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Rhodes College

Department of International Studies

THE LEGAL STATUS OF JERUSALEM

by

FRANK COLDEN CLARK, JR.

1 March 1988

Submitted in partial fulfillment of the requirements
for the Bachelor of Arts degree with Honors in International Studies

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Rhodes College

Department of International Studies

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Preface

A genuine understanding of the problems that exist in Jerusalem today is essential for eventually obtaining a broader peace in the Middle East. Enlightening the world community about the facts and the law pertaining to the conflict between Palestinian Arabs and Israeli Jews over this city must be the first step in resolving the lengthy and deeply rooted conflict between these two peoples. The violence in this city alone over the last four decades has destroyed dozens of structures, artifacts, and documents that are of paramount historical and religious importance to Jews, Christians, and Moslems throughout the world. These losses, however, pale in comparison to the needless waste of thousands of human lives over that same stretch of time.

Many scholars and diplomats have stated that the problems facing Jerusalem cannot be solved in a vacuum. In other words, there must be a much broader settlement that includes Jerusalem along with many other provisions. It is the opinion of the present author, however, that every day of delay in attempting to solve this problem or any other component of the Arab-Israeli dispute only compounds the difficulties in settling on a broad-based resolution. There have been numerous instances over the past forty years when the world community, acting vigorously and forcefully, could have made great strides toward the solution of the problems, not only in the city of Jerusalem, but most likely throughout the entire region in the Middle East now called Israel.

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The basic function of any legal system, be it domestic or international, is to maintain public order. More specifically, the responsibility of the international legal system, best represented by the United Nations, is to guard the community against violence and coercion by individual members. Article 2, Paragraph 4 of the UN Charter strictly forbids "the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." In regard to the Jerusalem issue, this prescription has been grossly ignored. Although good intentions have been shown by the General Assembly and Security Council since 1948 when Israel warred with the Arabs and took the western half of the city of Jerusalem, the damage done by the wasted years of policy without enforcement and legislation without teeth can never be repaired.

The goal of the present author is to examine carefully the events relevant to the Jerusalem question and evaluate them under contemporary international law. Much has been written on this subject, some more emotionally based than legally, but this material will be analyzed for its legal relevance and importance. In addition, a survey of the various recommended solutions to the problems of Jerusalem will be presented along with the present author's recommendations.

Gratitude is extended to the following individuals: Dr. John F. Copper, project sponsor, who has provided invaluable guidance and assistance over that last two years. Dr. Bruce Stanley and Katherine Owen have both been extremely helpful in obtaining numerous books, manuscripts, and articles. Annette B. Cate's services with interlibrary loan have been most beneficial. This paper would not have been possible

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Introduction

"The Legal Status of Jerusalem" is an attempt to analyze, in the light of international law, the problems facing that city. First we must determine what is meant by the term international law. Simply put, international law is a collection of norms and principles that are employed in the solution of world problems. These principles must remain consistent so that each problem may be treated uniformly and objectively. It is also important to mention that international law comes from agreements among the body of states comprising the world community. This is done either through treaty (conventional law) or implicitly through the repeated and consistent actions of states in a given policy area (customary law).

International law has been given many different definitions. Below are some of the most widely accepted:

International law consists in certain rules of conduct which modern civilized states regard as being binding on them in their relations with one another with a force comparable in nature and degree to that binding the conscientious person to obey the law of his country, and which they also regard as being enforceable by appropriate means in case of infringement.¹

¹W.E. Hall, *A Treatise on International Law*, 8th. ed. (New York: Oxford University Press, 1924), p.1.

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Also,

The Law of Nations, or International Law, may be defined as the body of rules and principles of action which are binding upon civilized states in their relations with one another.²

There exist many other definitions. Yet nearly all of them assume that for order and not chaos to be the rule, international law must be enforced and properly sanctioned in order for it to be obeyed at all times, not just when it becomes convenient for a nation to do so. Obviously, no such authority currently exists in the international system. However, the number of violations of international law is relatively low when compared to the total number of international legal transactions just in the last four decades since the formation of the United Nations. Why is this so?

Gerhard von Glahn illustrates this point well:

(1) *Motivation for Obedience* This concept is based on the premise that any individual, whether a single person or a state, acknowledges that order is more desirable than chaos and will obey the law even when not entirely in his best interest in order to ensure that order will be maintained.

(2) *Enlightened Self-Interest* This non-legal concept is the attitude that a much greater good is obtained by following the rules established under international law and risking the occasional loss in a decision so that all states may benefit by living in an ordered society. "...those who profit most from living in an order regulated by law can...expect to be able to maintain that order only by themselves making concessions...to make

²J.L. Brierly, *The Law of Nations*, 6th ed. (London: Oxford University Press, 1963), p.1.

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the order acceptable and tolerable to all the members profiting least from it."³

(3) *Necessity* States need the ability to predict the actions and behavior of other states in order to conduct normal international relations. This can only be carried out when the norms of international law are observed.

(4) *Credibility* The credibility of any state is enhanced when it is consistently seen as abiding by the rules governing states. Conversely, a state's credibility and reputation is severely damaged if it consistently ignores international law and pursues policy goals through headstrong and ruthless tactics.

(5) *Habit* Although less important, the habitual acceptance of the law by high officials in government is a force behind the general observance of international law.

(6) *World Opinion* Certainly, the pressures of world opinion can be regarded as a force behind the actions of many states if these collective opinions are voiced loudly and repeatedly. However, it is difficult to prove that world opinion is largely responsible for the observance of all international laws, especially when one examines the debate in the United Nations, the world's most organized legal body.

(7) *Social Approval and Costs* No one can deny that the costs (both in real terms and in terms of negative responses from a state's constituency) of pursuing forceful and coercive policy objectives are high. The desire to obtain social approval as well as to avoid the expenses of

³Ibid.

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This can be done by... (N) Creativity
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concerned by the other governing states. Conversely, a
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(2) Habit Although the habitual acceptance of the
law by high officials in government is a force behind the general
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(6) World Opinion Certainly, the pressure of world opinion can be
exercised to ensure that a state follows a course of collective
conduct which is regarded as just and equitable. However, it is difficult
to convince the world opinion for the observance of all
international law, especially when one examines the debate in the United
States the world has organized legal body.
(3) Social Approval and Censure No one can deny that the credit (both
in the past and in the future) of nations is largely dependent upon the
conduct of their foreign policy. Nations are especially sensitive to
international criticism and constructive policy objectives are high
to ensure the approval as well as to avoid the censure of other states.

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military belligerency add up to another powerful force for observing international law.

(8) *Disadvantages of Expediency* There is a definite advantage in a state pursuing policies along established legal channels rather than resorting to force. The latter policy not only serves to irritate the injured party, but also draws disrespect and uncooperativeness from the community of nations. Dependability and reliability through principled behavior can only enhance a state's reputation in the eyes of other states.⁴

Methods for enforcing international law do exist, but the primary reason for states obeying these laws lies within the principle of common consent. This consent, as mentioned previously, can be either formal through treaties and conventions or informal through tacit approval and acceptance of various laws. This approval is demonstrated in a state's respecting a given law but not being party to any formal agreement or treaty binding it to that law.

Since there is no precedent for punishing those states that violate international law, self-interest must be the prime motivating factor for compliance. Since most of contemporary international law does not make stringent demands on most states, many scholars maintain that "vital national interests" take precedent in almost all cases where this concept conflicts with established law. In light of this fact, some method(s) for enforcing the law above and beyond what is resorted to today must be created. This paper illustrates, among other things, how one such area of the world could benefit if international law were applied and enforced as

⁴Gerhard von Glahn, *Law Among Nations*, 5th ed. (New York: Macmillan Publishing Co., Inc., 1986.), p. 6.

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well as how that same area has degenerated to near chaos because such law has been consistently disregarded.

It is important to keep in mind that conclusions drawn from legal analysis always point to right and wrong parties in a legal dispute. In this particular case, the facts are analyzed along with arguments from both sides and conclusions are then reached based on established international legal principles. One should be able to determine by the end of this paper with which side the law rests in this dispute.

The first article recognized international legal principles concerning Palestine for League of Nations Mandate for Palestine, did not specifically mention Jerusalem; the city was treated as an integral part of that area. Similarly, some members of the following discussion will refer to that entire region as the Middle East rather than Palestine specifically.

Jerusalem is one of the major cities in the world. It is believed to have been founded by the Canaanites during the eighteenth century B.C. Archaeological evidence seems to corroborate this belief. In 1929, after the area brought to light evidence that indicates the city existed during the Middle Bronze Age (approximately 1800 B.C.E.). Additionally, the city

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Background

The history of Palestine and Jerusalem are vital to understanding the varied problems that exist in that region today. Many legal theorists, arguing in favor of Israeli claims to the City, tend to use a historical argument as proof of Jewish sovereignty. This seems ironic, however, since people who claim the Moslem faith have inhabited Jerusalem for a much longer period of time and in a much more recent historical period. This point will be discussed in more detail below.

The first officially recognized international legal document concerning Palestine, the League of Nations Mandate for Palestine, did not specifically mention Jerusalem; the city was treated as an integral part of that area. Similarly, some portions of the following discussion will refer to that entire region in the Middle East rather than Jerusalem specifically.

Jerusalem is one of the oldest cities in the world. It is believed to have been founded by the Canaanites during the eighteenth century B.C.E. Archaeological evidence seems to corroborate this belief.⁵ In 1961 digs in the area brought to light evidence that indicates the city existed during the Middle Bronze Age (approximately 1800 B.C.E.). Additionally, the El-

⁵Henry Cattian, *Jerusalem*. (New York: St. Martin's Press, 1981), pp. 19-20.

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Amarna tablets, discovered in 1887, have inscribed on them requests made to the Pharaoh of Egypt by the king of the city of what is now Jerusalem (then called Urusalim) for help in repelling certain enemy attacks. These tablets date back to the fourteenth century B.C.E. Jerusalem was inhabited by Jebusites, and it remained purely Canaanite for some 800 years.⁶ These facts are important because they indicate that Jerusalem was not founded by Jews, a claim frequently made by many Israeli statesmen. In fact, Jerusalem was founded and inhabited by several different peoples before the Israelites even emerged in Canaan (as Palestine was then called). Around 1000 B.C.E. the city was captured by the Israelites. According to the Bible this group of people had recently traveled from Egypt to Canaan around the year 1200 B.C.E. Once they arrived they began to settle in the heart of the area and divided into what we now refer to as the Twelve Tribes of Israel. Contrary to popular belief, the Israelites did not massacre the Canaanites. Some Biblical passages indicate this. Rather, they slowly entered the land, living in many unoccupied areas at first, then gradually moving into the interior. For an additional two centuries much of Palestine as well as Jerusalem "remained a Canaanite enclave...."⁷

After the Israelites had been ruled by the Judges for a period of time, Saul was proclaimed King near the year 1030 B.C.E. in an effort to consolidate military and political strength.⁸ He was later killed in battle

⁶Ibid.

⁷F.F. Bruce, *Israel and The Nations*. (Exeter: Paternoster Press, 1963), p. 19.

⁸Cattan., p. 21.

and replaced by David who had ruled Hebron under the Philistines.⁹ By using a crafty trick, David entered Jerusalem and captured the city around the year 1000 B.C.E., making it his capital.¹⁰ Henry Cattam makes an interesting observation about David's rule in Jerusalem:

It is appropriate to mention one important fact concerning David's capture of Jerusalem which stands in contrast to what happened thirty centuries later. He did not displace and dispossess its original inhabitants: the Jebusites were allowed to remain in their city, but not in the fortress, he (David) permitted them to settle in the east of the town....¹¹

David's rule lasted thirty-three years, followed by Solomon who ruled for forty. Solomon had a temple constructed in his name in 969 B.C.E. Shortly after he died, the unified tribes that had comprised Israel divided into northern (Israel) and southern (Judah) communities. Jerusalem became the capital of the southern kingdom. The two factions warred with each other intermittently until Israel was wiped out by the Assyrians in 721 B.C.E. Judah continued to exist, but Jerusalem was continually attacked and partially destroyed by the Philistines, Arabs, Syrians, Babylonians, and Egyptians.¹² Finally in 587 B.C.E. the Babylonians under King Nebuchadnezzar attacked Jerusalem, destroyed the temple, and carried most of the inhabitants of the city into exile. Some attempts were made to restore the Kingdom of Judah once some of the prisoners were released,

⁹Kathleen M. Kenyon, *Archaeology of the Holy Land*. (New York: Praeger Publishers, Inc., 1960), p. 240.

¹⁰Cattam, p. 22.

¹¹Ibid.

¹²Albert M. Hyamson, *Palestine Old and New*. (London: Methuen Publishers, 1928), p. 76.

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but none was ever successful. For the next 900 years, with only one brief interlude, Jerusalem was under the rule of several pagan cultures. King Cyrus of Persia ruled the city by defeating Babylon during the latter part of the fifth century B.C.E. He allowed the Jews to return, resettle, and construct another temple. Only a few came back, however; many elected to remain in Babylon where they had been since the time of the exilic period. Alexander the Great took the city by defeating Persia in 332 B.C.E. The Greeks under Alexander outlawed the Jewish faith and prohibited Jews from settling in the city. The Jews were further outraged when the Greeks began to use the recently reconstructed temple of Jerusalem to worship idols. Then in 141 B.C.E. Simon Maccabaeus led a revolt and succeeded in gaining independence for the Jews. This was extremely short lived, however, as Jerusalem was swiftly attacked by King Sidetes of Syria who subjugated its inhabitants and forced them to pay an annual tribute.

The Romans reigned in Jerusalem beginning around 63 B.C.E. This ended the Jewish occupation and rule of the city of some 78 years. Herod became ruler of Palestine in 40 B.C.E., which then became known as the Roman province of Judah. It was during Herod's reign that Jesus Christ was born in Bethlehem. From that point on, Bethlehem, Nazareth, Galilee, and Jerusalem became the most important cities to the Christian religion.¹³

The Jews at Jerusalem twice revolted unsuccessfully against the Romans. During the second in 132 C.E., the temple was again destroyed

¹³Cattan., p. 24.

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¹³Cattan., p. 24.

and Jerusalem was "never again revived as a Jewish city."¹⁴ Jews were slaughtered or sold into slavery, and again a decree was issued prohibiting the presence of any Jew in Jerusalem or the practice of the Jewish faith.

The Romans prevailed in the city for the next four centuries. Christianity became the official religion of Jerusalem in 323 C.E. once Emperor Constantine was converted. It soon became the religion of the entire Byzantine Empire. Constantine ordered the construction of the Church of the Holy Sepulchre and the Church of the Golgotha, both of which were completed in 336 C.E. Additionally, the Church of the Nativity (which still exists) and the Church of the Ascension on the Mount of Olives were built by Constantine's mother, Empress Helena.¹⁵

The city began to grow as a commercial center under Byzantine rule. Unfortunately, this made it attractive to many other kingdoms in the Middle and Near East, and the city was attacked by the Persians (who were aided by bands of Jews determined to recapture "their" city) in 614 C.E. The inhabitants were massacred, and several of the churches built under Constantine (including the Church of the Holy Sepulchre) were destroyed. The Persians were later conquered in 627, and Jerusalem was recaptured for the Byzantines. This rule was also short-lived, as the Arab conquest was to begin in 638.

Moslems laid siege to Jerusalem some time around the year 640. Once the inhabitants surrendered, a mosque was built at the sight of the footprint of the Prophet of Islam, where he is said to have stepped into

¹⁴Hyamson., p. 83.

¹⁵John Gray, *A History of Jerusalem*. (New York: Praeger Publishers, 1969), pp. 65-7.

heaven. This famous mosque, called the Mosque of the Dome of the Rock, holds tremendous significance to Moslems today. Later in 710 another famous mosque, the Mosque of Al-Aqsa, was erected. These two structures and their enclosure called *Haram Al-Sharif* (Noble Shrine) are the most sacred in Jerusalem to Moslems.

