

**THE UTILITY OF AN INTERNATIONAL LEGAL APPROACH  
TO THE JERUSALEM QUESTION:  
*CAMERA OBSCURA OR CAMERA LUCIDA?***

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I. INTRODUCTION

It's hard not to talk about fantasies when you are talking about Jerusalem. . . . The conquerors—Israelite, Muslim, Crusader, Ottoman, British, to name a few—all had an image of the city as it should be. . . . The very architecture of the city . . . materially embodies the layering of fantasies upon earlier fantasies, the competition of fantasies with each other, the echoing of one fantasy by another. As an international lawyer, I would like to focus on international legal fantasies, while keeping these other dreams in mind.

N. Berman, 'Legalizing Jerusalem or, Of Law, Fantasy, and Faith' (1996)<sup>1</sup>

Public responses to initiatives seeking to establish a just and lasting peace between Israelis and Palestinians are invariably, with good reason, tinged with cynicism.<sup>2</sup> The 1948 United Nations<sup>3</sup> plan to administer Jerusalem directly as a *corpus separatum* under an international regime represented an ambitious aspiration. Over the course of the 20<sup>th</sup> and 21<sup>st</sup> centuries, notions of global governance have given way to more pragmatic proposals borne out of bilateral negotiations, brokered by external mediators, between the parties themselves. Like the 1948 UN plan, these were abortive, including the two

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1 45 Cath. U.L. Rev. 823.

2 C.A. Radin, 'Both Sides Fault Mideast Peace Plan', *The Boston Globe* (5 Dec 2003) A4, available on Lexis.

3 Hereinafter 'the UN.'

2003 initiatives: the official US-backed road map,<sup>4</sup> and the bolder, independently-brokered Geneva Accord.<sup>5</sup>

International law has not acquitted itself well when invoked to assist in conflict resolution. Imprecisely-articulated claims and interests framed in terms of charges and counter-charges of terrorism, respective rights to self-determination, sovereignty and illegal uses of force fail to capture the complexity of reality. Juxtaposing international law's stencil-like approach to this very complex reality illuminates the law's limitations. The law is inhibited by a restricted recognition of sources of legitimacy, rooted in the ethnocentric secularism of the American and Western European powers controlling its development.

This article argues that despite its apparent shortcomings, international law is of some utility in relation to the Jerusalem problem. In this context, the word 'utility' is used in the sense of both functional and conceptual utility. Functional utility informs the understanding that international law is not an Austinian system of "order backed by threats,"<sup>6</sup> but a mechanism that seeks to induce state compliance with international norms. "Compliance" does not denote blind obeisance by Israelis and Palestinians to a pre-existing set of black-letter rules labelled 'international law.' Certain international norms do apply to this conflict, with the primary ones discussed below. However, it is argued that international law is a tool for interest accommodation, as opposed to conflict resolution. Resolution connotes a final answer to the Jerusalem problem. This is impossible, since claims to the city are based not merely on legal arguments, but are closely associated with religious assertions which cannot be conclusively adjudicated upon in a pluralistic world: 'What ye would see hastened, is not in my power. The command rests with none but God: He declares the truth, and He is the best of judges.'<sup>7</sup> Accommodation, on the other hand, connotes the simultaneous recognition of disparate claims, with

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4 J.W. Anderson and M. Moore, 'All Sides Failed to Follow "Road Map"', *The Washington Post* (28 Aug 2003) A01, available on Lexis. See also the press statement on the road map issued by the US Department of State, online: US Department of State <<http://www.state.gov/r/pa/prs/ps/2003/20062.htm>> (last modified: 30 April 2003).

5 The full text of the Geneva Accord is available online: Ha'aretz.com <<http://www.haaretz.com>> (date accessed: 3 Dec 2003). For media coverage of forceful opposition to the plan from both Israeli and Palestinian quarters, see for example: G. Hoffman and J. Zacharia, 'US Rejects Olmert's Call To Powell Not To Hold Geneva Talks', *The Jerusalem Post* (3 Dec 2003) 1, available on Lexis; and K.A. Toameh, ' Hamas Vows More Attacks', *The Jerusalem Post* (14 Dec 2003) 3, available on Lexis.

6 H.L.A. Hart, *The Concept of Law*, 2<sup>nd</sup> ed. (Oxford: Clarendon Press, 1994) at 216.

7 The Holy Qu'ran 6:57. All Qur'anic quotations appearing in this article are from the English translation by Abdullah Yusuf Ali (Kuala Lumpur: Saba Islamic Media Sdn Bhd, 1999).

the aim of constructing a framework for achieving temporal peaceful co-existence.

As to conceptual utility, the paradigm currently governing international legal discourse requires modification if accommodation is to be realised. The depth and complexity of Jewish, Christian and Muslim interests in Jerusalem, their interplay with historic Arab-Israeli nationalistic enmity and the city's place in the larger Middle Eastern problem demonstrates the inadequacy of characterizing the struggle for Jerusalem as one grounded only in sterile principles of non-acquisition of territory, self-determination and sovereignty. Part II sets out the dispute over the city in its historical and political context to justify this assertion, and to show the problem's international significance.

Part III examines prior applications of international legal principles to analogical situations to show that international law, as currently understood, articulates only one *Weltanschauung*: that of the Eurocentric secularist. If international law is truly a universal tool for interest articulation and accommodation, then its ultimate test resides in the Jerusalem question, where divergent claims collide. In Part IV, jurisprudential approaches to the relationships between international law and religion, and international law and politics, are discussed to show how international law can indeed function as a conduit for facilitating dialogue among different worldviews.

This article's overarching aim is to demonstrate how the conflict in Jerusalem can facilitate an understanding of law's function within the international community. While final resolution of the conflict may be beyond our grasp, international law presents one tool by which we may find a way to accommodate competing interests towards the goal of achieving peaceful co-existence.

## II. UNRAVELLING THE TANGLED SKEIN: THE STAKES IN JERUSALEM

### A. *(Religious) Dogma and (Legal) Doctrine in the Holy Land*

#### (i) *The Diktat of Dogma*

*I was glad when they said unto me, Let us go into the house of the Lord.*

*Our feet shall stand within thy gates, O Jerusalem.*

*Jerusalem is builded as a city that is compact together:*

*Whither the tribes go up, the tribes of the Lord, unto the testimony of Israel,  
to give thanks unto the name of the Lord.*

*For there are set thrones of judgment, the thrones of the house of David.*

Psalms 122:1–5

*And when he was come into Jerusalem, all the city was moved, saying,  
Who is this?  
And the multitude said, This is Jesus the prophet of Nazareth of Galilee.*  
Matthew 21:10–11  
Glory to (Allah)

*Who did take His servant for a Journey by night from the Sacred Mosque to  
the farthest Mosque, whose precincts We did bless, in order that We might  
show him some of Our Signs: for He is the One Who heareth and seeth (all  
things).*

The Holy Qur'an 17:1

Jerusalem has been coveted for millenia. Since its founding around 2,300 B.C. as a southern city of Canaan,<sup>8</sup> it has been subjected to the authority of sovereigns ranging from the Jewish Kingdom of David, to the Christian Byzantine bishops, to the Muslims under the early caliphates and finally the Ottoman Turks, prior to the current cycle of competition for possession.

In the minds of Palestinian Arabs, Muslim and Christian alike, the injustice of Israeli occupation lies not only in the manner in which the Israeli state dispossessed them of their homes and continues to take advantage of its control on the ground to 'create facts' in its attempt to 'de-Arabize' the city,<sup>9</sup> but in the very fact that their dispossessors are Jewish. This mutual disregard is entrenched in the holy scriptures of the monotheistic traditions, epitomized by the significantly differing versions of the story of the prophet Abraham's sacrifice of his son.

