early understanding on this question, then it becomes far more likely that an informal modus vivendi can emerge in lieu of a formal Israeli-Palestinian agreement over the Jerusalem question. Israeli and Palestinian positions on Jerusalem do not appear to be bridgeable in the context of a territorial settlement.

### **The Religious Dimension**

In addition to the temporal territorial aspect of Jerusalem, there also exists a spiritual and eschatological aspect of the Jerusalem question which stems from the universal religious interest in the fate of the "Holy City." In face of the present impasse as to the political and territorial dimension of the Jerusalem question, it seems that on the subject of the Holy Places and the rights of the religious communities in Jerusalem both the Israeli and the Palestinian sides may already agree, at least on the contents of some very loose principles such as respect for "existing rights" in the Holy Places, freedom of access and worship, partial immunity from jurisdiction, and fiscal exemption.

This does not necessarily refer to the norms which find their legal source in conventional international law (i.e., treaties or any written agreements). Indeed, the few agreements which dealt also with the subject of the Holy Places of Jerusalem were almost exclusively

bilateral accords and therefore, because of their very nature, they could not regulate the complex matter in an organic and complete way. For instance, "special" treatment was granted by the Ottoman Empire only to those members of the clergy who were citizens of (or "protected" by) some particular European Powers, through those bilateral commercial treaties known as "Capitulations."

Thus, different sources of international law may also come into consideration, involving at least two main hypotheses: the binding legal effect of unilateral declarations, and the idea that an "objective regime" or a "local custom" is to be recognized as part of contemporary international law. In both cases, it is maintained here that, in case of uncertainty as to the interpretation, or of possible lacunae in the implementation, of such special norms, the principles of freedom of religion and worship may be applied.

### **The Binding Legal Effect of Unilateral Declarations**

International law tends to recognize the binding force of unilateral commitments only if made in public by a competent organ and with the intention of creating legal obligations. The International Court of Justice has further stated that one cannot assume that a unilateral declaration is intended to create a legal obligation when the parties could have reached the same object by a formal agreement.

If we examine the unilateral commitments issued by the Israeli authorities on the subject, one may assume that the first condition (the public nature of the said declarations, emanating from a competent organ) seems clearly to be fulfilled. The fulfillment of the second condition (the intention of creating legal obligations), on the other hand, may be implied from the wordings of such declarations, taking into account the political-diplomatic context in which they were given.

As to the last condition (the fact that a formal agreement on the same subject could hardly be reached by the parties), this, too, seems to be fulfilled, if one considers that the states (or any other subject of international law) entitled to claim rights over the aforementioned Holy Places were (until recently) in a state of war with Israel, or did not have normal diplomatic relations with it.

Abba Eban, the representative of Israel, in the course of the discussions that preceded Israel's admission to the United Nations in May 1949, declared to the General Assembly's Ad Hoc Political Committee: The President of Israel, in a statement on 23 April 1949, had expressed the official policy by saying

that the Government pledged itself to ensure full security for religious institutions in the exercise of their functions; to grant the supervision of the Holy Places by those who hold them sacred; and to encourage and accept the fullest international safeguards and controls for their immunity and protection....That was a far-reaching commitment....

Mr. Mayhew, Under-Secretary of State for Foreign Affairs in the United Kingdom Government, had remarked in a statement to the House of Commons on 14 April 1949 that the United Nations would surely be expressing the will of the entire civilized world in insisting that the Holy Places be protected and free access to them be assured for all religions as well as for the inhabitants of Jerusalem. The Government of Israel fully shared that opinion.

...The Government of Israel was prepared to offer the fullest safeguards and guarantees for the security of religious institutions in the exercise of their functions, and to negotiate immediately with all religious authorities concerned with that end in view.

Indeed, declarations of this tenor were made several times in the following months and years by the Israeli authorities. On 5 December 1949, Israeli Prime Minister Ben-Gurion stated in the Knesset:

In our Declaration of the renewed State of Israel on the 14th May, 1948, we declared and undertook before the bar of history and before the world that "the State of Israel will ensure freedom of religion, conscience, language, education and culture; will guard the holy places of all religions and will be faithful to the principles of the United Nations Charter."

In accordance therewith, our delegation at the U.N. has stated that the State of Israel undertakes to respect all existing rights regarding the holy places and religious sites in Jerusalem, ensures freedom of worship and freedom of movement for clergy, and also agrees to effective U.N. supervision over the holy places and over existing rights, to be settled between the U.N. and the State of Israel.