Arab rule under the Omayyads, Abbassids, and Fatimids lasted from 638 to 1099 C.E. It was then that the Crusaders captured Jerusalem and established the Latin Kingdom of Jerusalem. Christians had become increasingly concerned over the persecution of their people within the city as well as desecration of Christian holy places at the hands of the Arab Moslems. Eighty-eight years later, Salah-Id-Din Ayoubi recaptured the city for the Arabs. For a brief ten-year period the city was returned to Christian hands, but was recaptured by the Moslems in 1239.

In 1517 the Ottoman Empire led by Sultan Selim captured Jerusalem. This event, however, did not bring with it any dramatic change in the demographics of the city. Only the administration was altered, and at that only slightly. A large majority of the ruling officials remained Arab.¹⁶ Turkish rule lasted nearly 400 years, with a brief interruption when Mohamed Ali proclaimed Egypt's independence from Turkish control and captured Jerusalem and the rest of Palestine.

Turkey's rule over Palestine became stormy during the latter part of the eighteenth century because of disputes with France, Great Britain, and Russia over the Holy Places and the latter powers' rights to protect the religious freedom of those persons adhering to their particular national

¹⁶Cattan, p. 27.

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faith. This was aggravated further when the Turks, after a long period of general acceptance of these demands (through treaties called the Capitulations), refused the Russians the right to protect the religious freedom of all Russian Orthodox in Turkey. This led to the Crimean War (1854-6) between France, Great Britain and Russia on one side and Turkey on the other.

It was during the First World War that Turkish rule in all of Palestine ended. The Ottoman Empire aligned itself on the side of the Germans, and it is because of this alliance that the importance of the Middle East to the European powers increased immeasurably. It is also at this point that the first of many promises were made by Great Britain, a leading European colonial power in the Middle East, concerning the independence of Palestine, several of which turned out to be in contradiction to others. As we will see later, these promises lay at the base of many of the problems that were to plague Palestine for many years.

Since the earliest records of Jerusalem to the time of the World War I, Jews have ruled the city for about 491 years, Christians for 399, and Arabs/Turks for 1181 years. Disregarding any claims concerning the level of religious significance to any one faith, clearly the Moslems have a much stronger case for sovereignty based on historical occupation and rule. Dr. W. Thomas Mallison, Director of the International and Comparative Law Program at the George Washington University, agrees:

In all, Palestine and Jerusalem were under the control of rulers who professed Islam for approximately 13 centuries and this was broken only by the Crusader rule of less than a century. Jerusalem was under the control of rulers who professed Judaism for a much shorter period of time and in a more remote historical epoch. If religious identification of its historic rulers provides

...the Dome of the Rock, which was built by the Muslims in the seventh century. This latter mosque is the most sacred in Jerusalem and has been the center of the city since the time of the Crusades. The Dome of the Rock is the most sacred in Jerusalem and has been the center of the city since the time of the Crusades. The Dome of the Rock is the most sacred in Jerusalem and has been the center of the city since the time of the Crusades.

In 1917 the Ottoman Empire fell by British and French hands, but was reoccupied by the Muslims in 1948. For a brief period the city was returned to Christian rule. Eighty-eight years later, in 1948, the city was returned to Christian rule. For a brief period the city was returned to Christian rule. Eighty-eight years later, in 1948, the city was returned to Christian rule.

Turkish control and occupied Jerusalem and the rest of Palestine. Turkey's role over Palestine became steady during the latter part of the eighteenth century because of its alliance with France. Great Britain and Russia over the Holy Land and the latter power's rights to protect the religion of those persons adhering to their particular national

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authority for contemporary sovereignty, it is clear that the adherents of Islam have a far better claim than the adherents of Judaism or Christianity.¹⁷

Religious claims, however, are not sound basis for either political control or legal sovereignty under contemporary international law. This point is made simply to refute the claim, which has been made repeatedly by many Israeli statesmen, that a long, continued Jewish religious connection with Jerusalem provides authority for Israeli political control and sovereignty. This claim is consistent with Zionist ideology, a major tenet of which is the incorporation of Judaism to make it an instrument of Zionist nationalism.¹⁸

Many scholars have said that up until the First World War there was no "Palestine problem." The events that transpired once the British took Palestine from the Ottoman Turks during World War I heralded the beginning of many of the modern questions and problems surrounding the city of Jerusalem and the region then known as Palestine.

¹⁷Sally V. Mallison and W. Thomas Mallison, "The Status of Jerusalem As A Question In International Law: The Jerusalem Problem in Public International Law: Juridical Status and A Start Towards Solution," in Hans Köchler, ed., *The Legal Aspects of the Palestine Problem with Special Regard to the Question of Jerusalem* (Vienna: Wilhelm Braumüller, 1980), p. 99.

¹⁸Rabbi Elmer Berger, "An Examination of the Claim of Zionism to Divine Authorization for Establishing Settlements," *Arab Perspectives* 1 (May 1980): 24.

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The Mandate Period

Most of the difficulties encountered over the last 40 years regarding Palestine and Jerusalem stem from the conflicting and contradictory assurances that were made by the British to the Arabs and the Jews during the course of the First World War. While President Woodrow Wilson was espousing the principle of national self-determination, Great Britain was doing all it could to make sure its overseas empire remained intact.

There had been little or no Arab nationalistic feeling in Palestine or among any other Arab group anywhere in the Middle East until the late nineteenth and early twentieth centuries. It was at this time that Arabs in Palestine began to regard that area as their own country, and they have done so ever since. Unfortunately, this dream was to be shattered by the events that followed World War I.

As mentioned previously, the Ottoman Turks decided to enter the war on the side of the Germans. This encouraged the British to seek other Arab allies in the Middle East, and they did so through letters (known as the McMahon Correspondence named after the chief British negotiator with the Arabs, Sir Henry McMahon) to the Sharif of Mecca, Husayn. In these letters, the terms under which the Arabs would enter the war on the side of Great Britain were laid out. First and foremost, the Arabs were to be granted independence once the war was ended. Despite the vague language of this document (see below) the Arabs believed (and still

maintain) that Palestine was to be included in the area that was to be part of an independent Arab state. During the course of the war, no other communications from the British gave the Arabs any clue that Palestine would not be included in the agreement.

In the crucial portions of the pledge McMahan states:

As for the regions lying within the proposed frontiers, in which Great Britain is free to act without detriment to the interests of her ally, France, I am authorized to give you the following pledges on behalf of the Government of Great Britain, and to reply as follows to your note:

- (1) That...Great Britain is prepared to recognize and uphold the independence of the Arabs in all regions lying within the frontiers proposed by the Sharif of Mecca....¹⁹

Earlier in the letter, McMahan had stipulated that certain areas in Syria could not be included since they could not "be said to be purely Arab."²⁰

The Arabs, however, believed that independence for Palestine and the rest of the Middle East would be forthcoming, and they therefore upheld their end of the agreement with the British by launching a revolt against the Turks in 1916, contributing significantly to fall of the Ottoman Empire. One year later, the British entered into the first of many agreements with the Jews, most notably Jews involved in the growing movement known as Zionism. Chaim Weizmann, a leading Zionist,

¹⁹Reprinted in Evan M. Wilson, *Jerusalem, Key to Peace*. (Washington, D.C.: The Middle East Institute, 1970), p. 143.

²⁰Ibid. Since this agreement was obviously abrogated later by the Balfour Declaration and the Sykes-Picot Agreement, many British statesmen claimed that Palestine was one of those areas stipulated by McMahan as being partially under the control of the French and, therefore, not subject to British disposal. However, the French government, following the war, claimed that Great Britain had sole responsibility for Palestine, furthering the claim that the McMahan agreement did indeed include Palestine as an area "in which Great Britain [was] free to act without detriment to her ally, France."

The Mandate Period

...most of the difficulties encountered over the last 40 years regarding Palestine and Jerusalem stem from the conflicting and contradictory promises that were made by the British to the Arabs and the Jews during the course of the First World War. While President Woodrow Wilson was espousing the principle of national self-determination, Great Britain was doing all it could to make sure its overseas empire remained intact. There has been little or no Arab nationalist feeling in Palestine or elsewhere and early twentieth century. It was at this time that Arabs in Palestine began to regard their own country and they have done so ever since. Unfortunately, this dream was to be shattered by the events that followed World War I. As mentioned previously, the Ottoman Turks decided to enter the war on the side of the Central Powers. This encouraged the British to seek other Arab allies in the Middle East, and they did so through letters (known as the McMahon Correspondence) named after the chief British negotiator with the Arabs, Sir Henry McMahon (to the Sharif of Mecca, Hussein bin Ali). The terms under which the Arabs would enter the war on the side of Great Britain were laid out. First and foremost, the Arabs were to be granted independence once the war was ended. Despite the vague language of this document (see below) the Arabs believed (and still

frequently discussed with numerous British Government officials the possibility of a Jewish homeland in Palestine. Weizmann's charismatic personality, in combination with the reverence that many British politicians held for Biblical lore, made his requests very attractive, and the seeds for a British-sponsored Jewish homeland were sown.

On November 2, 1917, the foreign secretary for Great Britain, Alfred Balfour, wrote a letter to the leader of the Zionist Federation, Lord Rothschild. This document later became known as the Balfour Declaration. Prior to the release of the document, President Wilson, as well as the governments of France and Italy, gave the declaration their general approval:

I have much pleasure in conveying to you, on behalf of His Majesty's Government, the following declaration of sympathy with Jewish Zionist aspirations which has been submitted to, and approved by the Cabinet.

His Majesty's Government views with favor the establishment in Palestine of a national home for the Jewish people, and will use their best endeavors to facilitate the achievement of this object, it being clearly understood that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country.

I should be grateful if you will bring this declaration to the knowledge of the Zionist Federation.²¹

The Balfour declaration is an interesting document in that it (1) obviously conflicts with the promises made to Sharif Husayn concerning an Arab independent state, (2) speaks more forcefully about not "prejudicing" the rights of the "non-Jewish communities" than it does concerning the

²¹Reprinted in Wilson, p. 146.

establishment of the Jewish state itself, (3) refers to "Palestine" as a distinct section of land with known boundaries when one such did not exist at that time, (4) implies that the "non-Jewish communities" in this area were a minority (which they clearly were not - over 91% of the population was Arab), and (5) is written in language that, like the McMahon Correspondence, is deliberately ambiguous. Interestingly, the declaration itself was never made public in Palestine for some two and a half years after it was officially released in Europe.

To make matters worse, the Arabs and the Jews were not the only groups to receive assurances concerning Palestine. In the negotiations during the First World War, the British persuaded the Russian, French, and Italian governments to agree to an international regime for Palestine, apparently as a method of preventing the French from further encroaching on Arab territories as they had already done in Syria. This agreement, along with other secret negotiations regarding spheres of influence for these powers in the Middle East, was known as the Sykes-Picot Agreement. To the chagrin of the British, Imperial Russia fell, and with the revolution the contents of the secret accord were released. Since this proposed international regime was in contradiction to the promises made to the Arabs, Husayn was necessarily disturbed. However, the British Government was apparently able to calm his fears and assure him that this was only a protectionary measure to keep the French out, thereby making it easier to grant the area independence after the war.

In December 1917, General Allenby leading the British forces entered Jerusalem, and by the following summer all of the Middle East had been liberated from Turkish rule. Oddly enough, the Arabs did not seem concerned about the Balfour Declaration, once again due

(apparently) to British assurances concerning the certainty of Arab independence.

During the Paris Peace Conference of 1919, President Woodrow Wilson became concerned over the obvious conflicts that had arisen out of the numerous promises given by the British regarding the formerly Ottoman territories, notably Palestine. Out of this concern, the King Crane Commission was formed. The report submitted by these two men, Henry C. King and Charles R. Crane is extremely interesting. A portion of the numerous recommendations follows:

We recommend...serious modification of the extreme Zionist Program for Palestine of unlimited immigration of Jews, looking finally to making Palestine distinctly a Jewish State.

(1) The Commissioners began their study of Zionism with minds predisposed in its favor, but the actual facts in Palestine, coupled with the force of the general principles proclaimed by the Allies and accepted by the Syrians have driven them to the recommendation here made.

(3) The Commission recognized also that definite encouragement had been given to the Zionists by the Allies in Mr. Balfour's often quoted statement, in its approval by other representatives of the Allies. If, however, the strict terms of the Balfour Statement are adhered to - favoring "the establishment in Palestine of a national home for the Jewish people", it being clearly understood that nothing shall prejudice the civil and religious rights of existing non-Jewish communities in Palestine" - it can hardly be doubted that the extreme Zionist program must be greatly modified. For "a national home for the Jewish people" is not equivalent to making Palestine a Jewish State; nor can the erection of such a Jewish State be accomplished without the gravest trespass upon the "civil and religious rights of the non-Jewish communities in Palestine". The fact came out repeatedly in the Commission's conference with Jewish representatives, that the Zionist look forward to a practically complete dispossession of the present non-Jewish inhabitants of Palestine, by various forms of purchase.²²

²²Reprinted in W. Thomas Mallison and Sally V. Mallison, *The Palestine Problem In International Law and World Order*. (Essex: Longman, 1986), pp. 76-77.

The report also stated:

The Peace Conference [referring to the Paris Peace Conference of 1919] should not shut its eyes to the fact that the anti-Zionist feeling in Palestine and Syria is intense and not lightly to be flouted. No British officer, consulted by the Commissioners, believed that the Zionist program could be carried out except by force of arms. The officers generally thought that a force of not less than fifty thousand soldiers would be required to initiate the program. That of itself is evidence of a strong sense of injustice of the Zionist program, on the part of the non-Jewish populations of Palestine and Syria. Decisions, requiring armies to carry out, are sometimes necessary, but they are surely not to be taken in the interests of serious injustice. For initial claim, often submitted by Zionist representatives, that they have a "right" to Palestine, based on an occupation of two thousand years ago, can hardly be seriously considered.²³

Sadly, President Wilson never saw the report. It reached Washington one day after he left on his famous tour of the United States to persuade the country to back the recently proposed League of Nations. Due to the intense pressure caused by this exhausting tour, in combination with his already poor health, he collapsed of a stroke and never recovered. The report was discarded by the American government and ignored by the Allies.²⁴

The League was established despite US refusal to take part, and a mandate system for granting immediate or gradual independence to many of the European colonies was devised. Great Britain was granted a mandate to administer Palestine and Transjordan (which later became the Hashimite Kingdom of Jordan) under Article 22 of the League of Nations Covenant which was adopted at the Paris Peace Conference in 1919. The

²³Ibid., p. 77.

²⁴Wilson, p. 54.

first and fourth paragraphs of the 22nd Article read as follows:

To colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the states which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples from a sacred trust of civilization and that securities for the performance of this trust should be embodied in this Covenant.

Certain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognized, subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the Mandatory.²⁵

With this document and the subsequent granting of the Palestine mandate to Britain, Palestine (and Jerusalem) acquired their first officially recognized legal status. Note that the fourth paragraph does state that "certain communities [Palestine and other Middle Eastern nations]... have reached a stage of development where their existence as *independent nations* can be provisionally recognized [emphasis supplied]." Therefore, Palestine did indeed receive internationally recognized status as an independent nation by virtue of the League's pronouncement.

One must also note the last sentence of the fourth paragraph: "The wishes of these communities must be a principal consideration in the selection of the Mandatory." This clause was blatantly disregarded since Great Britain had publicly professed its willingness to assist a minority group in the area, the Zionist movement, in establishing a Jewish national

²⁵Henry Cattán, *Palestine and International Law: The Legal Aspects of the Arab-Israeii Conflict*, (London: Longman, 1973), pp. 65-66.

home in Palestine. The King-Crane Commission pointed out that this objective was in direct contravention to the wishes of the "non-Jewish communities" in Palestine, which made up at the time of the mandate, 91% of the population. Surely, had the majority voice in Palestine been heard, Great Britain would have been the last choice for a mandatory power.

In addition to this abrogation of the Covenant, the specific terms of the mandate were settled, not in accordance with Article 22, but behind closed doors by British officials "in close consultation with Zionist representatives."²⁶ The final form of the mandate was far from the original intentions of the 22nd Article of the League Covenant. First, an additional objective was added, stipulating that the Mandatory was to put into effect the Balfour Declaration, in full, so that political, economic, and administrative conditions would ensure the creation of a Jewish homeland. This required massive Jewish immigration.