According to the Judeo-Christian tradition, it was Isaac, the younger son, whom Abraham took for a burnt offering on Mount Moriah.<sup>10</sup> In the Qur'anic version, it was Ishmael.<sup>11</sup> In the Judeo-Christian tradition, Isaac is believed to be the patriarch of the Jewish nation.<sup>12</sup> However, Ishmael, father of the Arab progeny, is characterized thus: 'And he will be a wild man; his hand will be against every man, and every man's hand against him; and he shall dwell in the presence of all his brethren.'<sup>13</sup> Isaac is not similarly disparaged in the Qur'an, but the Islamic scripture does describe the Jewish nation as being 'accursed'

8 K. Armstrong, *Jerusalem: One City, Three Faiths* (New York: Alfred A. Knopf, 1996) at 4.

9 C. Urquhart, 'Israel Vows To Keep On Building' *The Guardian* (23 Oct 2003) 19, available on Lexis. See also map of existing Israeli settlements in East Jerusalem as of 2000, online: PASSIA <[http://www.passia.org/palestine\\_facts/MAPS/images/jer\\_maps/Existingneighborhoods.html](http://www.passia.org/palestine_facts/MAPS/images/jer_maps/Existingneighborhoods.html)> (last modified: 31 Jun 2003).

10 Genesis 22:1–2. All Biblical quotations appearing in this article are from the King James Version (Authorized).

11 The Holy Qur'an 37:102–13.

12 Genesis 17:15–6.

13 Genesis 16:12.

for their blasphemy against God, Who then ‘placed enmity and hatred [amongst them] till the Day of Judgment.’<sup>14</sup>

Despite this significant disparity, both factions revere Jerusalem. To the Jews, Jerusalem is an integral part of the Promised Land, which extends ‘from the river of Egypt unto the great river, the river Euphrates.’<sup>15</sup> To the Muslims, however, the promise is one that the Jews forsook long ago for their disloyalty to God:

And remember it was said to them: ‘Dwell in this town and eat therein as ye wish, but say the word of humility and enter the gate in a posture of humility: We shall forgive you your faults; We shall increase (the portion of) those who do good.’

But the transgressors among them changed the word from that which had been given them so we sent on them a plague from heaven. For that they repeatedly transgressed.<sup>16</sup>

Herein lies Jerusalem’s distinctive quality as the epicentre of religious conflict. The resulting operational dichotomy between the secular/temporal and the sacred/spiritual creates an apparently intractable, complex situation.

Nowhere in the city is the discordant clash of divine Truths more manifest than on the Temple Mount, which is also home to the Al-Aqsa Mosque and to Caliph Abd-Malik’s great monument to Islam, the Dome of the Rock. The Temple Mount’s tremendous significance to the Jewish people was succinctly captured by the Israeli Supreme Court thus:

... the Temple Mount has been the most sacred site of the Jewish people, possessing unparalleled sanctity, for some three thousand years since Solomon built the First Temple on Mount Moriah (II Chronicles 3:1); ... ‘the Temple Mount is Mount Moriah ... and our father Isaac was bound at [the site of] the Temple’ (Maimonides, Laws of the Temple, 2:1–2, 5:1).

This *primal sanctity* of the Temple Mount continues to the present day ... The western wall of the Temple ... which still remains, is the most holy site in Jewish tradition.<sup>17</sup>

Muslims, however, believe this to be the precise spot where the prophet Muhammad tethered his steed, Buraj, on the night of his

14 The Holy Qur’an 5:64.

15 Genesis 15:18–21. This is still the traditional hard-line Zionist position.

16 The Holy Qur’an 7:161.

17 *Amutah et al. v. Attorney-General & Ors (The Temple Mount Faithful)* (1996) 45 Cath. U.L. Rev. 861 at 889 [emphasis added].

mystical ascent to heaven (Isra' Mi'raj). The confluence of religious interests erupted in a violent 1929 skirmish during the British Mandate. Subsequently, the British appointed an international commission to determine the rights and obligations of both religious communities over this site.<sup>18</sup> It remains a flashpoint for religious violence which, because of the broader struggle for Jerusalem, inevitably affects Palestinian and Israeli attitudes towards each other, and towards peace-making efforts.<sup>19</sup>

The Christian attachment to Jerusalem is borne of the fact that the city was the locality of Christ's ministry, crucifixion and resurrection. No Christian denomination purports to make a territorial claim to Jerusalem akin to those made by Palestinian Muslims and Israeli Jews. However, the Vatican (representing Catholic interests) and the Archbishop of Canterbury (representing Anglican interests), among others, have occasionally made recommendations for managing the dispute.<sup>20</sup> The Christian factor complicates the conflict to the extent that any potential settlement implicates administration, access and worship rights to Christian holy places. In many cases, this involves a delicate balancing of the interests of different Christian denominations who must share access to the same holy place because, like Muslims and Jews at the Temple Mount, that is where their spiritual identities meet. For example, the Church of the Holy Sepulchre, which some Christians believe to be the site of Christ's crucifixion and resurrection, is shared between the Greek, Latin and Armenian Orthodox Churches on the basis of the Ottoman Status Quo arrangements.<sup>21</sup> There is also a long-standing dispute between the Egyptian Copts and the Abyssinian Christians over the Dayr al-Sultan monastery near the Chapel of St Helena.<sup>22</sup>

Our temporal reality demands that a method for co-existence be found, because the international community has a vested interest in ensuring that regional volatility does not translate to full-scale

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18 UN Division for Palestinian Rights, *The Status of Jerusalem*, online: The Question of Palestine at the UN <<http://domino.un.org/UNISPAL.NSF/0/533b4714451b48bf0525651b00488d02?OpenDocument>> (date accessed: 22 Dec 2003).

19 See generally *Report of the Sharm El-Sheikh Fact-Finding Committee*, online: The Washington Post <<http://www.washingtonpost.com/wp-srv/world/texts/mitchellreport.pdf>> (date accessed: 22 Dec 2003).

20 See Part III for more on this.

21 The scheme of 'scattered sovereignty' under the Ottoman Status Quo arrangements is detailed in C.F. Emmett, 'The Status Quo Solution for Jerusalem' (1997) J. Palest. St. 16 at 20-1. No borders or lines of demarcation exist in these arrangements, but each religious community is allowed to post and light candles, and to worship in other ways at certain times.

22 *Ibid.*

international conflict. The tussle over the city lies at the heart of the decades-long political and oftentimes armed struggle between Arabs and Israelis, which has polarized the Middle East, and involves both state and non-state actors. Arab states have historically displayed an alarming willingness to use force against Israel if necessary.<sup>23</sup> Arab control of significant world oil reserves and pro-Israel lobbying by the influential Jewish-American community are factors that further complicate the geo-political complexities of the Arab-Israeli conflict.

The religious quality of the conflict accounts for its wide-ranging *dramatis personae*, including states, religious entities like the Vatican<sup>24</sup> and the Organization of Islamic Conference,<sup>25</sup> and various private individuals and non-governmental organizations. It is particularly noteworthy that the United Nations Security Council referred to Jerusalem as 'the Holy City' even as it invoked international norms in Resolution 478 (1980) of 20 August 1980, which censured Israel's 1980 Basic Law: Jerusalem, Capital of Israel.<sup>26</sup>

(ii) *A Doctrinal Orientation*

The issues do appear appallingly simple if framed in international legalese:

- (a) Israel's acquisition of Jerusalem via the use of force is invalid at international law.<sup>27</sup> Israeli control is therefore illegal.
- (b) Israel effected urban and demographic changes to Jerusalem by constructing settlements in Arab sectors of the city.<sup>28</sup> This

23 Relatively large-scale uses of armed force occurred in 1948, 1956, 1967 and 1973: see generally H. Kissinger, *Diplomacy* (New York: Touchstone, 1994).