On 13 December 1949, during the last session of the Knesset in Tel Aviv (it then moved its seat to Jerusalem and held there its first session on 27 December 1949), Prime Minister Ben-Gurion stated:

We have always respected the wishes of all states concerned with freedom of worship and free access

to the holy places and desiring to safeguard existing rights relating to the holy places and religious sites in Jerusalem and shall continue to do so. Our pledge to safeguard these rights remains valid, and we shall willingly fulfill it.

On the international plane, too, the Israeli representatives confirmed in several instances the same policy, as in a letter dated 26 May 1950 addressed to the President of the Trusteeship Council by the Permanent Representative of Israel to the U.N., Abba Eban:

It is needless to emphasize that the problem of the Holy Places is not only a problem of preservation but also one of access. Closely linked with the issues of preservation and access, there is the question of "existing rights" hallowed by the traditions and compacts of succeeding generations. High central institutions of many faiths, including four Patriarchates, have their abode in Jerusalem in close proximity and relation to the Holy Places themselves. Thus the preservation of the Holy Places, the assurance of facilities for access and pilgrimage, the peaceful settlement of religious disputes, the maintenance of existing rights under international sanction, and the unhampered pursuit of the religious life revolving around the Holy Places are all matters of recognized international concern.

It is significant that the changes brought about in the status of Jerusalem as a result of the Six-Day War did not entail any substantial change in Israel's position with respect to the Holy Places. This policy found expression both on the domestic and international planes. On the domestic level, the Knesset on 27 June 1967 adopted, simultaneously with the passing of the law extending Israeli law, jurisdiction and administration to the eastern sector of enlarged Jerusalem, the Protection of Holy Places Law:

1. The Holy Places shall be protected from desecration and any other violation and from anything likely to violate the freedom of access of the members of the different religions to the places sacred to them or their feelings with regard to those places.

Internationally, the fact that Israel now replaced Jordan as the responsible authority for the Holy Places in the Old City of Jerusalem and its immediate vicinity did not bring about a change in the Israeli position. Thus, the very day of the adoption by the Knesset of the aforementioned law, Israel's Prime Minister, Levi Eshkol, told a gathering of 41 religious leaders (including the heads of the Christian churches residing in

Jerusalem):

It is my pleasure to inform you that the Holy Places in Jerusalem are now open to all who wish to worship at them — members of all faiths, without discrimination. The Government of Israel has made it a cardinal principle of its policy to preserve the Holy Places, to ensure their religious and universal character, and to guarantee free access.

Through regular consultation with you, heads of the communities, and with those designated by you, at the appropriate levels, for this purpose, we will continue to maintain this policy and to see that it is most faithfully carried out. In these consultations, I hope that you will feel free to put forward your proposals, since the aims that I have mentioned are, I am certain, aims that we share in common. Every such proposal will be given full and sympathetic consideration.

It is our intention to entrust the internal administration and arrangements of the Holy Places to religious leaders of the communities to which they respectively belong; the task of carrying out all necessary procedures is in the hands of the Minister of Religious Affairs.

It may be recalled here that, according to the Report of the Commission of Investigation into the Events on the Temple Mount, on 8 October 1990, "The Government of Israel has never modified the policy articulated by the late Prime Minister Levi Eshkol."

A fortnight after the statement by Prime Minister Eshkol, Foreign Minister Eban, in a letter addressed to the Secretary-General of the United Nations, pointed out that

The measures taken by my Government to secure the protection of the Holy Places are only a part of Israel's effort to ensure respect for universal interest in Jerusalem. It is evident from United Nations discussions and documents that the international interest in Jerusalem has always been understood to derive from the presence of the Holy Places. Israel does not doubt her own will and capacity to secure the respect of universal spiritual interests. It has forthwith ensured that the Holy Places of Judaism, Christianity and Islam be administered under the responsibility of the religions which hold them sacred. In addition, in a spirit of concern for historic and spiritual traditions, my Government has taken steps with a view to reaching arrangements to assure the universal character of the Holy Places. In pursuance of this objective, the Government of Israel has now embarked on a constructive and

detailed dialogue with representatives of universal religious interests.