Second, Great Britain deviated from the Covenant further by ignoring the clause that stated that the mandatory power was to provide "administrative advice and assistance" and instead granted itself "full powers of legislation and administration."²⁷ These powers were necessary to force upon the majority in Palestine the Balfour Declaration and the implementation of the Jewish immigration programs that ensued.

The demographics of Jerusalem as well as Palestine changed dramatically. The number of Jews in Jerusalem, totalling 33,971 just prior

²⁶H.W.V. Temperley, *History of the Peace Conference of Paris*, vol. VI. (London: Hodder and Stoughton, 1924), p. 174.

²⁷Cattan, p. 34.

to the advent of the Balfour Declaration, tripled to 99,400 once the immigration program brought about by the document had reached its peak. At the same time Jewish population in Palestine increased ten times, from 56,000 in 1918 to 608,230 in 1946.²⁸

The opposition to the mandate was manifested in the form of riots and other disturbances, most of them inside Jerusalem. Bloody conflicts taking the lives of hundreds of Jews and Arabs occurred in 1920, 1921, 1929, and 1936. The 1936 outbreak of violence lasted three years and prompted the formation of the Peel Commission by Great Britain to discover a solution to their growing problems.

The Peel Commission called for the division of Palestine into separate Jewish and Arab States as well as a permanent British mandate over Jerusalem, Bethlehem, Nazareth, and Lake Tiberias.²⁹ In short, the original Mandate was declared totally unworkable. "To put it in one sentence, we [Great Britain] cannot - in Palestine as it now is - both concede the Arab claim to self-government and secure the establishment of the Jewish national home."³⁰ The Arabs and the Jews both rejected the plan.

Finally in 1939 the British began to realize that they had created an impossible situation by attempting to establish a Jewish state in a territory still overwhelmingly populated by Arabs. In an effort to cover its tracks, the British Government publicly proclaimed that continued Jewish immigration into Palestine violated that clause of the Balfour

²⁸Ibid., p. 35.

²⁹Ibid., p. 36.

³⁰Report of the Palestine Royal Commission, Cmd. 5479 (June 22, 1937) reprinted in J. N. Moore, ed. *The Arab Israeli Conflict: Documents* (1974), p. 150.

Declaration which prohibited the violation of the civil and religious rights of the non-Jewish communities. Great Britain on May 17, 1939, issued a White Paper which declared that Jewish immigration would be limited to 75,000 people over the next five years, that Palestine would be granted total independence in ten years, and that no further Jewish immigration would be allowed without Arab consent after the five-year period had expired.

Zionist reaction to this White Paper is infamous. Zionist Jews launched numerous terrorist attacks against the British Government in an effort to force them to repeal the decision. Three paramilitary organizations, the Irgun Gang, the Zvai Leumi, and the Stern Gang bombed government offices, sabotaged public buildings, and killed, tortured, and maimed British soldiers and government officials. The most publicized of all the incidents was the bombing of the King David Hotel in Jerusalem, which at the time was the headquarters for the Palestine Government. 91 people were killed and 45 wounded.³¹ Incidentally, Manachem Begin, former Prime Minister of Israel, was the leader of the Irgun at the time of this bombing.

³¹Stephen B.L. Penrose, *The Palestine Problem: Retrospect and Prospect* (New York: American Friends of the Middle East, 1966), p. 9.

III

The Balfour Declaration and The Palestine Mandate Under International Law

The Balfour Declaration, when finally issued in November 1917, had little if any legal relevance to the community of nations. Although on the surface it appears to be a multipartite agreement since the British Government, the Jews in Great Britain, and the Zionist Foundation were party to it, formally it was only a unilateral pronouncement by the British Government. Great Britain's legal authority to make significant changes in the character of Palestine, such as the establishment of a Jewish national home, would have been severely questioned. However, the fact that this did not occur plus the addition of very strong and specific "safeguard" clauses pertaining to the non-Jewish inhabitants of the area placed the British on more solid ground.

Once the Balfour Declaration was incorporated into the League of Nations Mandate for Palestine in 1922, the three main clauses of the Declaration (the clause establishing a Jewish national home or "favor clause" as it will be referred to from this point on, and the two "safeguard" clauses protecting the rights of the non-Jewish inhabitants in Palestine) were then given firm legal ground in international law. Since the Covenant of the League of Nations received multilateral consent from most of the nations at that time, the Mandate for Palestine, with the

Balfour Declaration as its second preambulatory paragraph, was legally binding. But this fact does not override the point that if any part of the mandate for Palestine were to contradict the League of Nations Covenant, the mandate could then be considered invalid.

It is fundamental that no part of the Palestine Mandate could be valid if it were in violation of any provisions of the League of Nations Covenant. The Covenant was the preeminent constitutional instrument of the organized world community of the time and the Palestine Mandate was authorized by it and subject to its limitations.³²

In one very flagrant and very important way, the Mandate for Palestine does violate the League Covenant. As cited earlier, the fourth paragraph of the League Covenant states that the wishes and desires of the communities being assigned mandatory powers *must* be a "principal consideration" in the selection of the mandatory. The stated wish of the Palestinian people at that time was for an independent state which they had been promised by the British Government and by the League Covenant. Yet the British had shown public and consistent support of the Zionist call for a Jewish national home in Palestine. This could not have been spelled out any more clearly than in the Balfour Declaration.

In addition, the mandatory power, Great Britain, violated both the League Covenant and the Mandate for Palestine. First, the League Covenant's provisions regarding the communities formerly belonging to the Ottoman Empire stated that the mandatory powers were to provide "administrative advice and assistance" in paving the way for eventual independence. Contrarily, Great Britain exercised full administrative and

³²Mallison and Mallison, "The Jerusalem Problem in Public International Law," p. 66.

legislative powers in Palestine. Obviously, these were necessary in order to carry out their objective: establishing a Jewish national home against the wishes of the majority of Palestine's inhabitants.

Second, the British violated the Mandate itself by refusing to observe the two safeguard clauses found in the Balfour Declaration which had been made part of the Mandate for Palestine by the League of Nations. These clauses required Great Britain to protect the religious and civil rights of the non-Jewish communities in Palestine. Instead, a massive Jewish immigration campaign ensued which radically changed the demographics of the entire country and its capital, Jerusalem. Furthermore, by fostering the Jewish nationalistic movement of Zionism, the British made certain that the Arab majority would be deprived of any power in governing the country since Zionism had as its ultimate goal the establishment of a Jewish State in Palestine.

Nonetheless, since no objection within the League was raised, the Mandate was accepted by the community of nations. It therefore became a part of international law. The United States, although not a League member, also formally recognized the Mandate by signing the Anglo-American Convention on Palestine in 1924. In this document the United States consented to a British administration of Palestine as spelled out in the League Mandate. This convention also tacitly makes the United States party to the Balfour Declaration which made up the second paragraph of the Mandate.

Legally, therefore, the Mandate for Palestine (and, consequently, the Balfour Declaration) has been accepted as part of international law by the community of nations. Despite the ambiguities and contradictions that exist both in the Mandate and in the Balfour Declaration, no objection was

ever raised concerning either document, and by silence and consent the two are now recognized as law. What is interesting to note, however, is that the present government of Israel, while not considering itself subject to any treaties or agreements made by the mandatory power for Palestine (Great Britain), does consider the Balfour declaration as still binding and valid. Yet,

There is no doubt that the proponents of the Zionist-Israel claims are no more interested in effectuating the safeguards [of the Balfour Declaration] in recent years than they have been at any earlier time. The result, however, of the establishment of the Balfour Declaration as customary international law is its acceptance as a whole. This undoubtedly creates a very difficult situation for the State of Israel and its juridically linked Zionist Organization because of the systematic and continuing character of the violation of both of the safeguard clauses.³³

In summation, there exist fundamental inconsistencies between the stated purpose of the Balfour Declaration, now a part of international law, and the goals and objectives of the State of Israel as demonstrated over the past four decades. Here is the first of several areas where the government of Israel has shown disregard for laws and norms established by international agreements and bodies to which they were a consenting party.

³³Ibid., p. 71.

IV

The Partition of Palestine and the Internationalization of Jerusalem

The guerrilla warfare that began in 1939 continued during the early and middle portions of the 1940's. This continuing violence placed British government in a very difficult situation with respect to its mandate in the Middle East. Zionist terrorism against British nationals, both in Palestine and throughout the world, was on the rise, ostensibly due to the White Paper of May 1939, severely limiting Jewish immigration and providing Palestinian independence in ten years. The United States, which had closed its own doors to Jewish immigration, was pressuring Great Britain to reconsider its position. Instead, the decision was made by the United Kingdom to withdraw completely from Palestine and turn the matter over to the United Nations.

A Special Session of the UN General Assembly was convened in April 1947. On May 15 a special committee was appointed to study the situation (UNSCOP - United Nations Special Commission on Palestine)³⁴ and was requested by the UN to submit proposals and recommendations on the problems' solution.

The Commission forwarded two plans, a minority and a majority

³⁴Cattan, p. 38.

report. The majority plan stated that Arab and Jewish goals were irreconcilable and proposed a partition of the area creating both an Arab and a Jewish State. The City of Jerusalem was to be established as a *corpus separatum* which would be administered by a special international régime under the Trusteeship Council of the UN. The minority plan proposed a federal state composed of Jewish and Arab halves with Jerusalem as the capital.

The boundaries of the proposed majority plan would have set up populations as follows:

	Jews	Arabs	Total
Jewish State	498,000	407,000	905,000
Arab State	10,000	725,000	735,000
Jerusalem	142,000	68,000	210,000
Total	650,000	1,200,000	1,850,000 ³⁵

The plan was reluctantly accepted by the Zionist Organization, while the Arabs flatly rejected it. The General Assembly approved the majority plan on November 29, 1947 by a vote of 33 in favor, 13 against and 10 abstentions. This resolution (GA 181 (II)) established the partition of Palestine and the internationalization of Jerusalem basically along the lines of the majority report of the Commission. The resolution also provided for the appointment of the Palestine Commission which was provisionally to take on the tasks of administering Palestine while the British withdrew. This Commission was charged with the additional task of putting into effect the partition plan as well as the establishment of an

³⁵Wilson, p. 63.

international régime in Jerusalem.

Meanwhile, conditions in Palestine were deteriorating rapidly. Zionist factions were highly organized and were preparing officially to declare statehood as soon as the last of the British mandatory authorities were out of the country. The Arabs, on the other hand, were much more loosely organized, but were generally prepared to attack the Jews and "drive them into the Mediterranean," if need be.³⁶

The British, who were very dissatisfied with the resolution 181, refused to transfer authority to the Palestine Commission until the withdrawal of the mandatory officials was complete.

The situation in Palestine (and Jerusalem in particular) degenerated to chaos. Several resolutions from the United Nations were adopted attempting to restore order as the Palestine Commission began to establish itself as the governing authority in Palestine. These resolutions, the most notable of which were Security Council Resolutions 44 and 48, and General Assembly Resolution 187, were not effective in preventing the further deterioration of the situation.

On May 14, 1948 the last of the British authorities hurriedly left the country without any formal handing over of power to the Palestine Commission. On that same day, leaders of the Jewish community met in Tel Aviv and declared the State of Israel. Within minutes, President Truman of the United States recognized the existence of the new state. On the following day, Arab forces from Egypt, Transjordan, Iraq, Syria, and Lebanon advanced into Palestine and warred with the large numbers of

³⁶Ibid., p. 64.

Arabs native to Palestine against the Jewish forces there. During the war 700,000 - 800,000 Arabs fled Palestine producing an enormous number of Arab refugees.

The battles in Jerusalem were particularly fierce. In a notable incident, the Irgun Gang (the same Zionist terrorist organization discussed above) brutally massacred several hundred defenseless men, women, and children in a small village just outside Jerusalem proper, Der Yassin. This village fell inside the area designated *corpus separatum* under resolution 181.

There is no question but that frightful massacres such as that which took place at Der Yassin in April 1948 were perpetrated for the major purpose of frightening the Arab population and causing them to take flight [from Jerusalem]. The Zionist radio repeated incessantly for the benefit of Arab listeners 'Remember Der Yassin'. It is small wonder that many Arab families began a hasty exodus from the battle area and from sectors which might soon become battlegrounds.³⁷

The estimated population of the *corpus separatum* in 1947 was 60,500 Moslems and 44,850 Christians. The number estimated to have been displaced by the violence in 1948 is between 50,000 and 60,000.³⁸

The Israelis conquered the modern portion of the city of Jerusalem (henceforth called the western sector) by the 15th of May 1948. Several attacks were launched against the old city (henceforth termed the eastern sector) between the 14th and the 18th of May. These offensives were repelled, and the situation remained virtually unchanged (Arabs in control of the eastern sector, Jews in control of the western sector) until

³⁷Penrose, p. 12.

³⁸Cattan, p. 45.

the Armistice Agreement between Jordan and Israel was signed on April 3, 1949. This situation of *de facto* control remained relatively stable from 1948 to 1967.

1948 is a key date in the study of the legal status of Jerusalem. It was at this time that many United Nations' resolutions were passed and a great deal of the legal discussion concerning the problems in Jerusalem was brought to the forefront of the world political scene. In the next chapters the author will discuss extensively the legal aspects of the problem and suggest its possible solution.

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V

The United Nations and Jerusalem

The first, and probably most important United Nations resolution concerning Jerusalem was passed on the 29th of November 1947. Known as the Palestine Partition Resolution 181 (II), it provided for the division of Palestine into separate Jewish and Arab states. Furthermore, a separate international status was approved for the City of Jerusalem. It was to be established as a *corpus separatum* to be administered by an international régime under the auspices of the United Nations Trusteeship Council. Resolution 181 brought about the official termination of the Mandate for Palestine established by the League of Nations. It was at the time of this termination that the *corpus separatum* was to enter into effect. This date was to be no later than August 1, 1948. As mentioned earlier, events in the region brought about a *de facto* division of power in Jerusalem with Jews occupying the western sector and Arabs holding the eastern (old) sector of the city.

Resolution 181 states in relevant part:

A. Special Régime

The City of Jerusalem shall be established as a *corpus separatum* under a special international régime and shall be administered by the United Nations. The Trusteeship Council shall be designated to discharge the responsibilities of the Administering Authority on behalf of the United Nations

B. Boundaries of the City

The City of Jerusalem shall include the present municipality of Jerusalem plus the surrounding villages and towns[see map in the Appendix III]....³⁹

This resolution went unimplemented as a result of the war between Israel and the Arab states once Jewish leaders in Tel Aviv proclaimed Israeli statehood in May of 1948. Although it did not take effect, the binding nature of the resolution itself does not and has not lapsed. There is no provision in the United Nations Charter placing time limits or deadlines on resolutions.

When it became apparent that the Holy Places as well as the inhabitants of Jerusalem were in danger due to the fighting in that area, the General Assembly passed resolution 185 (S-II) requesting the Trusteeship Council to investigate "suitable measures for the protection of the city and its inhabitants, and to submit within the shortest possible time proposals to the General Assembly to that effect."⁴⁰ General Assembly resolution 187 was written and adopted on May 6, 1948 based on these recommendations. The resolution called for, *inter alia*, a special commissioner to be appointed to oversee the administration of the City of Jerusalem. The appointment was made, but he was unable to perform his duties due to the intense hostilities in the city.

On May 14, 1948, the General Assembly passed resolution 186 calling for a United Nations Mediator for Palestine. Count Folke Bernadotte was appointed to this position. Unfortunately, he was assassinated in

³⁹Mallison and Mallison, *The Palestine Problem*, p. 211.

⁴⁰U.N. GENERAL ASSEMBLY OFFICIAL RECORD, Supplement 2, 2nd Special Session, 5, U.N. Document A/555 (16 April-14 May 1948), p. 5.

Jerusalem by Jewish terrorists on September 17, 1948.⁴¹ Before he was killed, he submitted a progress report which stated in relevant part:

The City of Jerusalem, because of its religious and international significance and the complexity of interests involved, should be accorded special and separate treatment.