24 Although the Vatican is technically a state at international law: see further D.J. Harris, *Cases and Materials on Public International Law* (London: Sweet & Maxwell, 1998) [hereinafter 'Harris'] at 144.

25 See 'Excerpts from the Organization of Islamic Conference's Declaration on Terrorism' *Associated Press* (2 April 2002), online: NEXIS (News, NEWS GROUP FILE) which, *inter alia*, 'condemn[ed] Israel for its escalating military campaign against the Palestinian people.'

26 SC Res. 478, UN SCOR, 2245th Mtg., UN Doc S/Res/478 (1980).

27 Article 2(4) of the United Nations Charter prohibits the threat or use of force. See *Charter of the United Nations*, 10 Dec 1948, reproduced in Harris, *supra* n. 24 at Appendix I (entered into force: 24 Oct 1945). This prohibition is amplified in the *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*, GA Res. 2625(XXV) (1980) [hereinafter 'the Friendly Relations Declaration'], also reproduced in Harris, which provides that 'no territorial acquisition resulting from the threat or use of force shall be recognized as legal.' Hence the UNSC's condemnation of Israeli action during the 1967 war as a violation of international law in Resolution 242 (1967).

28 *Supra*, n. 9.

- violates the Fourth Geneva Convention,<sup>29</sup> which prohibits an occupying power from transferring its population into occupied territory. These settlements are illegal.
- (c) The Palestinian people have the right to self-determination. This entails the establishment of a Palestinian state in the West Bank and Gaza Strip with East Jerusalem as its capital. Therefore, sovereignty over East Jerusalem must inure in the Palestinian state if this right is to be fully realized.<sup>30</sup>
  - (d) The Israeli people have the right to self-determination. They realized this right in 1948 when they established the independent Jewish state. Their right to self-determination is based on the continuing existence of the state of Israel with Jerusalem as its unified capital. Therefore, Israeli sovereignty over all of Jerusalem is vital to sustaining this right.

This is precisely how international law has been used to characterize issues associated with the Jerusalem question. For example, Security Council Resolution 242 (1967) of 22 November 1967 'emphasize[d] the inadmissibility of the acquisition of territory by war', calling for Israel's 'immediate withdrawal from territories occupied in the recent armed conflict.' Significantly, Resolution 478 (1980), which censured Israel's 1980 Basic Law, called upon member states 'not to recognise 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 to withdraw their diplomatic missions from Jerusalem.

Obviously, none of this has had any tangible effect on the *de facto* situation. Unfortunately, the current international legal paradigm reinforces, rather than bridges, the dogmatic divide between Israeli Jews and Palestinian Muslims. At the risk of over-simplification, territorial sovereignty remains the central organizing principle at international law, a definition of which is not offered here. My purpose is only to illustrate how the classical conception of sovereignty, with its strong exclusive links to territoriality, is a painfully inadequate doctrinal tool in approaching the Jerusalem problem.

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29 *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 12 Aug 1949, online: Office of the High Commissioner for Human Rights <<http://www.unhcr.ch/html/menu3/b/92.htm>> (last modified: 27 Mar 2002) (entered into force: 21 Oct 1950) [hereinafter 'the Fourth Geneva Convention'].

30 But see the Friendly Relations Declaration, *supra*, n. 27, which states that the right to self-determination is not to be construed as 'authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.' This is subject to the further qualification that such states must be 'possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.'

The appropriate starting point is Judge Huber's classic definition:

Sovereignty in the relations between states signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, *to the exclusion of any other state*, the functions of a state. The development of the national organization of states . . . and . . . the development of international law, have established this principle of *exclusive competence of the state in regard to its own territory* in such a way as to make it the point of departure in settling most questions that concern international relations.<sup>31</sup>

This may not be an entirely accurate statement insofar as external sovereignty is concerned.<sup>32</sup> Nevertheless, the link between sovereignty and territory subsists, because as Wicks observes, 'the entire concept of sovereign statehood . . . is connected to "the territorial anchor."' <sup>33</sup>

The idea of exclusive territorial sovereignty shapes international rules relating to territorial acquisition. Territory belongs to a state in the same sense that a piece of land belongs to a property owner in municipal law; territory may be ceded or leased to another state by treaty.<sup>34</sup> The concept of title at international law is derived from the *dominium* of Roman law.<sup>35</sup> Brownlie notes that 'in principle the concept of ownership, opposable to all other states and unititular, can and does exist in international law.'<sup>36</sup> Yet, Corbett notes the inherent incompatibility of Roman law principles with questions of territorial acquisition by states: 'the fact that they were not concerned with the type of claim for which the rules invoked had been elaborated, troubled lawyers and judges not at all.'<sup>37</sup>

The law was made by adherents to the particular set of values inherent in the Roman *dominium* and the idea of the 'territorial anchor.'<sup>38</sup>

31 *Island of Palmas Case (Netherlands v. US)* (1928) 2 R.I.A.A. 829, reproduced in Harris, *supra*, n. 24 at 190 [emphasis added].

32 The phrase 'external sovereignty' is used here to denote the freedom of states to act vis-à-vis other states. See generally *The Lotus Case (France v. Turkey)* (1927) P.C.I.J. (Ser. A) No. 10, reproduced in Harris, *supra*, n. 24 at 267-77. It is safe to say that this absolute conception of sovereignty no longer prevails: see for example, W.M. Reisman, 'Sovereignty and Human Rights in Contemporary International Law' (1990) 84 A.J.I.L. 866 and F. Tesón, 'The Kantian Theory of International Law' (1992) 92 Colum. L.R. 53.

33 E. Wicks, 'State Sovereignty—Towards A Refined Legal Conceptualization' (2000) 29 Anglo-American L.R. 282 at 310.

34 I. Brownlie, *Principles of Public International Law* (Oxford University Press, 1998) at 111-2, 134-5.

35 P.E. Corbett, *Law and Society in the Relations of States* (New York: Harcourt, Brace and Co., 1951) at 92-3.

36 *Supra*, n. 34 at 120-1.

37 *Supra*, n. 35 at 92.

38 See generally A. Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law' (1999) 40 Harv. Int'l L.J. 1 at 26-7, in which

This unitary conception of territorial ownership poses particular difficulties where the attachment to the territory in question is not merely temporal in nature, but spiritual. Such is the character of the relationship between indigenous peoples and their land, for instance.<sup>39</sup> In Jerusalem, a similar kind of attachment exists, with the important qualification that this attachment is felt not just by one group of people, but by all peoples regarding the city as their 'sacred space.'<sup>40</sup> Regrettably, the current paradigm preserves the restrictive classic link between sovereignty, title to territory and exclusivity.

The continuing use of this paradigm by the relevant parties, within which appeals to spiritual and historical justifications are curiously and incongruously subsumed, has created a problematical state of affairs. First, the official Palestinian position—or at least, the position espoused by the Palestine Liberation Organization—on Jerusalem (or, *Al Quds Ash-Sharif*) is examined.

Palestinians, Christians and Muslims regard Jerusalem as 'the geographical, political, administrative and spiritual centre of Palestine. It is, in all regards, the symbol of Palestinian nationality and identity.'<sup>41</sup> The 1988 Palestinian Declaration of Independence states:

The Palestine National Council, *in the name of God*, and in the name of the Palestinian Arab people, hereby proclaims the establishment of the State of Palestine on our Palestinian territory with its capital Jerusalem (Al-Quds Ash-Sharif).<sup>42</sup>

Even as it invokes divine authority, this proposition relies on two main legal arguments: first, that sovereignty over the city was in abeyance during Ottoman rule and during the British Mandate; second, that locating the Palestinian capital in Jerusalem is integral to fulfilling the Palestinian people's right to self-determination.<sup>43</sup>

The Palestinians build on these arguments to charge Israel with violations of the principle of non-acquisition of territory by conquest

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Anghie argues that defining sovereignty as control over territory allowed nineteenth-century jurists to distinguish the 'non-sovereign' nomadic tribes of 'barbarian nations' from 'sovereign' European powers who settled in and colonized those tribes' lands.