This approach was also reflected in subsequent statements made on behalf of the State of Israel. Thus, for instance, on 19 September 1969, Foreign Minister Eban told the U.N. General Assembly that

Israel does not claim exclusive or unilateral jurisdiction in the Holy Places of Christianity and Islam in Jerusalem and is willing to discuss this principle with those traditionally concerned. There is a versatile range of possibilities for working out a status for the Holy Places in such a manner as to promote Middle Eastern peace and ecumenical harmony. In the meantime, our policy is that the Moslem and Christian Holy Places should always be under the responsibility of those who hold them sacred. This principle has been in practical effect since 1967.

Thus, it seems that the suggested interpretation of the Israeli attitude vis-à-vis the religious dimension of the Jerusalem question has never been contradicted; on the contrary, it finds implicit confirmation even in the Fundamental Agreement between Israel and the Holy See, signed in Jerusalem on 30 December 1993: "The State of Israel affirms its continuing commitment to maintain and respect the 'Status quo' in the Christian Holy Places to which it applies and the respective rights of the Christian communities thereunder" (Article 4, par. 1).

#### **The Hypothesis of an "Objective Regime"**

An analysis of Israeli practice and attitudes regarding the Holy Places and the rights and interests of the religious communities in these sacred shrines, while showing the existence of some self-imposed international obligations, reveals how complex and wide the subject can be. It involves the question of applicability of several principles and sets of rules both within the municipal and the international systems of law. The same considerations would apply to the attitude shown by the several entities entitled to administer the territory before 1967. However, study reveals that the practice of the states vis-à-vis the special privileges, immunities, or exemptions granted to the religious communities present in Jerusalem (in particular the Christian ones) was rather coherent and often went far beyond the standard of similar rights granted by the majority of the other countries in the world.

As to the Holy Places' international status, the alleged limitations to the full exercise of territorial sovereignty may find their legal source in an interna-

tional (local) custom, a sort of "objective regime" which binds, it is submitted, any administrator of the territory in question. In fact, in order to ascertain the effective existence of the alleged source of international norms, it would be necessary to consider not only the attitude of Israel, but also that of all the other parties concerned vis-à-vis the subject matter under analysis.

While such a detailed and broad exposition is beyond the scope of this essay, let us look, by example, at a few instances relating to the status quo at the Christian Holy Places. The wide principles involved, which stem from the traditional and delicate compromise among the Christian communities, apply today to the relationship between the secular state and the various religious denominations, including — by way of analogy — the Muslim and Jewish ones.

Indeed, one of the first major instances among the several acts enacted by the Ottomans in order to provide the guarantees and to reaffirm the privileges and immunities of the non-Muslim communities may be considered Sultan 'Habdulmecid's *Hatti Humayun* (decree) of 18 February 1856 (on the eve of the peace conference at Paris), which was recognized by the European powers in Article IX of the Treaty of Paris, signed on 30 March 1856.

After the termination of the Ottoman administration, the League of Nations entrusted Great Britain, the Mandatory Power, with "All responsibility in connection with the Holy Places and religious buildings or sites in Palestine, including that of preserving existing rights and of securing free access to the Holy Places, religious buildings and sites and the free exercise of worship."

Thus, the already consolidated "principle of non-interference" by the territorial government in the religious activities in the Christian Holy Places, started to be extended by analogy also to the Jewish and Muslim sacred shrines (whose immunities, according to the same article, are guaranteed).

Before the British Mandate was terminated, then, the General Assembly of the United Nations adopted the Resolution on the Future Government of Palestine, which envisaged for Jerusalem "a *corpus separatum* under a special international regime to be established for the following special objectives: (a) To protect and to preserve the unique spiritual and religious interests located in the city of the three great monotheistic faiths throughout the world, Christian, Jewish and Moslem."

Such a resolution, though never implemented, was inspired — as well as the Mandate entrusted to Great Britain by the League of Nations — by values which

represented, when such international documents were adopted, the views of the whole international community (or, at least, of its more representative members at that time).

In this context, it should be recalled here that on 18 May 1992, the then spokesman of the Jordanian delegation at the Madrid peace negotiations, Dr. Marwan Muasher, declared: "Jordan believes that as part of a settlement of the Arab-Israeli conflict, access to the Holy Sites in Jerusalem is a right that should be guaranteed to all, regardless of the political settlement that might be reached regarding Jerusalem."