The City of Jerusalem, which should be understood as covering the area defined in the resolution of the General Assembly of 29 November, should be treated separately and should be placed under effective United Nations control with maximum feasible local autonomy for its Arab and Jewish communities, with full safeguards for the protection of the Holy Places and sites and free access to them, and for religious freedom.⁴²

This report engendered a number of United Nations resolutions reaffirming the validity of the establishment of a *corpus separatum* for Jerusalem administered by an international régime as set forth in GA resolution 181 (II). General Assembly resolution 194 of December 11, 1948 was one such resolution. It established a Conciliation Commission for Palestine and stated, *inter alia*:

*Resolves that...the Jerusalem area...should be accorded special and separate treatment from the rest of Palestine and should be placed under effective United Nations control.*⁴³

The first General Assembly resolution to refer specifically to resolution 181 (as well as 194) was passed on December 9, 1949 (resolution 303). This was

⁴¹Cattan, p. 55.

⁴²Progress Report of the United Nations Mediator in Palestine Submitted to the Secretary-General for Transmission to the Members of the United Nations, 3 U.N. GENERAL ASSEMBLY OFFICIAL RECORD, Supplement 11 pp. 17-19, U.N. Document A/648 (1948); reprinted in Moore, p. 369.

⁴³Mallison and Mallison, *The Palestine Problem*, pp. 212-213.

also the first resolution passed following the Armistice Agreement which came into force in April of that same year ending the hostilities between Jordan and Israel. This armistice sealed the *de facto* control of the two respective halves of the City of Jerusalem. Resolution 303 states in its first operative clause:

To restate, therefore, its intention that Jerusalem should be placed under a permanent international régime, which should envisage appropriate guarantees for the protection of the Holy Places, both within and outside Jerusalem, and to confirm specifically the following provisions of General Assembly resolution 181 (II):

- (1) The City of Jerusalem shall be established as a *corpus separatum* under a special international régime and shall be administered by the United Nations;
- (2) The Trusteeship Council shall be designated to discharge the responsibilities of the Administering Authority...; and
- (3) the City of Jerusalem shall include the present municipality of Jerusalem plus the surrounding villages and towns.⁴⁴

Both Israel and Jordan continued to reject the proposed internationalization of the city. Notwithstanding, the second paragraph of the above resolution called for the Trusteeship Council to continue with its plans to implement the international régime.

The strength of the *de facto* division continued to grow as both Israel and Jordan tightened their respective grips over their portions of the city. By the end of 1949 Israel had moved the Knesset (its legislative body), the Supreme Court, and most of its other government offices to West Jerusalem.⁴⁵ On January 23, 1950 Israel announced that West Jerusalem

⁴⁴U.N. GENERAL ASSEMBLY OFFICIAL RECORD, *Resolutions*, 25, U.N. Document A/1251 (September 20 - December 1948), reprinted in Mallison and Mallison, p. 213.

⁴⁵Mallison and Mallison, *The Palestine Problem*, p. 214.

would become its capital city.⁴⁶ Surprisingly, this move drew little or no reaction from the world community. From 1950 until the after hostilities between Israel and some of her Arab neighbors broke out in 1967, no United Nations' resolutions were brought to the floor concerning the status of Jerusalem. Many proponents of Jewish control of the city maintain that this lack of international legal attention can be translated into a tacit recognition of Israel's sovereignty over the entire city. The present author strongly disagrees with this point, and will discuss this in some length in a later chapter.

On June 5, 1967 Israel attacked Egypt, Syria, and Jordan in what was termed the Six-Day War.⁴⁷ Many casual observers of Middle East politics make the mistake of alleging that the Arab countries were the initiators of hostilities that sparked that war, due primarily to a strong media bias in favor of Israel. Although military preparations were underway in several Arab states, no clear evidence can be cited pointing to an impending Arab attack. In fact, it was later revealed that Gamal Abd Al-Nasser, then President of Egypt, was quite unprepared for war with Israel and was not at the time contemplating aggression, nor was he recommending it to his Arab allies.⁴⁸

Discussion as to whether Israel's resort to force was legitimate

⁴⁶1st Knesset, 2nd Session, 108th Meeting, *Israel Parliamentary Protocol* (Tel Aviv, Israel: n.p. 1950), pp. 602-603.

⁴⁷For a detailed account of the events precipitating the 1967 war between Israel and the Arabs see Wilson, pp. 92-128.

⁴⁸See Gamal Abdel Nasser, *The Philosophy of the Revolution*, with an introduction by John S. Badeau and a Biographical Sketch by John Gunther (Buffalo: Economics Books, Smith, Keynes, and Marshall, Publishers, 1959), pp. 81-83.

under modern international law is relevant inasmuch as a significant amount of Arab territory, including the entire eastern sector of the City of Jerusalem, came under the occupation of the Israeli military. A program to unite the two parts of the city was forthwith implemented. Water, electrical, sanitation, bussing, and telephone services were quickly linked. The pace of political and "legal" unification was equally swift. On June 28 and 29 laws were enacted that both expanded the size of the city and brought all of East Jerusalem under Israeli rule. Gerhard von Glahn outlines the measures taken following the June laws:

- (1) abrogation of the Arab Municipal Council; (2) elimination of certain municipal services and the amalgamation of others with their Israeli counterparts; (3) application of all Israeli laws to the Arab inhabitants; (4) transfer of all Arab public schools to the authority of the Israel Ministry of Education, which then led to the use of Israeli curricula; (5) issuance of Israeli identification cards to all inhabitants; (6) nonrecognition of the Jerusalem Islamic courts; (7) closure of Arab banks and exclusive use of Israeli currency; and (8) physical transfer to East Jerusalem of a number of Israeli ministries and government departments.⁴⁹

As a result of this action, the General Assembly met in emergency special session.

On July 4th, 1967 the General Assembly adopted resolution 2253 which stated in part:

Deeply concerned at the situation prevailing in Jerusalem as a result of the measures taken by Israel to change the status of the City,

1. *Considers that these measures are invalid;*
2. *Calls upon Israel to rescind all measures already taken and to desist forthwith from taking any action which would alter the status of*

⁴⁹Gerhard von Glahn, *Law Among Nations*, 5th ed. (New York: Macmillan Publishing Co., Inc., 1986.), p. 324.

This resolution went unheeded by the Israeli government which continued the "Judaization" process in East Jerusalem. Henry Cattan explains this procedure:

...the Israelis razed to the ground the historic Mughrabi quarter which dated back to AD 1320, destroying, in the words of David Hirst, 'seven hundred years of Muslim history' in order to make a parking lot in front of the Wailing Wall. Similarly, a large area of the historic cemetery of Mamillah which contained the tombs of many famous or pious Moslems was bulldozed and converted into a car park.⁵¹

During June and the months that followed, Israel sequestered large sections of East Jerusalem and destroyed scores of Arab homes. Israeli police confiscated the unfinished Muslim hospital in the city and used it as a military headquarters. Israel expropriated 838 acres from Arabs in East Jerusalem for Jewish settlements. More than 700 buildings, 50 acres of land, 437 shops, and 1,048 apartments belonging to nearly 5,000 Arabs were confiscated.⁵² The demographic structure of the city was changed dramatically as well. The Arab population in that area which made up the *corpus separatum* was, in 1947, approximately 105,540. By mid-1967 this number had been reduced to about 75,000. Jewish inhabitants of the city climbed from the 1947 figure of 99,690 to over 275,000.⁵³ Jerusalem was

⁵⁰22 U.N. GENERAL ASSEMBLY OFFICIAL RECORD (ES-V), Supplement 1, U.N. Document A/6798 (July 1967), p. 4.

⁵¹Cattan, p. 75.

⁵²Richard H. Plaff, *Jerusalem: Keystone of an Arab-Israeli Settlement*, (Washington: American Enterprise Institute for Public Policy Research, 1969), p. 38.

⁵³Cattan, p. 82.

forcibly being made into a Jewish city.

As a result of Israel's failure to comply with GA resolution 2253, resolution 2254 was adopted on July 14, 1967. It noted Israel's non-compliance and stated:

[The General Assembly] 1. *Deplores* the failure to implement General Assembly resolution 2253 (ES-V);

Reiterates its call to Israel in that resolution to rescind all measures already taken and to desist forthwith from taking any action which would alter the status of Jerusalem.⁵⁴

In the Security Council the matter of Jerusalem and its legal status was taken up when it became evident that Israel did not intend to comply with either of the General Assembly resolutions passed in July, 1967. Security Council resolution 242, which has subsequently been accepted as the bases for Middle Eastern peace, was passed on November 22, 1967. In this resolution Jerusalem is never mentioned specifically, but there are several references to "the inadmissibility of the acquisition of territory by war."⁵⁵ One of the first recommendations of this resolution is for "withdrawal of Israeli armed forces from territories occupied in the recent conflict..."⁵⁶ This reference clearly includes Jerusalem and was so understood by one of its principle authors, Lord Caradon of Great Britain.⁵⁷

⁵⁴22 U.N. General Assembly Official Record, Supplement 1, p. 4.

⁵⁵Lord Caradon, U.N. Security Council Resolution 242: A Case Study in Diplomatic Ambiguity, (Washington D.C.: Georgetown University's Institute for the Study of Diplomacy, 1981), p. 17.

⁵⁶Ibid., p. 9.

⁵⁷Ibid., p. 14. Resolution 242 received a unanimous vote in the Security Council.

On May 21, 1968 Security Council resolution 252 was adopted to deal specifically with the Jerusalem situation. It referred to previous General Assembly resolutions 2253 and 2254 and declared that the Security Council:

1. *Deplors* the failure of Israel to comply with the General Assembly resolutions mentioned above;
2. *Considers* that all legislative and administrative measures and actions taken by Israel, including expropriation of land and properties thereon, which tend to change the legal status of Jerusalem are invalid and cannot change that status;
3. *Urgently calls upon* Israel to rescind all such measures already taken and to desist forthwith from taking any further action which tends to change the status of Jerusalem.⁵⁸

This particular resolution is significant for several reasons. (1) It recognizes as "invalid" all those measures taken by Israel that alter Jerusalem's "legal status." (2) It is the first post-1950 resolution to refer specifically back to Jerusalem's legal status, that of the *corpus separatum*. There can be no other interpretation of this clause since only one such status was ever recognized as valid by the community of nations: the provisions laid down in General Assembly resolution 181 (II) which provided for the international régime to administer Jerusalem as a *corpus separatum*. Further discussion as to the many and varied references made by UN resolutions regarding Jerusalem's "status" will be taken up in the following chapter.

Resolution 252 was ignored by the State of Israel. On July 3, 1969 the Security Council adopted yet another resolution dealing with the Jerusalem problem. Resolution 267, which mentions previous General

⁵⁸ U.N. Security Council Official Record, *Twenty-third Year*, pp. 9-10.

Assembly resolutions 2253 and 2254 as well as Security Council resolution 252 additionally states that the Security Council:

1. *Reaffirms* its resolution 252 (1968);
2. *Deploras* the failure of Israel to show any regard for the resolutions of the General Assembly and the Security Council mentioned above;
3. *Censures* in the strongest terms all measures taken to change the status of the City of Jerusalem;
4. *Confirms* that all legislative and administrative measures and actions taken by Israel which purport to alter the status of Jerusalem, including expropriation of land and properties thereon, are invalid and cannot change that status;
5. *Urgently calls* once more upon Israel to rescind forthwith all measures taken by it which may tend to change the status of the City of Jerusalem, and in future to refrain from all actions likely to have such an effect;
7. *Determines* that, in the event of a negative response or no response from Israel, the Security Council shall reconvene without delay to consider what further action should be taken in this matter.⁵⁹

This resolution employs more forceful and stringent terms in its demands. It is also the first resolution to refer to future events (see paragraph 5).

Security Council resolution 271 of September 15, 1969 was adopted in response to the outrageous destruction by arson of the Al-Aqsa Mosque. Extensive damage was done to the roof of the structure as well as to the ancient wooden pulpit.⁶⁰ Preambulary paragraph 4 recalled Security Council resolutions 252 and 267 as well as General Assembly resolutions 2253 and 2254, all of which concerned the status of Jerusalem. Preambulary paragraph 5 reaffirms the inadmissibility of the acquisition of

⁵⁹U.N. Security Council Official Record, Twenty-fourth Year, pp. 3-4.

⁶⁰Cattan, p. 74. The culprit reportedly told Israeli officials that he attempted to burn the mosque so that the Temple of Solomon could be rebuilt in its stead.

territory through conquest. Several of the operative paragraphs state that the Security Council:

2. *Recognizes* that any act of destruction or profanation of the Holy Places, religious buildings and sites in Jerusalem or any encouragement of, or connivance at, any such act may seriously endanger international peace and security;
4. *Calls upon* Israel scrupulously to observe the provisions of the Geneva Conventions [Geneva Conventions of August 12, 1949] and international law governing military occupation and to refrain from causing any hindrance to the discharge of the established functions of the Supreme Moslem Council of Jerusalem, including any co-operation that Council may desire from countries with predominantly Moslem populations and from Moslem communities in relation to its plans for the maintenance and repair of the Islamic Holy Places in Jerusalem;
5. *Condemns* the failure of Israel to comply with the aforementioned resolutions and calls upon it to implement forthwith the provisions of these resolutions;⁶¹

Further Security Council action was outlined in resolution 298 passed September 25, 1971. Additional measures to further "Judaize" East Jerusalem had been implemented by the State of Israel in direct contravention to numerous General Assembly and Security Council resolutions. Resolution 298 basically restated what many of the previous resolutions had already said:

The Security Council,...

1. *Reaffirms* Security Council resolutions 252 (1968) and 267 (1969);
3. *Confirms* in the clearest possible terms that all legislative and administrative actions taken by Israel to change the status of the City of Jerusalem including expropriation of land and properties, transfer of populations and legislation aimed at the incorporation of the occupied sections are totally invalid and cannot change that status;
4. *Urgently* calls upon Israel to rescind all previous measures and actions and to take no further steps in the occupied section of Jerusalem which

⁶¹U.N. Security Council Official Record, Twenty-fourth Year, p. 5.

may purport to change the status of the City, or which would prejudice the rights of the inhabitants and the interests of the international community, or a just and lasting peace;

The above resolution makes a reference to an "occupied" section of Jerusalem, implying that there existed some section that was unoccupied, presumably that portion which Israel acquired in the war in 1948 (the western sector). This contradicts the stated demands of several earlier resolutions which declare as invalid all acts aimed at altering the "status of Jerusalem," that of the *corpus separatum*.

On February 11, 1974 the Commission on Human Rights of the Economic and Social Council of the United Nations adopted a resolution by a vote of 21 to 1 with 8 abstentions⁶² condemning Israel's policy of annexation and transfer of population in the occupied territories, including Jerusalem. It stated, *inter alia*:

The Commission on Human Rights,

2. *Deplores* Israel's persistent defiance of the relevant resolutions of the United Nations and its continued policy of violating the basic human rights of the inhabitants of the occupied Arab territories;

3. *Reaffirms* that all measures taken by Israel to change the physical character, the demographic structure and the status of the occupied Arab territories, including occupied Jerusalem, are null and void;

4. *Declares* that Israel's policy of annexation, establishment of settlements and transfer of an alien population to the occupied territories is in contravention of the purposes and principles of the Charter of the United Nations, the principles and provisions of international law concerning occupation, the principles of sovereignty and territorial integrity, and the basic human rights and fundamental freedoms of the people.⁶³

That same body adopted another resolution on February 21, 1975

⁶²Cattan, p. 190.

⁶³*Ibid.*

condemning Israel's violations of human rights in the occupied territories and censuring Israel's acts in Jerusalem:

The Commission on Human Rights,

1. *Deplors* Israel's continued grave violations, in the occupied Arab territories, of the basic norms of international law and of the relevant international conventions, in particular the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949, which have been considered by the Commission on Human Rights as war crimes and an affront to humanity...;

8. *Censures* in the strongest terms all measures taken by Israel to change the status of Jerusalem.⁶⁴

This resolution is of particular interest since it accuses Israel of violating provisions of the Fourth Geneva Convention on the Protection of Civilian Persons in Time of War which states in Article 85 (4a), *inter alia*, "The occupying power shall not deport or transfer parts of its own civilian population into the territory it occupies."⁶⁵

The General Assembly then passed resolutions 31/106A and C (December 16, 1976), 32/5 (October 28, 1977), 32/91A and C (December 13, 1977), and 33/112 A, B, and C (December 18, 1978) all pertaining in full or in part to the illegality of Israel's actions in Jerusalem.