<sup>39</sup> For more on this, see, *infra*, n. 128 and accompanying text.

<sup>40</sup> *Supra*, n. 8.

<sup>41</sup> *Jerusalem*, online: PLO Negotiations Affairs Department <<http://www.nad-plo.org/permanent/jerusalem.html>> (date accessed: 22 Mar 2002).

<sup>42</sup> *Palestinian Declaration of Independence*, online: The Official Website of the Palestinian National Authority <[www.pna.net/search/TitleDetails.asp?txtDocID=98](http://www.pna.net/search/TitleDetails.asp?txtDocID=98)> (date accessed: 25 Mar 2002).

<sup>43</sup> *The Status of Jerusalem in International Law*, online: PLO Negotiations Affairs Department <<http://www.nad-plo.org/permanent/jesus2.html>> (last modified: 19 Mar 2002). The Palestinian argument that sovereignty was in abeyance draws on Judge McNair's separate opinion in the *Western Sahara Case* [1975] I.C.J. Rep. 12. See in particular, paras. 10–18.

and the laws of war.<sup>44</sup> In 2001, for example, the Palestinians and their Arab League brethren transmitted an indignant resolution to the UN Secretary-General deploring Israeli attempts to have certain archaeological sites in East Jerusalem entered on the UNESCO World Heritage List as an affront to the Palestinian claim.<sup>45</sup> The resolution ‘condemn[ed] Israel’s dubious attempts to *assert its sovereignty* over Jerusalem’, urging member states to ‘establish the necessary contacts . . . with the States Members of the World Heritage Committee in order to convey to them the Arab position that Jerusalem . . . [has] since 1967 constituted occupied territory under the terms of *resolutions that have the force of international law*.’<sup>46</sup>

As for the official Israeli position on Jerusalem (or *Yerushalaim*), the city exerts a similar primordial pull over Jewish national and religious consciousness. The 1980 Basic Law: Jerusalem, Capital of Israel declares that ‘Jerusalem, complete and united, is the capital of Israel.’<sup>47</sup> According to the Israeli Ministry of Foreign Affairs position paper on the status of Jerusalem, the city is ‘the heart and soul of the Jewish people,’ and ‘no other city has played such a predominant role in the history, culture, and religion of a people as has Jerusalem for the Jews.’<sup>48</sup>

Whereas the Palestinians rely on the proposition that sovereignty over the city was and still is in abeyance, Israel cites its historical claim to the city for support:

Jewish independence in the land of Israel, which ended in 70 C.E. and was renewed in 1948, marks the longest period of sovereignty over Jerusalem by any nation. No other nation can claim such a long political existence in the recorded history of this unique city.<sup>49</sup>

Since the merits of this argument at international law are dubious at best,<sup>50</sup> certain international jurists have buttressed the Israeli claim by contending that sovereignty over Jerusalem was not in abeyance as the

44 *Ibid.*

45 *Resolution of the Council of the League of Arab States: Dubious attempts by Israel to have a number of archaeological sites in East Jerusalem inscribed on the World Heritage List*, UN SCOR, 56th Year, Annex, Agenda Item 40, 41 and 85, UN Doc. S/2001/491 (2001).

46 *Ibid.* at paras. 1–2 [emphasis added].

47 *Basic Law: Jerusalem, Capital of Israel*, online: Israel Ministry of Foreign Affairs <<http://www.israel-mfa.gov.il/mfa/go.asp?MFAH00hf0>> (date accessed: 22 Mar 2002).

48 Israeli Foreign Ministry, *The Status of Jerusalem*, online: Israel Information Office Scotland <<http://www.isrinfo.demon.co.uk/articl91.htm>> (last modified: 22 Dec 2003).

49 *Ibid.*

50 See *Minquiers and Erchos Case (France v. UK)* [1953] I.C.J. Rep. 47, reproduced in Harris, *supra*, n. 24 at 204–6. International law requires ‘effective control’ of that territory by the claimant State and its ‘peaceful and effective exercise of State functions’ therein. See the *Island of Palmas Case*, *supra*, n. 31.

Palestinians assert, but that a 'sovereignty vacuum' existed in the City after the British Mandate terminated in 1948.<sup>51</sup> Therefore, Israel's seizure of West Jerusalem in 1948 was perfectly valid. The official Israeli position is that the subsequent annexation of East Jerusalem was pursuant to the legitimate exercise of its right of self-defence.<sup>52</sup>

In response to Palestinian allegations and UNSC resolutions deploring its blatant, systematic campaign of Judaization in East Jerusalem since 1967,<sup>53</sup> which began with the audacious destruction of the entire Mughrabi (Moroccan) Quarter to build a plaza for Jewish worshippers in front of the Wailing (Western) Wall,<sup>54</sup> Israel argues that it is not in belligerent occupation of East Jerusalem. Israel's stated policy is that 'development of the city's services and amenities' should be for all its communities, not just one.<sup>55</sup>

#### B. *Surrender to Realism?*

Thus charge is met with counter-charge, with no resolution in sight. Sparring in the language of self-determination and sovereignty serves Israelis and Palestinians well insofar as it appears to legitimise their international claims. In practice, though, international law has usually taken a secondary position to political horse-trading and diplomatic brinkmanship in relation to international disputes. Hence the critique that international law is a servile handmaiden of politics, which recalls John Austin's argument that international law is not law but 'does belong to a possible analogous science of positive morality.'<sup>56</sup> Like the rules on territorial acquisition, this is another particularistic conception of international law.

51 See F.L.M. Van de Craen, 'The Territorial Title of the State of Israel to "Palestine": An Appraisal in International Law' (1978-79) 14 *Revue belge de droit international* 500 at 506-7. See also M.I. Gruhin, 'Jerusalem: Legal and Political Dimensions in a Search for Peace' (1980) 12 *Case W. Res. J. Int'l L.* 169.

52 *Answers to Frequently Asked Questions: Palestinian Violence and Terrorism*, online: Israel Ministry of Foreign Affairs <<http://www.israel-mfa.gov.il/mfa/go.asp?MFAH0i9o0>> (date accessed: 22 Mar 2002) [emphasis added].

53 See for example, SC Res. 476 (1980), UN SCOR, 2242d Mtg., UN Doc. S/RES/476 (1980).

54 See for example J. Quigley, *Palestine and Israel: A Challenge to Justice*, (Durham; London: Duke University Press, 1990) at 8ff; Armstrong, *supra* n. 8; UN Division for Palestinian Rights, *The Origins and Evolution of the Palestinian Problem 1917-1988*, online: Question of Palestine at the United Nations <<http://domino.un.org/unispal.nsf/85255db800470aa485255d8b004e349a / 57c45a3dd0d46b09802564740045cc0a!OpenDocument>> (date accessed: 22 Dec 2003).

55 *Letter from Foreign Minister Abba Eban to UN Secretary-General U Thant on Jerusalem*, 15 Nov 1971, online: Israel Ministry of Foreign Affairs <<http://www.israel-mfa.gov.il/mfa/go.asp?MFAH01990>> (date accessed: 22 Mar 2002).

56 Quoted in S. Hall, 'The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism' (2001) 12 *E.J.I.L.* 269.

The criticism operates on three levels. The first is directed at the essential flexibility inherent in international law discourse, in that either party to a dispute may use the very same legal principles to their own advantage. Detractors of the international legal framework read this flexibility as detrimental to the integrity of the system itself, asserting that this allows polar-opposite political positions to be clothed in apparently equally legitimate terms.