Dr. Muasher (who was afterwards named as the first Jordanian Ambassador to Israel and is presently a Minister of the Hashemite Kingdom) maintained, in the same statement, that the Jordanian position vis-à-vis Jewish-Israeli access to the Holy Places under Jordan's rule from 1948-1967, should be considered in light of the provisions of the Jordanian-Israeli Armistice Agreement, including further negotiation over access to Nazareth and other sites in Israel.

Thus, the Hashemite Kingdom, too, shows its willingness to recognize the binding international nature of the principles regulating the rights of the religious communities in Jerusalem. Indeed, according to the Israel-Jordan Peace Treaty (Article 9: Places of Historical and Religious Significance and Interfaith Relations):

1. Each party will provide freedom of access to places of religious and historical significance....
3. The Parties will act together to promote interfaith relations among the three monotheistic religions, with the aim of working towards religious understanding, moral commitment, freedom of religious worship, and tolerance and peace.

It may be further recalled here that, in resolutions adopted by the Higher Waqf Council and the Committee for Muslim Affairs on 14 August 1967, these Islamic bodies,

discussed the evolution of the question of the Wailing Wall in its different phases and adopted the following conclusions:

1. The Jews have right of access to the Holy Place called the Wailing Wall, which is the Western Wall to the Holy Mosque, and the Muslims have preserved the Wall throughout the centuries and saw to it that no damage ever occurred.

2. The Jews enjoyed full freedom in using their rights of access to this Wall to conduct prayers and supplications until the 1948 war.

3. The Jews' rights in the Wailing Wall have been established by status quo and tradition.

While reaffirming the traditional rights of the Jews at the Western Wall, the Waqf authorities maintained that any action which threatened to damage the Aksa Mosque, any infringement upon the rights of Muslims, or any violation of the sanctity of their Holy Shrines "would contravene all international laws and conventions."

Similarly, one may recall the letter accompanying the conclusion of the Camp David Agreements sent on 17 September 1978 by the President of Egypt, Anwar Sadat, to the President of the United States, Jimmy Carter, stating the Egyptian position on Jerusalem:

5. All peoples must have free access to the City and enjoy the free exercise of worship and the right to visit and transit to the holy places without distinction or discrimination.

6. The holy places of each faith may be placed under the administration and control of their representatives....

As to the Palestinian position, it seems that the PLO, too, endorsed similar principles. Marwan Kana-fani, member of the Palestinian Legislative Council, said that the Palestinian National Authority (PNA) did not want to divide Jerusalem, establish a wall in the city, or prevent members of the three monotheistic faiths from reaching it. He said that throughout history, the Palestinian people ensured freedom of worship and opened the holy places for all peoples. Moreover, the position of the PLO has been expressed in the following terms: "Assurance of freedom of worship and the practice of religious rites at the holy places in Palestine for adherents of all religions." It would be

interesting to know whether the PLO organization feels itself internationally bound by the aforementioned set of rules.

In conclusion, one cannot but hope that all the parties concerned recognize once and for all, and in clear terms, the traditional principles which, it is maintained, already bind whomever will be the administrator (i.e., the holder of territorial jurisdiction) in the areas in question following the outcome of the permanent status negotiations.

In this perspective, a series of unilateral declarations emanating from the interested parties would, once again, stress the binding nature of the said principles. Thus, once the "religious" dimension of the Jerusalem question will be considered settled, at least in its broad terms, a solution for the "territorial" (or political) aspect may not appear as impossible to reach as it seems today.

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Enrico Molinaro is a candidate for the doctoral program in International Law at the Hebrew University of Jerusalem. His most recent publications include (in Italian) "Jerusalem and the Holy Places," *La Comunità Internazionale* (1994), and "Religious Freedom in the Holy Places of Jerusalem," *I diritti dell'uomo. Cronache e battaglie* (1995). This *Jerusalem Letter* is based on the author's presentation at an international conference on "Jerusalem: Past, Present and Future" held at the University of Madrid, 5-9 August 1996.

## The Constitution of the State of Israel, 1996-5756

Third Edition

Although Israel does not have a single complete constitutional document, in its forty-seven years of statehood the Jewish state has developed an operative constitution of its own, embodied in a set of written texts that reflect the political system on which the state is based, its social content, and an expanding constitutional tradition. Those texts were properly promulgated by the representatives of the people and recognized as constitutional by Israel's Supreme Court. The texts are collected and presented here for what they are — Israel's operative constitution that determines the basic operations of the Israeli polity, the basic rules of governance enforced by those empowered to execute and enforce the law and, as such, interpreted by the courts as a constitution.

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