During March, 1979 the Security Council formed a commission consisting of three member states to file a report on conditions in the occupied Arab territories including Jerusalem. This commission was formed as a part of resolution 446 of the same date. Although the government of Israel refused to cooperate with the study group, the commission reported back to the Security Council on March 1, 1980, and

⁶⁴*Ibid.*, p. 191.

⁶⁵Reprinted in von Glahn, p. 692.

the report was made part of resolution 465 of that same date which stated, *inter alia*:

The Security Council,

5. *Determines* that all measures taken by Israel to change the physical character, demographic composition, institutional structure or status of the Palestinian and other Arab territories occupied since 1967, including Jerusalem, or any part thereof, have no legal validity and that Israel's policy and practices of settling parts of its population and new immigrants in those territories constitutes a flagrant violation of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War and also constitutes a serious obstruction to achieving a comprehensive, just and lasting peace in the Middle East.⁶⁶

In May, 1980 legislation was introduced in the Israeli Knesset declaring Jerusalem to be the new capital of Israel, replacing Tel Aviv.⁶⁷ This move drew immediate reaction from the Security Council, which adopted resolution 476. It stated, *inter alia*:

Deploring the persistence of Israel in changing the physical character, demographic composition, institutional structure and the status of the Holy City of Jerusalem,

Gravely concerned over the legislative steps initiated in the Israeli Knesset with the aim of changing the character and status of the Holy City of Jerusalem,

1. Reaffirms the overriding necessity to end the prolonged occupation of Arab territories occupied by Israel since 1967, including Jerusalem;

3. Reconfirms that all legislative and administrative measures and actions taken by Israel, the occupying Power, which purport to alter the character and status of the Holy City of Jerusalem have no legal validity

⁶⁶U.N. Security Council Official Record, *Thirty-fifth Year*, p. 5. Incidentally, the United States, which had voted in favor of this resolution at first, later stated publicly that this had been a mistake resulting from a failure to communicate, and clarified that their vote should have been an abstention. The U.S. Department of State then submitted to the House Foreign Affairs Committee forty documents demonstrating the consistency of resolution 465 with the stated position of the U.S. government in regards to the Middle East.

⁶⁷*New York Times*, July 31, 1980, sec. A, p. 1, col. 1.

and constitute a flagrant violation of the Fourth Geneva Convention relative to Civilian Persons in Time of War and also constitute a serious obstruction to achieving a comprehensive, just and lasting peace in the Middle East;

6. Reaffirms its determination in the event of non-compliance by Israel with this resolution, to examine practical ways and means in accordance with relevant provisions of the Charter of the United Nations to secure the full implementation of the resolution.⁶⁸

Despite this resolution, the bill in the Knesset was enacted July 30, 1980.⁶⁹ This law stated that a "complete and united Jerusalem is the capital of Israel [and] the seat of the President of the State, the Knesset, the government and the Supreme Court."⁷⁰ It stated further that "the holy places shall be protected from desecration and other offense and from anything that is likely to prejudice the freedom of access of the religious communities to the places holy to them."⁷¹ The law also requires Israel to "attend to the development and prosperity of Jerusalem."⁷² The passage of this law was responsible for Security Council resolution 478:

The Security Council,

Deeply concerned over the enactment of a 'basic law' in the Israeli Knesset proclaiming a change in the character and status of the Holy City of Jerusalem, with its implications for peace and security,

1. *Censures* in the strongest terms the enactment by Israel of the 'basic law' on Jerusalem and the refusal to comply with relevant Security Council resolutions;

2. *Affirms* that the enactment of the 'basic law' by Israel constitutes a violation of international law and does not affect the continued application

⁶⁸U.N. Security Council Official Record, *Thirty-fifth Year*, p. 13. The resolution passed by a vote of 14 to 0 with the United States abstaining.

⁶⁹*New York Times*, July 31, 1980, sec. A, p. 1, col. 1.

⁷⁰*Ibid.*, sec. A, p. 7, col. 1.

⁷¹*Ibid.*

⁷²*Ibid.*

of the Fourth Geneva Convention of 12 August 1949...in the Palestinian and other Arab territories occupied since June 1967, including Jerusalem;

5. *Decides* not to recognize the 'basic law' and such other actions by Israel that, as a result of this law, seek to alter the character and status of Jerusalem and calls upon all Members of the United Nations:

- (a) to accept this decision;
- (b) and upon those States that have established diplomatic Missions in Jerusalem to withdraw such Missions from the Holy City...⁷³

Once the Israeli law was enacted, thirteen nations (Venezuela, Uruguay, the Netherlands, Chile, Ecuador, El Salvador, Costa Rica, Haiti, Panama, Colombia, Bolivia, Guatemala, and the Dominican Republic) moved their embassies from Tel Aviv to Jerusalem. With the adoption of resolution 478, all states concerned returned them to Tel Aviv. Saudi Arabia and Iraq, two of the world's largest oil exporters, declared on August 6, 1980 that they would completely sever all diplomatic and economic ties with any nation who recognized Jerusalem as Israel's capital city.⁷⁴ Nevertheless, Costa Rica, followed by El Salvador in April, 1984, shifted its embassy back to Jerusalem. This move prompted Egypt to break off diplomatic relations with these states as a sign of protest.⁷⁵ The Islamic Conference meeting in Fez, Morocco then made a call for all member states to break diplomatic relations with the above states.⁷⁶

⁷³U.N. Security Council Official Record, *Thirty-fifth Year*, p. 14. The resolution was adopted by a vote of 14 to 0 with the United States abstaining.

⁷⁴Cattan, p. 221.

⁷⁵von Glahn, p. 325.

⁷⁶*Ibid.* There was a remarkably strong effort in the United States to pass a Senate bill proposing the move of the United States embassy in Israel from Tel Aviv to Jerusalem. The question over whether Israel could legally declare East Jerusalem to be a part of the State of Israel as well as the question of the meaning of Article 11, Section 3 of the United States Constitution (power vested in the executive branch to recognize) were grounds to defeat the bill. See Sally V. Martinson and W. Thomas Mallinson, "Moving U.S. Embassy: What's the Law?" *Christian Science Monitor*, April 2, 1984, p. 3 and p. 6.

VI

Basic Juridical Principles in Regards to Jerusalem

After reviewing the vast array of Security Council and General Assembly resolutions pertinent to the Jerusalem question, several facts can be established:

(1) Jerusalem's only official legal status was established in 1947 by General Assembly resolution 181 (II). This provided for Jerusalem to be governed as a *corpus separatum* by an international régime under UN (specifically Trusteeship Council) auspices. Palestine continued to be an imperial colony under British authority until the establishment of the three-tier trustee system under the League of Nations as outlined by Woodrow Wilson in his Fourteen-Point address. Under the League of Nations Charter, Palestine was established as a state that could be recognized as independent pending a limited amount of "administrative advice and assistance"⁷⁷ from a mandatory power, in this case Great Britain. Although there is some question as to whether the Mandate for Palestine was legal, since several of its clauses conflicted with the League Charter Article 22, Palestine's (and, ergo, Jerusalem's) status can be said to be that of a provisionally independent state consisting of a mixed

⁷⁷Cattan, *Palestine and International Law*, p. 65.

population of Arabs and Jews.

Great Britain's realization that it had made too many unfulfillable promises to both Arabs and Jews led to the decision to decline as the Mandatory for Palestine and turn the matter over to the United Nations which had since replaced the moribund League of Nations. It was at this juncture that the UN passed Resolution 181 (II) providing for a partition of Palestine into Jewish and Arab sovereign states and an internationalization of Jerusalem. The fact that this resolution was rejected by Great Britain, Israel, and the majority of the Arab states at the time does not, as many scholars postulate, negate the legally binding nature of resolution 181. "[The] international body continues to uphold the principle of the internationalization of the City [of Jerusalem]. Israel's rejection of the UN resolutions to this effect does not deprive them of their validity."⁷⁸ Likewise, the failure of the plan to be implemented due to hostilities that erupted once Jewish leaders in Palestine declared an independent Jewish state, Israel, does not invalidate the resolution. There was no time provision built into the Partition Plan; therefore the fact that the resolution is forty-one years old does in no way invalidate it. In short, the resolution invoking the *corpus separatum* for Jerusalem is still valid today.

The armistice agreement between Jordan and Israel signed in 1949 which ended the hostilities between those two countries is also valid legally, though it did not create legal boundaries for the city of Jerusalem

⁷⁸Türkçakaya Ataöv, "The Status of Jerusalem as a Question of International Law," in Hans Köchler, ed., *The Legal Aspects of the Palestine Problem with Special Regard to the Question of Jerusalem* (Vienna: Wilhelm Braumüller, 1980), p. 142.

as some maintain. The fact that this agreement led to a *de facto* division of the city for a period of approximately eighteen years, however, seems to have had some effect on the language of United Nations resolutions on the subject of Jerusalem. One notices that in all resolutions adopted prior to the hostilities that occurred in 1967, all references to the status of Jerusalem were in terms of the *corpus separatum* as outlined in General Assembly resolution 181 (II). Indeed, many of these resolutions actually refer to the Palestine Partition Plan and the *corpus separatum* specifically. However, in all but one post-1967 resolution, the implied reference is to the status of Jerusalem after the *de facto* division that occurred as a result of the 1949 armistice agreement. In only one case is there a reference to "the legal status" of Jerusalem, and even this reference is not clarified with any specific resolutions. While the present author wishes to maintain that the legally binding nature of the *corpus separatum* remains in effect today, it is apparent that the United Nations, albeit tacitly, has accepted the fact that Israel has acquired some title to West Jerusalem.⁷⁹ Nonetheless,

The consequence of this *de facto* situation...is that even continual occupation has not led to an alteration of the legal situation as per 1948. To be sure, important aspects may have been altered, in particular by means of rigorous policies of liquidation and the displacement of indigenous inhabitants, as well as Zionist settlement measures. The essential *de facto* basis for the legal ramifications of 1948, however, has remained....⁸⁰

In fact, some scholars maintain that the UN did not accept Israeli

⁷⁹This view is supported in Mallison and Mallison, *The Palestine Problem*, p. 228.

⁸⁰Gerhard Stuby, "The Status of Jerusalem and the Right of Self-determination of the Palestinian People," in Hans Köchler, ed., *The Legal Aspects of the Palestine Problem with Special Regard to the Question of Jerusalem* (Vienna: Wilhelm Braumüller, 1980), p. 128.

sovereignty:

It does not seem that after 1952 the United Nations acquiesced in Israeli...alleged sovereignty over Jerusalem. It should be pointed out that the UN silence on the question between 1952 and 1967 cannot amount as such to acquiescence in their acquisition of a legal title. UN inaction on the matter, clearly motivated by the inability to overcome the political impasse, can only mean that the World Organization accepted and acquiesced in *de facto* control of Jerusalem by Jordan and Israel. The granting of a legal title or, to be more precise, the turning of *de facto* authority into fully-fledged sovereignty, could not be brought about by mere silence.⁸¹

Does Israel have title to West Jerusalem? This question is very difficult to answer, since it hinges upon whether or not the creation of the State of Israel can be legally recognized. It is important to note that when the State of Israel was declared in 1948, it was done so purportedly in accordance with the UN partition resolution (181). If this was indeed the case, then Jerusalem would not have been part of the Jewish State envisaged by the Palestine Partition Plan. Only after the war that ensued following the Israeli announcement did Israel occupy the portion of the city known as West Jerusalem.

It is safe to interpolate, therefore, that (1) Israel's declaration of statehood is valid (This validity is strengthened by the fact that many nations, the United States and the Soviet Union among them, were quick to extend formal recognition.); (2) there was a tremendous amount of opposition, both from within Palestine and without, to a Jewish government in control of land inhabited primarily by Arabs. (The actual population totals had been altered, as illustrated previously, by massive

⁸¹Antonio Cassese, "Legal Considerations on the International Status of Jerusalem," in Köchler, p. 144.

Jewish immigration carried out contrary to the wishes of the British as outlined in the White Paper of May, 1939.); (3) this opposition led to revolt from the Arabs in Palestine who were quickly joined by other independent Arab states. The State of Israel then resorted to its legal right to defend itself. But in the course of the war Israel conquered a significant amount of territory not previously part of the declared State of Israel, including West Jerusalem. On this point, the law is very clear. With the advent of the United Nations Charter, the use of force to obtain territory is clearly a violation of the Charter and, therefore, prohibited by all member states. "...this [act of self-defense]...did not authorize her [Israel] to annex territories under a 'sovereignty vacuum.' Self-defense only entitles one to use force to repel an unlawful armed attack; it does not legitimize the acquisition of territory."⁸² This rule was strengthened in the case of *United States v. Alstotter et al.* in 1947 in which it was held that "the so-called annexed territories in Poland [during the Second World War] were in reality nothing more than territory under belligerent occupation of the military forces of Germany."⁸³ In contemporary international law this principle has been reinforced in United Nations Resolution 242 of November 22, 1967 which clearly reflects the obligations of customary international law and of the UN by "emphasizing the inadmissibility of acquisition of territory by war."⁸⁴ This view is further supported by R. Y. Jennings, International Law Professor at the University of Cambridge:

⁸²Ibid., p. 147.

⁸³Martinson and Mallison, "Moving U.S. Embassy: What's the Law?" p. 14.

⁸⁴U.N. Security Council Official Record, Twenty-second Year, pp. 8-9.

(a) The prohibition of the use of force or threat of force in international relations rests not only upon the Charter of the United Nations and its antecedent instruments but has probably also become a part of the general customary international law. It seems therefore impossible any longer to concede that the successful seizure of another's territory by force, i.e. conquest, or subjugation, may be itself a lawful title to the territory.

(b) This carries with it the further conclusion that a cession imposed by illegal force is void, for otherwise a conquest could be saved from the sanction of the law by the mere artifice of changing the mode of transfer of sovereignty. The general principles of law that consensual obligations cannot be founded in force, and that *ex injuria jus non oritur* [the law will not recognize a wrong] lead to the same conclusion.⁸⁵

Similar principles can be extended to the situation that came to exist following the hostilities in 1967 between Israel and her Arab neighbors. Israel attacked Egypt, Syria, and Jordan on June 5, 1967 in what the Israeli government termed a "preventive war."⁸⁶ Evidence made public on June 4, 1972, revealing a secret decision within the Israeli Cabinet to attack the Arab states, proves conclusively that the attack was premeditated.

The legitimacy of the so-called "preventive war" has been questioned by many legal scholars. As stated by Gerhard von Glahn:

...unlimited freedom to strike at another state in the name of self-defense would reduce to rubbish all attempts to prevent the outbreak of international violence. Hence the least that should be done... would be to provide a way for a third-party judgement as to the validity of the claim of self-defense for the preventive use of force... to assess damages or even to

⁸⁵R.Y. Jennings, *The Acquisition of Territory in International Law* (Manchester, England: Manchester University Press, 1963), p. 67. Jennings points out that the invalidity of cession by the use of unlawful force is supported in the cases of *Amato Narodni Podnik v. Julius Klenwerth Musikinstrumentenfabrik* and *Ratz-Lienert and Klein v. Nederlands Beheers-Instituut*, both tried in Dutch municipal courts. See International Legal Report, 1957, p. 435 and p. 536.