Second, if international law can be invoked to validate both parties' positions as such, then it holds no helpful problem-solving value. Critics would argue that in the absence of any constructive benefit derived from a dialogue in international legalese, parties to the conflict should reduce their discourse to the level of the merely political. This, of course, leads nowhere. It would be a bare capitulation to partisanship and diplomacy.

The third level of the critique is the purely pragmatic observation that any solution based on international legal principles is only as good as disputing parties' political will. If neither party is willing to negotiate or discuss a proposed solution, an impasse is inevitable.

Quite apart from the functional critique, the epistemological schema of international law—with its governing hypothesis of rationality—is unable to conceive of the legitimacy of Palestinian and Israeli claims to Jerusalem where they are expressed in terms of religious diktat. The theory of legal positivism, the predominant jurisprudential approach in modern international law, is essentially scientific in nature. As Hall observes, the nineteenth-century backlash against 'Enlightenment naturalism' that produced classical legal positivism 'impelled scholars . . . to attempt to stake out clearly the boundaries of their disciplines and to exclude from their ambit issues which were *not susceptible to solution by methods resembling those used in the natural sciences*.'<sup>57</sup> The problem, of course, is that there is no other issue less susceptible to scientific deduction than divine revelation: 'The Spirit (cometh) by command of my Lord: of knowledge it is only a little that is communicated to you, (O men)!'<sup>58</sup>

Religious attachment knows not the secular, artificial boundaries of the modern Westphalian nation-state. The Muslim-Palestinian cause in Jerusalem resonates across the Muslim *ummah*, and '[t]hroughout the Diaspora, Jerusalem has always remained foremost in the thoughts of the Jewish people as they turned to Zion three times a day in prayer.'<sup>59</sup> More importantly, the diktat of religious dogma leads to

57 *Ibid.* at 277 [emphasis added].

58 The Holy Qur'an 17:85.

59 *The Status of Jerusalem*, online: Israeli Ministry of Foreign Affairs <<http://www.israel-mfa.gov.il/mfa/go-asp?MFAH0e5d0>> (date accessed: 22 Mar 2002).

exclusive and often extravagant claims. The Islamic fundamentalist group Hamas, for example, claims Arab sovereignty over the entire city.<sup>60</sup>

The dilemma is that it is impossible, were it even productive, to separate the spiritual and religious interests from the purely legal. A dialogue confined to physical territorial possession only cloaks the conflict's heart beneath a purported mask of rationality and makes any efforts towards a just and lasting peace ring hollow, if it is at all possible to reach that stage given such a framework. It is a paradigm that presupposes state protagonists, and their ability to legitimise their claims by drawing on secular legal sources.<sup>61</sup> The question is whether this paradigm, which finds the basis of its organisation in the principles of territoriality and sovereignty, *can* properly accommodate the primordial elements attending the Jerusalem question.<sup>62</sup>

### III. INTERNATIONALISING JERUSALEM: RATIONALISING JERUSALEM?

#### A. *The Conflict's Place in History*

##### (i) *The Concept of 'The International Frontier'*

Perhaps some guidance may be sought by examining prior instances in which state and non-state actors grappled for control of the same piece of territory. Jerusalem is not a historical anomaly. It is, in fact, one of a genus of phenomena<sup>63</sup> that has confronted international peace and security since at least the 19<sup>th</sup> century. Writing in the first years of the Cold War, H. Duncan Hall posited the idea that contemporary flashpoints of conflict ran along an 'international frontier': a fault line where the competing interests of superpowers clashed, with the potential to develop into full-blown military confrontation.<sup>64</sup> Jerusalem also lies along an international frontier; however, the colliding interests

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60 See generally M. Hirsche *et al*, *Whither Jerusalem? Proposals and Positions Concerning the Future of Jerusalem* (The Hague; London; Boston: Martinus Nijhoff Publishers, 1995).

61 See generally S. Hall, *supra*, n. 56. Hall's cogent deconstruction of the sources of international law as set out in Article 38 paragraph 1 of the Statute of the International Court of Justice demonstrates how the assumption that these sources are 'positive in character' is itself erroneous.

62 See though the discussion in Part IV below, in which it is argued that the 'Law-Reason'/'Religion-Irrationality' parallel is a mythic and fallacious caricature of reality.

63 See generally H.D. Hall, 'The International Frontier' (1948) 42 A.J.I.L. 42. The specific flashpoints of conflict Hall had in mind included 'the mandates (now trusteeships) of Ruanda Urundi and Tanganyika; . . . rivalries of Britain and France over Egypt and the valley of the Nile . . .; the mandates over Transjordan, Palestine, and Syria; [and] the projected international trusteeship regime for Jerusalem.' See Hall at 43-4.

64 *Ibid.*

here are not merely political, but religious. Moreover, the interests are not localised, but span private individuals, non-governmental organisations and international organisations.

The phenomena of the international frontier occur where disparate interests ‘come together in conflict. [The international frontier] is the main line of structural weakness in the earth’s political crust—the main fissure where wars break through.’<sup>65</sup> Although Hall had in mind ‘Great Power interests,’ the characterization applies equally to Jerusalem although the dispute there encompasses the conflicting interests of state and non-state actors.<sup>66</sup> As Ydit quaintly puts it, the defining characteristic of these phenomena is that ‘the jealousy of the contesting Powers prevent[s] the allotment of this territory to either of them.’<sup>67</sup> That is the fundamental problem that must be confronted in Jerusalem: the disinclination of either side to yield dominion over territory which both perceive as rightfully belonging to them.

(ii) *A Topographical Survey of the International Frontier*

The perennial challenge on the international frontier is to devise a solution that actively engages and accommodates the parties’ concerns. An accurate understanding of these interests is a pre-condition; thus, the *nature* of competing interests in these territories must be accurately identified.<sup>68</sup>

Competing powers have sought to protect three discernible categories of interests in disputed territories. First, ‘kin’ ethnic states have intervened in other states where their ‘kin’ ethnic groups are an oppressed minority.<sup>69</sup> Second, control over disputed territories

65 *Supra*, n. 63 at 42.

66 See Part II for more on the involvement of non-state actors in Jerusalem.

67 M. Ydit, *Internationalised Territories: From the ‘Free City of Cracow’ to the ‘Free City of Berlin’* (Leyden: A.W. Sythoff, 1961) at 11.

68 Due to constraints of space, this article cannot cover every case in which two or more states have laid claim to a single piece of territory. Only a handful of situations have been chosen as generally illustrative of the nature of the interests that are usually at stake in such circumstances.

69 This conception of the ‘kin’ ethnic state manifested itself in a macabre foreshadowing of the events of the Second World War in the German delegate’s remarks during the League of Nations debates on the inter-war minorities protection scheme. The delegate went so far as to say that the ‘kin’ state has ‘a natural and moral right to consider that all its members—even those separated from the mother country by state frontiers—constitute a moral and cultural whole’ [emphasis added.]; League of Nations Official Journal, Minutes of the Sixth Committee (Political Questions), 14<sup>th</sup> Ordinary Sess., Spec. Supp. No. 120, 5<sup>th</sup> Mtg., Agenda Item 19 (1933). Note, though, that the situations alluded to in the main text of this article are cannot strictly be equated with the majority of cases that arose following the redrawing of the map of Europe at the 1919 Versailles Conference. The cases examined here are instances of true disputes

may serve a particular state's strategic interests. Third, states may see safeguarding their economic interests as contingent upon possessing territory through which passes regional or global trade and commerce.