⁸⁶von Glahn, p.592.

impose sanctions against the offending state.⁸⁷

Philip Jessup, a distinguished international lawyer, echoes this view:

Under the Charter, alarming military preparations by a neighboring state would justify a resort to the Security Council, but would not justify resort to anticipatory force by a state which believed itself to be threatened.⁸⁸

As a result of this war, Israel once again captured territory that previously fell under the sovereignty of the attacked Arab states. This territory included East Jerusalem along with the entire West Bank (of the Jordan River). The multiple resolutions adopted by the Security Council during this period reflect the feeling of the world community that Israel's acquisition of territory in the 1967 war was completely inadmissible. Furthermore, Israel was cited as being in violation of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949. Since Israel did not acquire legal title to any of the territories conquered in the 1967 war, Israel's presence there could only be regarded as a military occupant, subject to the relevant Geneva Conventions governing military occupation. The Fourth Geneva Convention states, *inter alia*:

ARTICLE 47

Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and

⁸⁷Ibid.

⁸⁸Philip C. Jessup, "Force Under a Modern Law of Nations," *Foreign Affairs* 25 (1946), pp. 90-105 at p. 96.

the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory.

ARTICLE 49

(1) Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.

(6) The Occupying Power shall not deport or transfer parts of its civilian population into the territory it occupies.⁸⁹

Evidence cited earlier in this text as well as basic common knowledge of current events indicate the gross manner in which these articles have been violated by the State of Israel, which, incidentally, is a signatory of this Geneva Convention.

Israel's declaration that Jerusalem was to become the capital city of that country in 1980 was also a violation of the convention. Article 64 of Geneva IV states that the penal laws of a territory must remain in force. In this same vein, Israel violated this provision first when it attempted to supercede Jordanian law in 1967 following the war and again in 1980 when it further demonstrated its attempt at *de facto* annexation of East Jerusalem. While annexation of this sector of the city has never been formally declared by the Israeli government, the laws passed in 1967 as well as the "basic law" adopted in 1980 certainly constitute an attempt of annexation. Israel has indisputably overstepped its authority as a military occupant in these actions.⁹⁰

In summary, international law provides a firm ground upon which

⁸⁹Reprinted in Mallison and Mallison, *The Palestine Problem*, p. 486.

⁹⁰Melinda Crane, "Middle East: Status of Jerusalem," *Harvard International Law Journal* 21 (Fall, 1980): 792.

VII

Survey of Israeli Legal Claims to Jerusalem

Despite the fact that it is commonly recognized that Israel acquired both the eastern and western sectors of Jerusalem through military actions, there exist several arguments postulated by Israeli legal theorists claiming a legal right to Israeli rule in all of Jerusalem. Of these, the contentions of Julius Stone appear to be the most detailed and thorough.⁹²

The Israeli arguments begin by claiming that the Palestine Partition Plan and the *corpus separatum* for Jerusalem have lapsed owing to (1) a lack of binding force *ab initio* since the majority of the Arab states in the UN rejected the plan, (2) the plan's failure to be implemented due to the aggression of the Arab states into the declared State of Israel, and (3) a gap in time (from 1950 to 1967) during which there was virtual silence on the part of the United Nations regarding Jerusalem and the plan to internationalize it. Insofar as the post-1967 UN resolutions regarding Jerusalem are concerned, the Israeli legal proponents claim that since there is no specific reference to either the *corpus separatum* or Resolution

⁹²Other arguments in favor of Israeli sovereignty in Jerusalem include Elihu Lauterpacht in *Jerusalem and the Holy Places* (London: Anglo-Israel Association, 1968), and Yehuda Zvi Blum in *The Juridical Status of Jerusalem* (Jerusalem: Hebrew University, 1974). These two, as well as the arguments by Stone, seem to follow basically the same course.

181, none of the resolutions passed after the 1967 war can be said to restate a UN position on the internationalization of Jerusalem as a *corpus separatum*. Indeed, Stone maintains that this lack of specific reference confers UN acceptance of Israeli sovereignty in West Jerusalem.⁹³ Lauterpacht outlines the terms under which the *corpus separatum* eventually met its demise:

- (i) During the critical period of the changeover of power in Palestine from British to Israeli and Arab hands, the UN did nothing effectively to implement the idea of the internationalization of Jerusalem.
- (ii) In the five years 1948 to 1952 inclusive, the UN sought to develop the concept as a theoretical exercise in the face of a gradual realization that it was acceptable neither to Israel nor to Jordan and could never be enforced. Eventually the idea was allowed to quietly drop.
- (iii) In the meantime, both Israel and Jordan demonstrated that each was capable of ensuring the security of the Holy Places and of maintaining access to and free worship at them - with the exception, on the part of Jordan, that Jews were not allowed access to Jewish Holy Places in the area of Jordanian control.
- (iv) The UN by its unconcern with the idea of territorial internationalization, as demonstrated from 1952 to the present date, effectively acquiesced in the demise of the concept. The events of 1967 and 1968 have not led to its revival.⁹⁴

Nearly every Israeli argument vehemently states that while Israel was ready to agree to some international control and protection of the Holy Places, they specifically pointed out at the time that they did not agree to the Partition Plan⁹⁵ and claimed sovereign authority in Jerusalem.

⁹³Julius Stone, *Israel and Palestine - Assault on the Law of Nations* (Baltimore: Johns Hopkins University Press, 1981), p. 116.

⁹⁴Elihu Lauterpacht, *Jerusalem and the Holy Places* (London: Anglo-Israel Association, 1968), p. 36.

⁹⁵*Ibid.*, p. 100.

Prime Minister Ben Gurion in fact was reported by the Palestine Conciliation Commission as explicitly rejecting the territorial *corpus separatum*, and the representative of Israel was careful to explain this in terms of Israel's readiness to cooperate with a regime for the protection of the holy places, and the claim to "sovereign authority in Jerusalem."⁹⁶

Israeli occupation of East Jerusalem following the war in 1967 has been justified by Israeli legal theorists as a resort to legal self-defense as prescribed in Article 51 of the United Nations Charter.⁹⁷ Some qualify this claim by elaborating that, while Israel did indeed make the first strike against Egypt, this step was necessary in order to ward off an impending attack from Arab neighbors. In other words, Israel engaged in what is termed a "preventive war."⁹⁸

Immediately following the end of the hostilities, "a number of urgent measures" were taken by Israel in the form of laws passed in the Knesset linking East Jerusalem to West in nearly all administrative and municipal aspects.⁹⁹ These laws also drew specific municipal boundaries for the city encompassing a great deal more territory than even provided in resolution 181.¹⁰⁰

Several United Nations resolutions condemned these laws as an effort to annex the eastern sector of Jerusalem and bring it under Israeli

⁹⁶Stone, p. 100.

⁹⁷Yehuda Zvi Blum, *The Juridical Status of Jerusalem* (Jerusalem: Hebrew University, 1974), p. 20.

⁹⁸See von Glahn, p. 592. See also the discussion on the illegality of "preventive wars" p. 54 above.

⁹⁹Stone, p. 111.

¹⁰⁰See map in Appendix III

authority. Despite this, the Israeli legal argument contends that the laws did not indicate an intent to annex East Jerusalem. Rather, "the measures adopted related to the integration of Jerusalem in the administrative and municipal spheres and furnish a legal basis for the protection of the Holy Places."¹⁰¹

But virtually in the same breath as the above statement disclaiming intent to annex Stone states, "We may...have to conclude that international law accords to Israel, because of the lawfulness of her entry, grounds of legal territorial title other than those of a mere belligerent occupant."¹⁰² Much of the foundation for these "legal grounds" lies in religious tradition and history rather than international law. For example, Stone attempts to justify Israel's legal title to all of Jerusalem by pointing out there was a Jewish majority in Jerusalem over time:

In 1844 there were 7,000 Jews to 5,000 Moslems; in 1876, 12,000 Jews to 7,500 Moslems; in 1896, 28,112 Jews to 8,560 Moslems; in 1910, 47,000 Jews to 9,800 Moslems; in 1931, 51,222 Jews to 19,894 Moslems; in 1948, 100,000 Jews to 40,000 Moslems; in 1967, 200,000 Jews to 54,902 Moslems.¹⁰³

This, however, is not the only evidence cited by Israeli proponents of a Jewish legal claim to Jerusalem. For the sake of clarity, the arguments for sovereignty are divided between East and West Jerusalem:

West Jerusalem. As to West Jerusalem, the state of Israel, since she

¹⁰¹Ibid., p. 114. This was a paraphrased version of a statement by Mr. Aba Eban during the discussion in the United Nations over whether the Israeli actions constituted annexation.

¹⁰²Ibid.

¹⁰³Ibid.

maintained control by her self-defense struggle in 1948-49, has claimed full sovereignty, as she has over the rest of the territory she controlled after the 1948 aggression against her by the Arab states. Under well-settled rules of international law the claim of Israel seems difficult to challenge. For not only was her entry lawful, being in self-defense, but the history of the territory to that time reveals no other claimant state with any legal title at all - let alone better title of full sovereignty.

...the effect of international law is that Israel acquired sovereignty over the territory she controlled at her independence on March 14, 1948, as well as over any other territory in Palestine that came under her control in the course of her lawful self-defense. And West Jerusalem was certainly within these areas. And...the legally abortive partition proposals did not operate as a matter of law either to enable this or to prevent it.¹⁰⁴

The above argument is seriously flawed in several respects. (1) The claim to "full sovereignty" based on acquisition through self-defense is in no way supported in contemporary international law. True, the Charter specifically allows for self-defense:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security.¹⁰⁵

But, as mentioned earlier, international law holds that the right to self-defense is only valid for protecting and maintaining the territorial status quo - not for territorial aggrandizement. Such acquisition can only be interpreted as forceful seizure, and this principle has been declared illegal in untold numbers of UN resolutions during the past four decades. It seems ironic that Stone chooses the phrase "well-settled rules of

¹⁰⁴Ibid., p. 116.

¹⁰⁵Reprinted in von Glahn, p. 124.

international law"¹⁰⁶ when it seems quite clear (and irrefutable) that the law does not support his claim.

(2) History, religion, population, etc. do not constitute grounds for a legal claim to sovereignty. Yet so much of the Israeli claim to Jerusalem is shrouded in religious significance and history. This too is odd since, were these factors to have any relevance in a legal claim, Moslems could (and do) profess the same religious ties, a much longer historical connection to the City, and accurate population figures¹⁰⁷ that stand in direct contraposition to those posited by Israeli theorists.

(3) Whether or not Israel can be said to have acquired sovereignty over all of the territory it controlled following the hostilities of 1948-49 is indeed questionable. It is, however, a topic that cannot be examined thoroughly here. However, the contention that Israel acquired sovereignty to West Jerusalem at that same time is unquestionably false. The United Nations, the legal body vested with the authority for all mandates following the demise of the League, had established Jerusalem as a *corpus separatum* to be administered by an international régime. This status, the only legal status conferred upon the city was in force in 1948 when Israel declared independence and remains so to this day. International law clearly dictates that no nation can legally claim sovereignty to this city, and several United Nations resolutions stand behind this fact.

¹⁰⁶Stone, p. 115.

¹⁰⁷See Appendix II.

As to East Jerusalem:

It is not in dispute that at the very least Israel's standing in East Jerusalem, as on the West Bank and in Gaza, derives from what was initially a situation of belligerent occupation during active hostilities. Nor is it seriously in dispute that her entry there was lawful, because it occurred in the course of self-defense.

The present inquiry is whether the principles of international law and the charter [sic], to which by its admonitions after 1967 the General Assembly correctly referred [to] the future territorial status of East Jerusalem, give any guidance as to this future.¹⁰⁸

Stone continues by citing the opinions of four "international lawyers"¹⁰⁹ all leading to the conclusion that Israel's standing in both East and West Jerusalem (as well as Gaza and the West Bank) goes beyond that of just a military occupant. The author claims that two of these four views "conclude that under international law, sovereignty is already at present vested in Israel" but offers no further explanation as to why this is so. The third view states that a formal declaration of annexation is all that is required for Israel to gain sovereignty to Jerusalem and the other occupied territories. The fourth maintains that, although it might be impossible to attribute sovereignty to any state, the territory in question would still be subject to the original Palestine mandate, which, in Stone's words, requires "access of Jews to this territory."

This argument is specious indeed. Clearly, international law recognizes Israel as a belligerent occupant in East Jerusalem, the West Bank, Gaza Strip and Golan Heights. For sovereignty to be granted to

¹⁰⁸Stone, pp. 116-117.

¹⁰⁹Ibid., p. 116. The lawyers are never named.

Israel for any of these territories would be a refutation of the notion of the illegality of acquisition of territory through aggression. Any declaration of annexation would also violate this principle.

The fourth argument concerning the mandate for Palestine seems equally untenable. The mandate was unquestionably superceded by General Assembly resolution 181 (II), which established Jerusalem as a *corpus separatum* and a division of Palestine. Even if one refuses to recognize the validity of that particular resolution, the formal recognition of Israel as well as the acceptance of Israel into the United Nations heralded the end to the mandate since a large portion of the territory was in the hands of a sovereign power, albeit not the one envisioned by the League when the mandate was originally established.

Perhaps the most interesting Jewish argument of all is that posited by Elihu Lauterpacht. He asserts that once the British mandate ended in the late 1940's, sovereignty in Jerusalem (and all of Palestine) became temporarily "suspended."¹¹⁰ This analysis, which has been termed the "sovereignty vacuum" theory, attempts to persuade the reader that since Palestine was in 1948 *terra nullius*, some entity had to fill this void through lawful action. Lauterpacht then carefully examines the legality of the various demonstrations of power in the region immediately following the creation of the vacuum.

Israel's declaration of statehood and consequent acts of self-defense against Arab invaders constitutes a legal act and a display of sovereignty, according to Lauterpacht, thereby filling the sovereignty vacuum and

¹¹⁰Lauterpacht, p. 40.

Britain seems extremely dubious, especially in light of the fact that no clear cut case for such a situation has ever existed since the advent of modern international law.

Secondly, whether Mr. Lauterpacht disputes the principle or not, the fact of the matter is that acquisition of territory through conquest is totally unacceptable under current international legal norms. In addition, it seems equally clear that any claim for self-defense can not include territorial expansion and still be recognized as valid.

In summation, virtually all of the material and arguments in defense of Israeli claims to Jerusalem, both East and West, are religious or historical in nature and do not present arguments based on legal precedent or international laws. Those few that do follow logical legal paths (as those outlined above) tend to distort to a large degree many of the accepted principles regarding territorial sovereignty, the legal rights of the United Nations, and the inadmissibility of the resort to force for territorial expansion.

There is a general tendency among the pro-Israel arguments to totally disregard UN resolutions concerning Palestine and Jerusalem, especially General Assembly resolution 181 (II) which calls for the internationalization of Jerusalem and separate Arab and Israeli states in Palestine. There is a very broad interpretation of the UN Charter's statements regarding self-defense, and a general belief that territorial expansion can occur in some instances through the use of force, especially if carried out during self-defense. Clearly, there is no historical precedent for this type of interpretation, since the wars in 1948, 1956, 1967, and 1973 between the Arabs and Israel represent the only times since World War II that a nation has taken territory from another nation and retained it indefinitely.

VIII

Solutions

This paper is not the first analysis of the problems of Jerusalem; there have been many others. Therefore, a survey of the various solutions to the problems facing the City will be outlined before turning to the recommendations.

1. Maintenance of the *Status Quo*

This can hardly be called a solution, but it is a position advocated by many in the Israeli Government as well as its chief supporter, the United States. It would involve the continued enforcement of harsh Israeli military laws on the Palestinians in Jerusalem and the West Bank and engender continued bitterness and hatred among both parties concerned. Violence and destruction would continue to be the rule. Short of total suppression, the near chaotic situation of today would undoubtedly continue.

This solution lies in direct opposition to the stated purposes of both the United Nations General Assembly and Security Council, as well as being contrary to the internationally recognized principle of the inadmissibility of the acquisition of territory by war as specified in Security Council resolution 242. In addition, it would violate the Geneva

Council resolution 242. In addition, it would violate the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949.

2. Return to pre-1967 Conditions

This strategy would basically entail a return to the armistice line formed after the war in 1948. Although this plan would officially grant international legal legitimacy to Israel's annexation of West Jerusalem, many undesirable effects from such a division would most likely be noticed. First, there would likely be no access for Jews in Israel to the Wailing Wall which would fall on the Jordanian side of the division of the city. Other holy sites to all Christians, Jews, and Moslems would be at the mercy of the Israeli and Jordanian Governments, and access might be used as a weapon once boundaries were set.