### B. *Stopping the Fissures: Attempts to Engineer Compromise*

A consistent set of tools seems to have evolved in international law to engage the 'clash of sovereignties' on the international frontier. As Hall remarks, the usual approach is to attempt to 'mitigate' that clash 'by some compromise form of international regime.'<sup>70</sup> This international regime usually consists of 'the establishment of autonomous entities under a form of international protection, supervision or guarantee.'<sup>71</sup> By involving a third party, international law seeks to depoliticise a conflict by moving it from the plane of 'particularistic cultural passion' to that of impartial 'universal legal reason.'<sup>72</sup>

This is achieved by either constructing a framework of governance in which the disputants share direct authority over the territory,<sup>73</sup> or by farming out administrative functions to an international organisation. Early experiments in 'internationalisation' tended to utilise the former approach, while the latter method was prevalent in the recent UN administration of Kosovo and East Timor.

#### (i) *Sharing Authority over Disputed Territory*

This approach was taken in the 19<sup>th</sup> century with respect to Krakow, in the early 20<sup>th</sup> century in Danzig and Tangier, and more recently, in the constituent republics of the former Yugoslavia.

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over territory stemming from ethnic-based claims, whereas the German interest in Czechoslovakia's Sudetenland, for example, was more genuinely a case of asserting the *Volkstum*.

<sup>70</sup> *Supra*, n. 63 at 47.

<sup>71</sup> J. Crawford, *The Creation of States in International Law* (Oxford: Clarendon Press, 1979) at 160. The short-hand term of reference employed for present purposes is 'internationalisation.'

<sup>72</sup> N. Berman, 'The International Law of Nationalism: Group Identity and Legal History', in D. Wippman, ed., *International Law and Ethnic Conflict* (Ithaca: Cornell University Press, 1998) 25 at 34.

<sup>73</sup> This effectively 'parcels out sovereignty' so that each of the disputants may at least lay claim to some aspects of *functional* sovereignty. As will be seen in the discussion that follows, however, the resulting ambiguity as to where sovereignty actually inures is often the Achilles heel of this type of settlement. See Section D1 below for more on this topic.

In strategic terms, control over Polish Krakow was the weight that could tip the scale in the delicately-crafted European balance of power. The three-way wrangle between Austria, Prussia and Russia was eventually settled by a 'joint and triple protectorate' over the so-called 'Free City of Krakow.' Similarly, the 'Free City of Danzig' was established under the auspices of the League of Nations<sup>74</sup> to bring a peaceful settlement to the Polish-German dispute over the city. After World War One, sovereignty in Danzig vested in the Allied Powers. The newly-formed League of Nations then brokered the 1920 Treaty of Paris between Poland and the ethnic German inhabitants of Danzig. The Treaty did not provide for direct League administration, but for the city to be governed directly by Danzigers with guarantees of Polish rights to conduct Danzig's foreign affairs, to free use of the port and to establish its own postal and telegraphic services.<sup>75</sup>

In early 20<sup>th</sup> century Tangier, international co-operation in the administration of the territory by way of treaty arrangement had in fact already been the norm before the 1923 Statute of Tangier was adopted by Great Britain, Spain and France. Other European powers ratified the Statute over the next three years. The Statute effectively removed the Sultan of Morocco's jurisdiction over the nationals of state signatories by subjecting them instead to the extraterritorial jurisdiction of the 'Mixed Court of Tangier,' much like the Ottoman capitulations and European consular jurisdiction in China.<sup>76</sup> Seventeen European nationals sat in Tangier's Legislative Assembly. These arrangements were revised at Spanish behest in 1928, but the international character of legislative governance remained.<sup>77</sup>

Finally, and more recently, the 1995 Constitution of Bosnia and Herzegovina was promulgated as an annex to the General Framework Agreement for Peace in Bosnia and Herzegovina, to which the Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia (acting on behalf of the Serb Republic) are parties. The Constitution was designed to work along much the same lines as Krakow and Danzig, modifying the internal structure

74 The difference between the Krakow and Danzig compromises, though, was that the 'Free City of Danzig' was effectively foisted on Germany due to its status as one of the vanquished after the First World War. See Ydit, *supra*, n. 67 at 58.

75 *Supra*, n. 67 at 189–90.

76 L.E. Thayer defines the 'capitulations' as 'a code of legal reconciliation founded upon the immiscibility of Christianity and Islam; and a term of art alone descriptive of extraterritoriality in Turkey.' By virtue of this code, foreigners in the Ottoman Empire enjoyed extraterritorial rights, privileges and immunities: see further L.E. Thayer, 'The Capitulations of the Ottoman Empire and the Question of Their Abrogation As It Affects the United States' (1923) 17 A.J.I.L. 207.

77 *Supra*, n. 67 at 169.

of the Bosnian Republic so as to allow for power-sharing between its constituent entities: the Bosnian Federation and the Serb Republic.<sup>78</sup>

(ii) *Direct Exercise of Authority by an International Organisation*

In post-1918 Fiume and Trieste, and in East Timor and Kosovo, an international organisation was directly involved in administering the disputed territory.

A League of Nations-appointed Commission was proposed for Fiume. The Permanent Statute of Trieste, which purported to create the neutral 'Free Territory of Trieste,' was adopted by the UN Security Council in 1947. The Free Territory was 'envisaged as an independent state entity under the direct control of the Security Council of the UN'<sup>79</sup> The Governor of Trieste was to be appointed by and subject only to the direction of the Security Council.<sup>80</sup>

More recently in East Timor and Kosovo, the UN effectively took on direct governance of the territories in question in the guise of the UN Mission in Kosovo (UNMIK) and the UN Mission in East Timor (UNAMET). Indeed, UNMIK was expressly created to provide an 'interim administration' in Kosovo, while UNAMET later gave way to the UN Transitional Authority in East Timor (UNTAET), which administered East Timor until it achieved independence in May 2002.<sup>81</sup>

C. *Fitting Jerusalem into International Law's Template*

(i) *Treaty-Based Power-Sharing Arrangements*

Jerusalem's religious significance prompted the first foreign, treaty-based interventions.<sup>82</sup> In the middle period of its existence, international interest in Jerusalem manifested itself in bilateral or multilateral treaties concluded between the ruling Ottomans and foreign

78 *General Framework Agreement for Peace in Bosnia and Herzegovina*, 14 Dec 1995, online: Office of the High Representative in Bosnia and Herzegovina <[http://www.ohr.int/dpa/default.asp?content\\_id=372](http://www.ohr.int/dpa/default.asp?content_id=372)> (date accessed: 8 Apr 2002), Annex 4. See for example Articles I, III and IV. R.S. Lee has characterized these constitutional developments as a 'parallel [to] the international developments creating multiple tiers of sovereignty.' See Theme Panel III, 'Multiple Tiers of Sovereignty: The Future of International Governance,' (1994) A.S.I.L. Proceedings 51 at 53.

79 *Supra*, n. 67 at 244.

80 *Supra*, n. 67 at 162.

81 See generally R. Wilde, 'From Danzig to East Timor and Beyond: The Role of International Territorial Administration' (2001) 95 A.J.I.L. 583. See also SC Res. 1392 (2002), UN SCOR, 4453d Mtg., UN Doc. S/RES/1392 (2002). The implicit assumption was that UNTAET was in East Timor to oversee its 'liberation' from Indonesia—a case of belated decolonization, as it were.

82 See Part II for more on Jerusalem's religious significance.

powers. While part of the motivation for such treaties was the perceived inadequacy of the Ottoman legal infrastructure with regards to issues of trade and commerce, the Ottoman Sultans also undertook to grant extraterritorial jurisdiction to foreign powers with respect to certain of the Christian holy places located in Jerusalem. A prime example is the 1535 Franco-Turkish treaty, which established the system of ‘capitulations’ that forged the template for Ottoman-European relations in the city for the next three hundred years.<sup>83</sup>

The religious dimension in the conflict over Jerusalem attracted outside interest and intervention from the outset. Hence the consistent pattern of European involvement and intervention in Jerusalem under Ottoman rule, epitomized by Sultan Abdul Majid’s 1852 *firman* crystallising the customary rights and privileges held by the different religious communities in the holy places. As further evidence of the European powers’ self-designated position as protectors of the religious communities affiliated to their States, this *firman*, known as the ‘Status Quo arrangement,’ was given credence in a series of multilateral treaties up to the 1919 Treaty of Versailles.<sup>84</sup>

(ii) *‘Internationalising’ Jerusalem: Reducing Faith and Nationalism to Legality*

‘Internationalisation’ in the manner of Fiume and Trieste has been floated as a possible solution to the conflict in Jerusalem since the 1916 Sykes-Picot Agreement between Great Britain and France.<sup>85</sup> A subsequent incarnation of the ‘internationalisation’ ideal was the plan to administer Jerusalem as a ‘*corpus separatum* under a special international regime,’ put forward in UN General Assembly Resolution 181 (II) of 29 November 1947.<sup>86</sup> An implicit assumption underlying these governance schemes was that an internationalised approach was the most viable option available. Yet neither the UN’s *corpus separatum* scheme, nor any other proposal for internationalisation since, has been implemented in the city.

1. Before the British Mandate

Governing Jerusalem has never been an exclusively local undertaking. The Sykes-Picot Agreement, to begin with, effectively amounted to a

83 *Supra*, n. 76 at 210.

84 *Supra*, n. 21 at 19–20.

85 The full text of the Sykes-Picot Agreement is available online: The Avalon Project <<http://www.yale.edu/lawweb/avalon/mideast/sykes.htm>> (date accessed: 22 Dec 2003).

86 *Future Government of Palestine*, GA Res. 181 (II), UN GAOR, UN Doc. A/Res/181 (II) (A + B) (1947).

‘secret understanding’ to divide Palestine between the British and French, with Russian complicity. Interestingly enough, the specific plan for Jerusalem and its surrounding environs was *not* to appropriate the territory for themselves, but to establish there ‘an international administration, the form of which is [*sic*] to be decided upon after consultation with Russia, and subsequently in consultation with the other allies, and the representatives of the sheriff of Mecca.’ Therefore, an ‘Allied condominium’ was envisaged.<sup>87</sup>

## 2. Mandate Palestine, 1922–1948

The British capture of Palestine towards the end of World War One prevented the implementation of the Sykes-Picot Agreement,<sup>88</sup> but the idea of finding an internationalised solution to stem religious conflict in Jerusalem survived the War and the British Mandate. In fact, the Vatican, aware of the need to protect Catholic interests in Jerusalem under a Protestant Mandatory Power, proposed in 1917 that the holy places be placed under an international regime.<sup>89</sup>

Arab-Jewish unrest during the middle to later period of the Mandate spearheaded a number of commissions of inquiry to investigate grievances and suggest proposals to deal with the Palestine problem.<sup>90</sup> The intervening war temporarily put the problem on hold until 1947, when the despairing British put the issue before the UN, which succeeded the failed League of Nations as the international community’s second international organisation of general competence. Pursuant to General Assembly Resolution 106 of 1947,<sup>91</sup> the UN Special Committee on Palestine (‘UNSCOP’) was created to prepare a Report on the Palestine Question for the General Assembly’s consideration at its next session. The plan for partition of Palestine and the administration of Jerusalem as a *corpus separatum* under a special international regime was UNSCOP’s majority recommendation.

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87 A condominium ‘exists when two or more States exercise sovereignty conjointly over a territory.’ See Brownlie, *supra*, n. 34 at 114.

88 Armstrong characterized the arrival of the British at Jerusalem’s Jaffa Gate as having ‘completed the work of the Crusaders’: *supra*, n. 8 at 370.

89 *Supra*, n. 67 at 277.

90 The British appointed the Peel, Woodhead and Anglo-American Commissions of Inquiry to ascertain the respective grievances of both Arabs and Jews in Mandate Palestine and make policy recommendations. Much of the problem stemmed from widespread dismay and insecurity among Palestinian Arabs at blinkered British policy based on the 1917 Balfour Declaration. See *supra*, UN Division for Palestinian Rights, n. 54.

91 *Special Committee on Palestine*, GA Res. 106 (S-1), UN GAOR, UN Doc. A/RES/106(S-1) (1947).

### 3. The 1948 UN Plan for a *Corpus Separatum* under an International Regime

In many respects, the broad lines of the UN plan mirrored the salient characteristics of past plans for internationalising sectors of territory manifesting the phenomena of the international frontier. As with Fiume and Trieste, Jerusalem was to be administered by a Governor appointed directly by the UN Trusteeship Council. For all intents and purposes, the Governor would be the embodiment of UN authority in the city, and would exercise powers of administration on its behalf.

However, unlike plans for internationalisation elsewhere, special regard was to be had to the City's holy places, which were to be a 'special concern of the Governor.' Possible disputes between the different religious communities were to be farmed out to the Governor, whose mandate as the supposedly impartial third party was to 'make decisions on the basis of existing rights.' The nucleus of the plans for the special international regime contained in the Partition Resolution were subsequently fleshed out in the Draft Statute for Jerusalem, prepared by the UN Trusteeship Council.

### 4. Proposals for Internationalisation from Other Quarters

While the UN would have had internationalisation extend as far as Abu Dis, Bethlehem, Ein Karim and Shu'fat,<sup>92</sup> other proposals limited it to the holy places. One example is the Archbishop of Canterbury's 1949 private memorandum to the UN, which suggested that the Jewish residential area in northern and western Jerusalem should be incorporated into Israel, while the remaining area of the *corpus separatum* should stay under international authority.<sup>93</sup> The Archbishop's objective in maintaining an international enclave in this portion of Jerusalem was to facilitate some form of international supervision over Nazareth and other holy places *outside* the Old City. This would ensure freedom of access and preclude monopolistic control by either the new Jewish state or a Palestinian Arab entity.

Another example is the Israelis' counter-proposal to the 1950 Draft Statute. Israel proposed instead that UN authority be limited only to the holy places within Jerusalem, and that a UN representative be given the power to negotiate with other states regarding the protection of Holy Places located outside the City. These proposals, and those

92 A map is available online: Question of Palestine at the UN <<http://domino.un.org/unispal.nsf/cf02d057b04d356385256ddb006dc02f/3f1bd9477022a0c285256cc500530c1f?OpenDocument>> (date accessed: 22 Dec 2003).

93 *Supra*, n. 60 at 141–4.

propounded by Sweden, E.M. Wilson, Reisman and T. Prittie, further advocated vesting of sovereignty in Israel alone, or a city divided between Jordan and Israel.<sup>94</sup> The common denominator was provision for international authority in restricted enclaves corresponding with the location of the holy places.

##### 5. Different Degrees of Internationalisation

The incongruity between the various proposals speaks volumes about the different perceptions of the conflict within the international community. It illustrates an inability to—or perhaps, the unwillingness to—comprehend the precise parameters of the dispute. Certainly, the vital core of the struggle centres on control and possession of the holy places. This constitutes just one of many issues. To Israelis and Palestinians, the larger question that needs to be resolved is *ownership* over the entire municipality of Jerusalem.<sup>95</sup> As the Allied powers and the UN recognised, the Jerusalem conflict extends beyond the Old City. This invites the question: what crucial failings were common to the proposals for internationalisation, in Jerusalem or otherwise?