Obviously, a great deal of cooperation and good faith would be required by both sides in order for such a plan to be effective. In addition, the border between these two countries would require, at the very least, armed patrols to ensure conflicts or terrorism did not occur. Since it is highly unlikely that either side would agree to military presences from their respective armies, a United Nations force would probably be required.

3. The Establishment of the *Corpus Separatum*

Internationalization of Jerusalem as a means of solving the problems of that city is a proposal that was first introduced in 1947 by the General Assembly as resolution 181 (II) better known as the Palestine Partition Resolution. In addition to the division of what was once known as Palestine prior to Israel's declaration of statehood in 1948, the plan

called for the internationalization of the city of Jerusalem to be administered by the United Nations under the direct supervision of the Trusteeship Council. The city would then enjoy autonomy from Israel as well as from any proposed Palestinian State.

The advantages of this plan seem to be multiple. Effective protection of the Holy Places would be guaranteed by the United Nations, and it would become the vested interest of all nations to ensure that protection by the use, if necessary, of UN force. The international controversy over Jerusalem as Israel's capital city would be eliminated, and access to the city by all people the world over would be guaranteed by the UN. The primary disadvantage inherent in this strategy is the seemingly insurmountable logistical problems of internationalization. Although theoretically attractive, mapping out an effective plan that would be palatable to all nations of the world would be extremely difficult, especially in light of the current position of the United States government on this issue.

4. The "Wilson" Plan

In his book *Jerusalem, Key to Peace*, Evan M. Wilson, former Consul-General of the United States in Jerusalem, outlines his proposal for the solution of the Jerusalem problem.¹¹² He recommends a partial internationalization which would only include a very small area of the existing city comprising the old Walled City plus some additional areas sacred to various religions. Officially recognized sovereignty would be

¹¹²The details of Mr. Wilson's plan can be found in Wilson, pp. 135-143.

granted to Israel over West Jerusalem, and the eventual Palestinian State in the West Bank and Gaza Strip could locate its capital in East Jerusalem. Free access to the internationalized Holy Places would be guaranteed to all.

The advantages to this plan are obvious. In addition to granting official recognition to the Israelis for their sovereignty in West Jerusalem, it provides Arabs (specifically Palestinians) the opportunity to claim East Jerusalem, similar to the situation that existed prior to the 1967 war. Internationalization of the Holy Places would provide the same advantages as mentioned in a previous section, but the logistical problems inherent in any internationalization plan persist.

In the present author's view, although this plan has been widely accepted and acclaimed, too many obstacles stand in the way of its implementation. The very fact that 18 years has elapsed since the plan's inception without either group (either Israeli or Arab) embracing it seems to point to its impracticality. Further, it seems doubtful that the United States government would throw its Security Council vote behind such a strategy, a vote which would be vital to at least the internationalization portion of the Wilson proposal.

5. The Mallison "Step-by-Step" Solution

Drs. W. Thomas and Sally V. Mallison have, in a number of their works, have advocated what they call a "step-by-step" solution to the Jerusalem problem.¹¹³ The Mallisons stress that any solution for

¹¹³Details of this plan can be seen, among other sources, in two of the Mallison's works, *The Palestine Problem In International Law and World Order*. (Essex: Longman, 1986), pp. 229-239, and in "The Status of Jerusalem As A Question in International Law; The Jerusalem Problem in Public International Law: Juridical Status and A Start Towards Solution," in

Jerusalem must be made part of a broader plan for Middle East peace. They see this "workable" solution as "based upon the compromise between extremes"¹¹⁴ which is embodied in the world community consensus on the one hand illustrated by the United Nations, and the position of the governments of Israel and United States on the other.

The first step advocated in this plan is the withdrawal by Israel to the boundaries that existed prior to the 1967 hostilities. The eastern portion of the city would then be "returned" to the United Nations "to act as a temporary trustee...pending a more permanent solution."¹¹⁵ The second step is much less specific - it would entail either the eventual implementation of General Assembly Resolution 181 (II) (the Palestine Partition Resolution with Jerusalem as a *corpus separatum*) or "a more permanent division of the city between a Palestinian State and the State of Israel with provisions to effectively protect the legitimate religious interests of all."¹¹⁶

This author agrees with the portion of the the above plan that calls for the withdrawal of Israel to pre-1967 borders. Above nearly all other Israeli transgressions, the acquisition of this territory during the war of that same year was a blatant disregard for common, internationally recognized legal norms. It seems clear that by returning the occupied territories to their rightful sovereigns the first step toward peace and

Hans Köchler, ed., *The Legal Aspects of the Palestine Problem with Special Regard to the Question of Jerusalem* (Vienna: Wilhelm Braumüller, 1980), pp. 110-115.

¹¹⁴Mallison and Mallison, "The Jerusalem Problem in Public International Law," p. 111.

¹¹⁵*Ibid.*, p. 112.

¹¹⁶*Ibid.*

justice will have been achieved. The Mallisons concentrate most of their effort and discussion on the first step of their plan and spend very few words on subsequent steps; I will therefore reserve judgement on the latter portions of their proposal. It does seem clear, however, that there is a tremendous emphasis on a Jerusalem settlement as being only part of a larger Middle East peace plan. This emphasis appears misplaced, since (1) the United Nations has at its disposal the *ability* to deal with the legal question by using force if necessary in order to ensure compliance with the Charter and with the stated wishes of the body, and (2) a resolution of the Jerusalem issue would very likely be the beginning to a much broader peace settlement in the occupied territories.

Ideally speaking, the United Nations should be the international instrument through which a solution to the Jerusalem, and indeed the Middle Eastern, problem should be devised and implemented. Realistically, however, this is not only virtually impossible, but has been proven to be so over the last four decades. Therefore, certain types of coercive force will be necessary to bring about solutions, especially in light of the Israeli government's seemingly intractable position on this and other related issues. What form should the coercion take and what should be its source? Once again ideologically speaking, the United Nations not only should be the source, it already possesses the legal authority to use necessary force to carry out its wishes under the UN Charter. Again, however, reality demonstrates that this will not likely occur.

In examining the situation in Palestine since Israel's inception in 1948, it is clear that the United States has played a very key role in Middle

Eastern political dynamics especially in the State of Israel. It is common knowledge that Israel receives over one-third of all US foreign aid. It is somewhat less well known, but nonetheless quite factual, that the political influence of pro-Israel PAC's (political action committees) in the United States is enormous. The influence is in some instances so great that earning the favor or wrath of these groups can mean the winning or losing of an election to a House, Senate or even Presidential office.¹¹⁷

With these factors in mind, the United States will unquestionably be required to play a major role in coercing the State of Israel to compromise where it has been stubbornly unyielding before. Israel's unwillingness to abide by international law as well as her violation of the civil and human rights of the citizens in the territories she occupies must be forced to change if any headway is to be gained toward a settlement to the problems that plague Jerusalem and Palestine.

Coercion does not mean military threats. Economic sanctions would be extremely effective, especially if carried out by the United States. The entire economic structure of Israel depends on US foreign aid - without it the country would collapse. In addition, Israel's military hardware is supplied almost in full by the United States. There are many effective ways of bringing Israel to the realization that further disregard of

¹¹⁷For a detailed and thorough discussion of American aid to Israel including a complete, uncensored version of the June 24, 1983 Draft Report on U.S. Assistance to the State of Israel from the United States General Accounting Office see Mohamed El-Khawas and Samir Abed-Rabbo, *American Aid to Israel: Nature and Impact* (Battleboro, VT: Center for Arab and Islamic Studies, 1984). The influence of the pro-Israel lobby in the U.S. is discussed in Edmund Chareeb, ed., *Split Vision* (Washington, D.C.: American-Arab Affairs Council, 1983) as well as former U.S. Representative Paul Findley, *They Dare to Speak Out; People and Institutions Confront Israel's Lobby* (Westport, CT: Lawrence Hill & Company, 1985).

human rights and international law will not be tolerated.

The Mallisons further illustrate the need for sanctions:

If there is any single point that has been made most clearly in the United Nations dealings with the State of Israel and Zionist nationalism over a period of more than three decades, it is that there will be no solution in Jerusalem and in Palestine until effective sanctions are applied to the Government of Israel. Because of the continuing Israeli economic crisis, largely caused by the militarization of its foreign policy and its domestic society, there is every reason to believe that economic sanctions would be successful.¹¹⁸

6. The Recommended Solution

Nearly all of the plans for Jerusalem have assumed both Israeli cooperation and compromise on the issue of the occupied territories, and a willingness and an ability on the part of the United Nations to back up with force certain provisions of such a solution. Clearly, however, Israel has shown no signs whatsoever of negotiating toward a peaceful solution, nor has the UN in its forty-year history shown a willingness to use force in order to carry out stated policy. Unfortunately, it is a body that is completely paralyzed by "national interests" which are all too often placed ahead of the good of all nations.

Nonetheless reality must be reckoned with, and it dictates that the only international actor that can possibly influence Israel to make the first step is the United States. Even by working through the United Nations, the United States has tremendous influence with the Government of Israel, and it could effectively bring about some movement in a process that has been stalemated for over twenty years. Many would attribute the

¹¹⁸Ibid., p. 114.

Camp David Accords as being a starting point to Arab-Israeli peace in 1978. Indeed, the Accords mentioned Jerusalem specifically throughout the document. Yet, as the Mallisons have indicated, the steps taken (or planned) during Camp David were merely steps in place (or even steps backward) rather than a genuine movement toward resolution. Camp David was a failure, and present day dynamics are a testament to this fact.

The first part of any plan must include Israeli withdrawal from the occupied territories and United Nations or multinational protection of the Holy Places in the city of Jerusalem. The second step should include the gradual granting of autonomy to the peoples of the West Bank and Gaza Strip, land that would eventually be recognized as a Palestinian homeland. Other necessary provisions of such a plan would need to include the formal recognition of West Jerusalem as the capital of Israel, the recognition of Israel's sovereignty in that part of the city, and a guarantee from both lands, Palestinian and Israeli, that access to the Holy Places would be granted to people of all religions.

The realities of today suggest that bringing about the radical changes mentioned above is nearly impossible. Certainly, the violence and destruction that characterize Jerusalem are a reflection of what happens when serious international legal disputes are simply left to fester rather than cured through action. The application of sanctions to enforce settlement proposals for Jerusalem arrived at by world community consensus through the United Nations are not only needed but indispensable. No county, province, city, municipality, country, or world community can achieve order without force to back up law. What we see in Jerusalem today is coercion and force used by the strong over the weak. What we must see in the future is legally authorized force, applied

through the provisions of an international legal order. Admittedly, the superpowers of the world, the United States more specifically, will at first have to play a very active role in beginning the process.

Why has the legal argument in favor of the Arabs in Jerusalem and Palestine failed to prevail during the last forty years? There are many answers to this question: (1) The role of the media, especially in the United States, has been to favor the Israeli perspective. Only within the last year have there been reports critical of Israel carried on major television networks and newspapers in this country. (2) There is a general tendency among all nations to be very sympathetic toward Israel in light of the plight of the Jews over the past several centuries. This is especially true when the issue of the Holocaust is raised. (3) Many First-world countries regard Israel as the only "democracy" in the Middle East. It is felt, therefore, that Israel has an inherent right to survive since it is the only true ally in the area to many Western countries.

A model for the type of attitude needed among the leaders of the nations of the world for facing the problem in Jerusalem is reflected in a statement made by President Dwight D. Eisenhower of February 20, 1957 following the Israeli-Anglo-French invasion of the Suez Canal region of Egypt:

We are approaching a fateful moment when either we must recognize that the United Nations is unable to restore peace in this area or the United Nations must renew with increased vigor its efforts to bring about Israeli withdrawal.

The U.S. Department of State Bulletin, Vol. 14, 1957, p. 307

through the provisions of an international legal order. Admittedly, the perspective of the world, the United States more specifically, will at first have to play a very active role in defining the process.

With the legal argument in favor of the Arabs in Jerusalem and the rest of the West Bank, during the last four years, there are many reasons to think that (1) The role of the media, especially in the United States, has been to favor the Israeli perspective. Only within the last year have there been reports critical of Israel carried on major television networks and newspapers in this country. (2) There is a general tendency among all nations to be very sympathetic toward Israel in light of the plight of the Jews over the last several centuries. This is especially true in the case of the many Western countries.

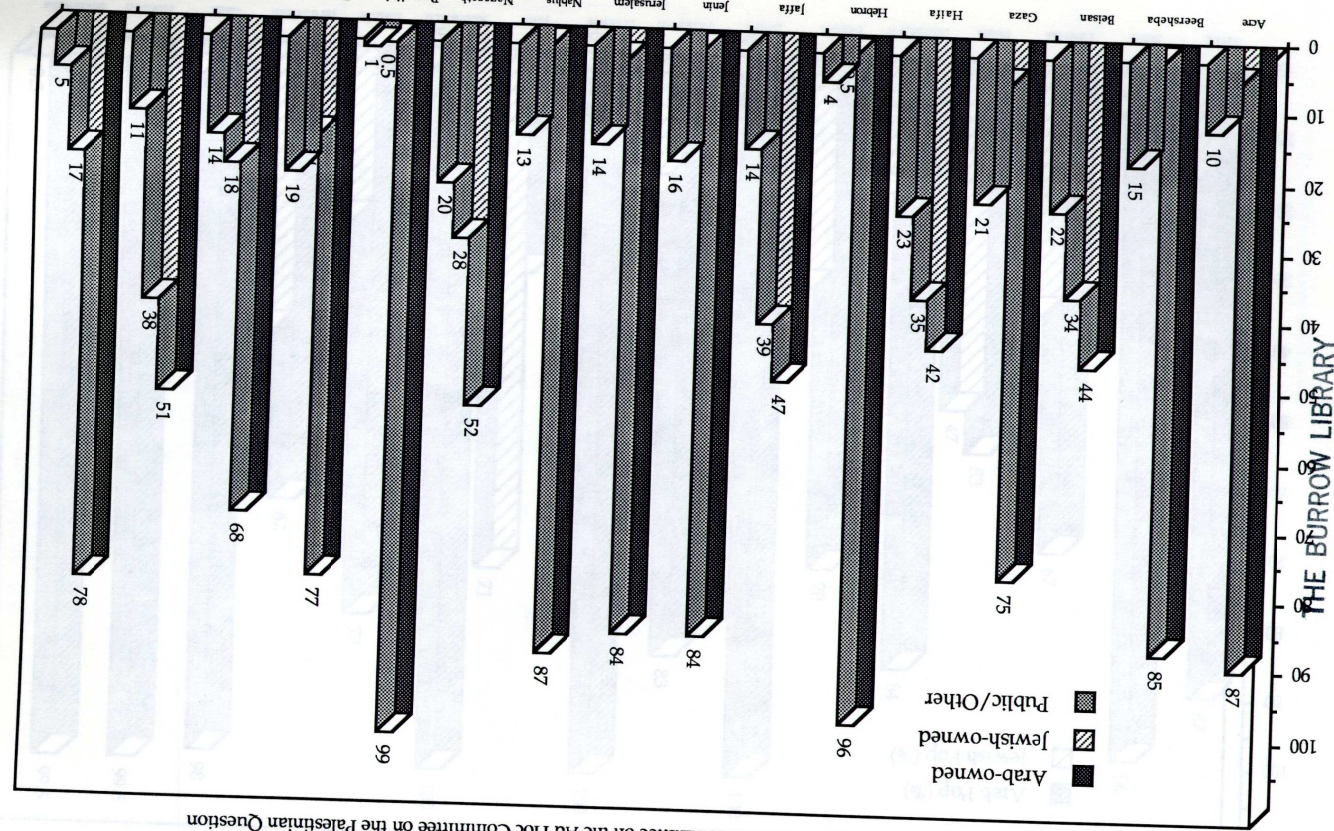
A model for the type of attitude needed among the leaders of the nations of the world for solving the problem in Jerusalem is reflected in a statement made by President Dwight D. Eisenhower of February 20, 1957 following the Israeli-Arabo-French invasion of the Suez Canal region of Egypt:

We are disappointed a Jewish settlement would occur on land recognized that the United Nations is unable to restore peace in this area to the United Nations must remain with processes right to efforts to bring about Israeli withdrawal.

The United Nations must not fail. I believe that - in the interests of peace - the United Nations has no choice but to exert pressure upon Israel to comply with the withdrawal resolutions. Of course, we still hope that the government of Israel will see that its best immediate and long-term interests lie in compliance with the United Nations and in placing its trust in the resolutions of the United Nations and in the declaration of the United States with reference to the future.¹¹⁹

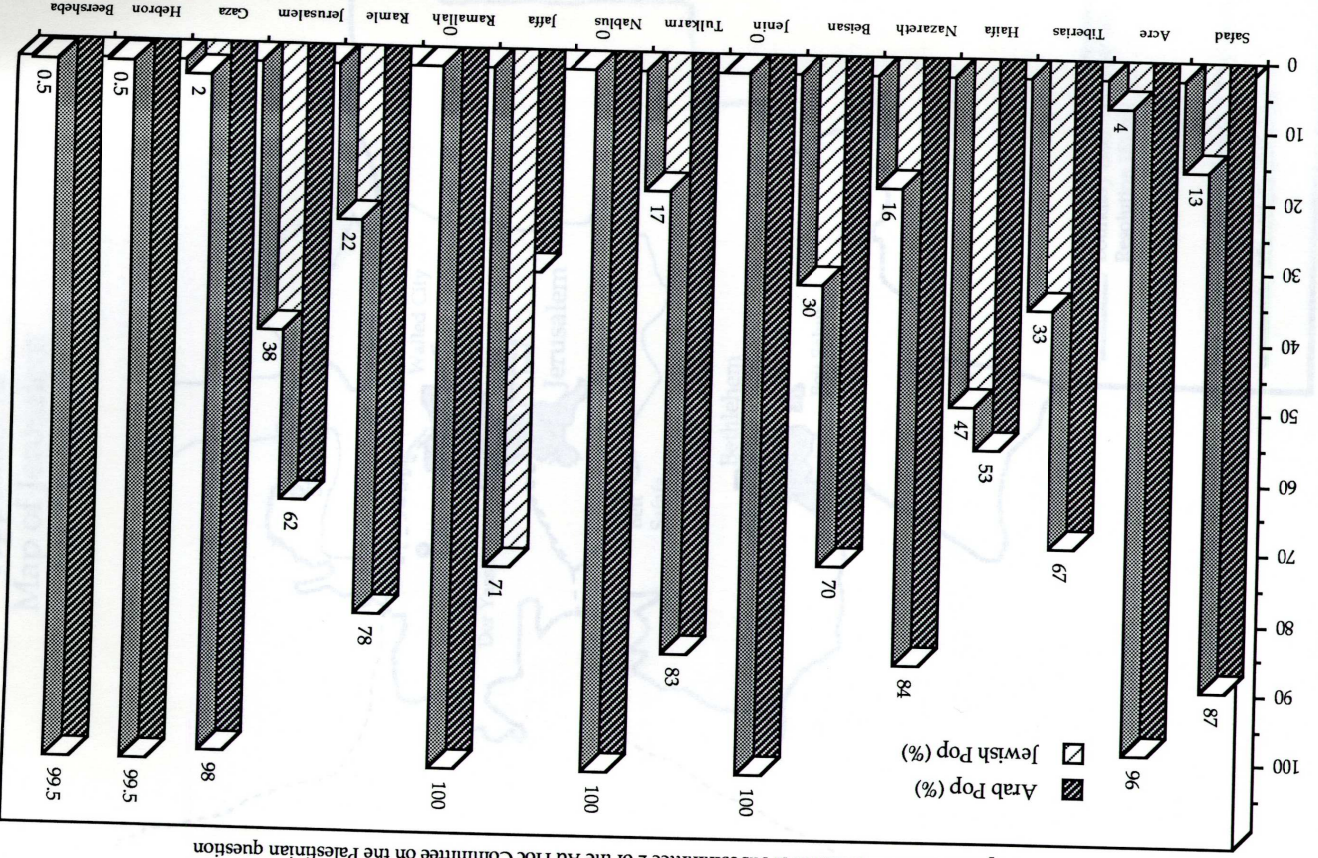
Israel's withdrawal from the canal zone is a matter of historical record.

Appendix I
Land Ownership by Districts in Palestine - 1945
Prepared on the instruction of the subcommittee on the Ad Hoc Committee on the Palestinian Question



with reference to the primary responsibility of the United Nations and to the question of the Jewish state in its constituent with the United Nations and to bring to the attention of the United Nations the Jewish community and the Jewish people with the appropriate assistance. It cannot be said that the United Nations has no right to deal with the Jewish people in the United Nations and no right to deal with the Jewish people in the United Nations.

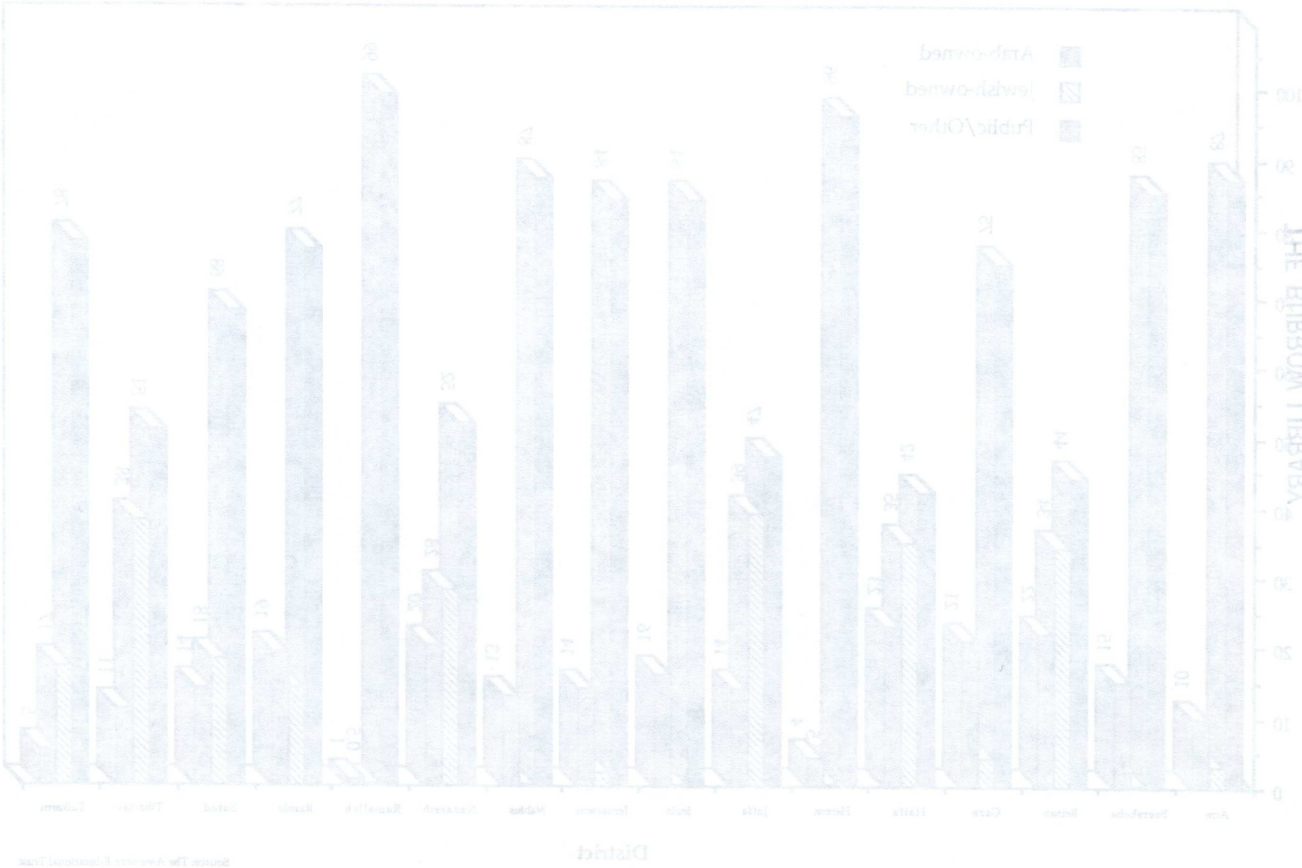
(%)



Appendix II
 Distribution of Population by Districts in Palestine - 1946
 Prepared on the instruction of subcommittee 2 of the Ad Hoc Committee on the Palestinian question

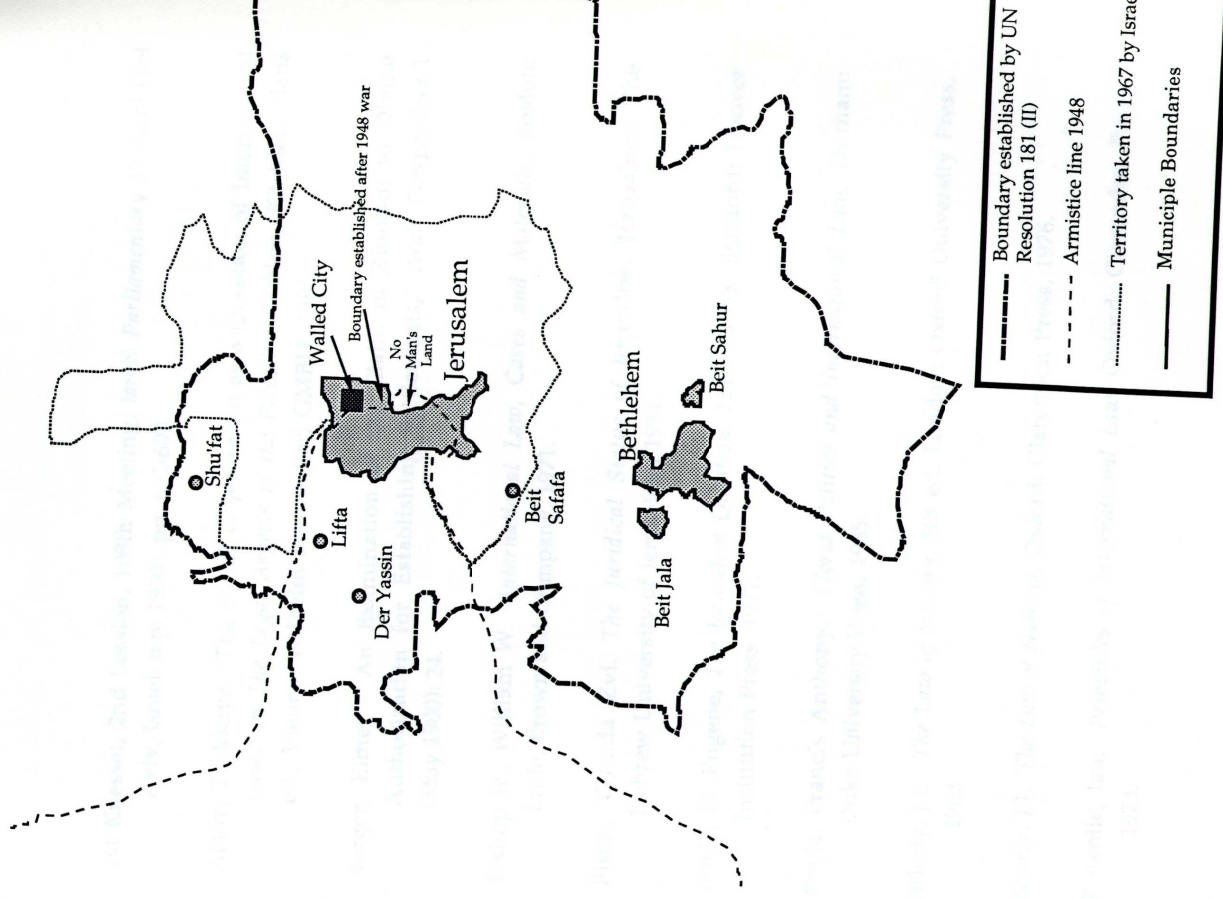
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Rhodes College
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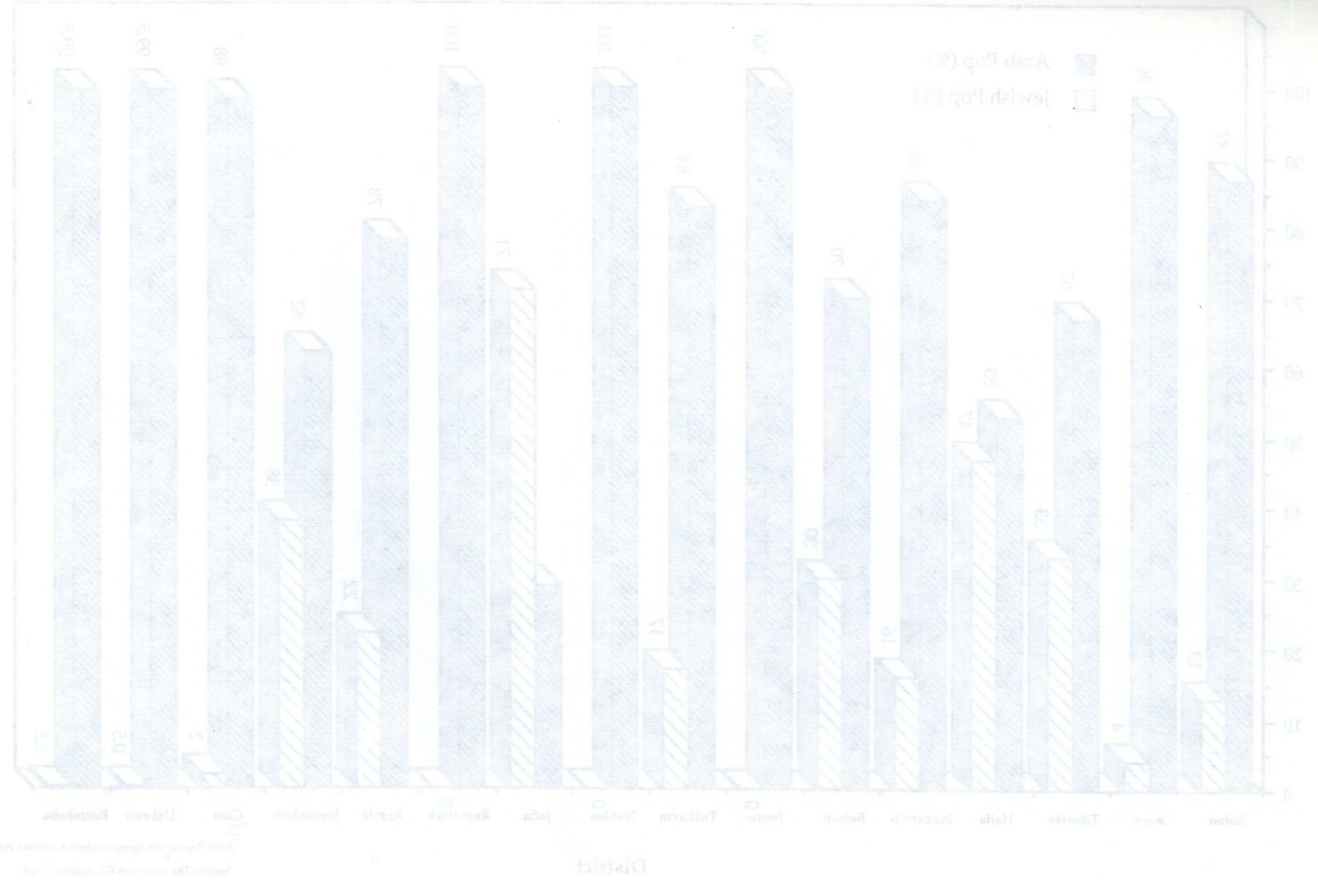
Appendix I
 Land Ownership by Districts in Palestine - 1945
 Prepared on the instruction of the subcommittee on the Ad Hoc Committee on the Palestinian Question

Appendix III Map of Jerusalem 1947-present



Appendix II

Distribution of Population by Districts in Palestine - 1948



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