##### D. *International Law's Failure to Stop the Fissures*

Crawford reports rather candidly that 'politically, it cannot be said that these experiments in internationalisation have been very successful' and observes that this is in fact the theme of Ydit's entire treatise on internationalised territories.<sup>96</sup> Indeed, in most cases schemes for internationalisation were either never implemented, or put into practice for a limited period only to be abolished or overtaken by superseding events.<sup>97</sup> Proposals for international regimes in Fiume, Trieste and Jerusalem remained paper ideals. In Danzig and Tangier, internationalisation ultimately failed to satisfy the claims of the disputing parties, which resulted in practical inefficacy and eventually, abolition. In particular, the Statute of Tangier was ineffective in maintaining the balance between the competing interests of the European powers; in fact, 'France's influence . . . was always preponderant.'<sup>98</sup>

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94 See generally M. Hirsche, *supra*, n. 60.

95 While Israel's claim encompasses the whole city, the Palestinian claim is limited to East Jerusalem and a guarantee of free access to West Jerusalem, while maintaining that the status of Jerusalem as a whole has not been conclusively determined: see *supra*, n. 43.

96 *Supra*, n. 71 at 163.

97 Hitler's *blitzkrieg* during the Second World War, for example, put paid to the Free City of Danzig.

98 *Supra*, n. 67 at 180.

Furthermore, in both cases, internationalisation failed to properly account for the aspirations of the inhabitants themselves, therefore paving the way for a situation in which another form of ‘particularistic cultural passion’—the nationalist aspirations of the territories’ inhabitants—prevailed over ‘universal legal reason.’<sup>99</sup> As Ydit writes, ‘hardly had the ink of the Polish-Danzig Treaty dried [than] there started a protracted struggle between the 40,000 Danzigers and the twenty-five million-strong Poland.’<sup>100</sup> Similarly, the Statute of Tangier proved no match for Moroccan nationalism.

Accounting for this bleak record both explains the pattern of failure and illuminates the inadequacy of the current paradigm of international law with respect to problems of this nature. There are two reasons why international law has failed thus far.

(i) *Difficulties Inherent in the Discourse of International Law*

Internationalisation simply evades questions of sovereignty and self-determination. In some of the cases examined, the primordial pull of ethnicity and nationalism is stifled beneath engineered compromise, only to re-emerge in due course with disastrous effect. This is what happened in Danzig and Tangier. In Trieste and Jerusalem itself, internationalisation’s failure to precisely address the parties’ concerns over these issues prevented its coming into being at all.

Sovereignty, with its egotistical connotations of exclusive possession and control over territory, is something that one party to a dispute is loathe to yield to another. In the cases examined, the question of sovereignty was either left unresolved, or not resolved to the satisfaction of one or more of the parties. For example, Crawford allows that Danzig may have been a state ‘in the sense in which that term was defined,’<sup>101</sup> but that this conclusion would seem to be negated by Polish rights to conduct the Free City’s foreign affairs and to have free access to its port.<sup>102</sup> In Jerusalem, one may surmise that the Israeli objection to the Draft Statute was largely founded on the fact that

99 See Berman, *supra*, n. 72

100 *Supra*, n. 67 at 190.

101 The conventional (if dated) starting point for defining statehood is in the 1933 Montevideo Convention on the Rights and Duties of States. Article 1 provides that the state as a person of international law should possess a permanent population, a defined territory, a government and the capacity to enter into relations with other states: see Harris, *supra*, n. 24 at 102.

102 See *Case of the Customs Regime Between Germany and Austria* (1931), Advisory Opinion, P.C.I.J. (Ser. A/B) No. 41, reproduced in Harris, *supra*, n. 24 at 105–6. The Permanent Court of International Justice therein defined Austria’s independence as ‘the continued existence of Austria within her present frontiers as a separate state with sole right of decision in all matters economic, political, financial or other with the result that independence is violated, as soon as there is any violation there, either in

sovereignty over Jerusalem would accrue to the Trusteeship Council, and not to Israel. The same reasoning applies to Italian and Yugoslav opposition to the Permanent Statute of Trieste.

The sovereignty question is closely tied to the issue of self-determination.<sup>103</sup> Unless the territory's inhabitants specifically agree to an international regime, internationalisation would seem to be precluded by their right to freely determine their political status since it removes powers of governance from their purview. Although the Draft Statute for Jerusalem provided for a popularly elected Legislative Assembly, its effect was negated by the authority granted to the religious communities to appoint fifteen members and the granting of executive power to the Trusteeship Council-appointed Governor. Since both Israel and the Palestinians regard Jerusalem as their national capital, and as a vital component of the complete fulfilment of their respective rights to self-determination,<sup>104</sup> removing sovereignty from either party obstructs the realization of national self-determination.

(ii) *The Superficiality of the Prevailing Conception of Territory*

At international law, territory is conceived of as property. Corbett remarks that physical possession of territory is 'kin to the notion of property in national law and obviously corresponds to one of the deeper urges of the human animal' in that it gives expression to the 'impulse of the exclusion of the stranger from one's own' and the 'strength of the human instinct for exclusive use and control.'<sup>105</sup> This kinship between the principles of territorial acquisition at international law and municipal property law is not surprising given that the international law principles derive largely from Roman law.<sup>106</sup>

However, the roots of territorial conflict often run far deeper than notions of possession, exclusivity of use and control can convey. Possession of the desired piece of territory is also a fulfilment of national and/or religious destiny, especially in Jerusalem. Hall makes the point vividly when he observes that the phenomena of the international

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the economic, political or other field, these different aspects of independence being in practice one and indivisible . . .'. See Harris, *supra*, n. 24 at 105.

103 The precise content and meaning of the principle of self-determination is by no means settled at international law. This article adopts Ruth Gordon's formulation of the principle. Gordon states that the principle 'has evolved to embrace the "right" of all peoples freely to determine, without external interference, their political status and to pursue their economic, social, and cultural development.' See R. Gordon, 'Some Legal Problems with Trusteeship' (1995) 28 *Cornell Int'l L.J.* 301 at 320-1.

104 See Part II for more on this topic.

105 *Supra*, n. 35 at 91-2.

106 See Part IIA(ii) for more on this topic.

frontier are but ‘volcano[es] in a local vent for widespread pressures in molten depths of the earth.’<sup>107</sup>

International law is currently ill-equipped to satisfactorily address this nature of conflict, which at its core is really a clash of destinies, which in turn derive their legitimacy from mutually exclusive sources of Truth as revealed in divine text. The extra-legal elements of the dispute simply cannot be separated from the legal arguments. As such, what remains to be considered is this: is there a place for international law in a dispute of this nature, or has the history of international law’s failure and irrelevance up to this point only proven its disutility?

#### IV. INVOKING INTERNATIONAL LAW IN JERUSALEM: A POWERLESS INCANTATION?

Based on the preceding discussion, a *prima facie* assessment of whether international law has served the purposes for which it evolved points inexorably to the conclusion that it has been singularly ineffective in restoring peace to Jerusalem. To leave matters at that, however, would be to conclude that there can be no resolution to the Jerusalem conflict, as J. Ruedy does near the end of an essay misleadingly titled ‘Guidelines to a Solution’: ‘I am convinced we must divest ourselves of the delusion that an acceptable solution exists.’<sup>108</sup>

##### A. *The ‘Rationalist Assumption’*

It is submitted, though, that the real ‘delusion’ with regard to the application and utility of international law in Jerusalem lies in the assumption that it is a tool that douses the conflict’s underlying fire, which is stoked by a combination of ethno-religious and nationalist passion. This is the rationalist assumption behind the reliance on international legal discourse: that by expressing the dynamics of the conflict in terms of unlawfulness of territorial acquisition by conquest, notions of sovereignty and self-determination, one is able to move the conflict into the sphere of ‘universal legal reason.’<sup>109</sup> In reality, this rationality is but a veil under which ‘particularistic cultural passion’ is subsumed.

International law can be a useful tool in assisting conflict resolution, but only if there can be movement away from the current paradigm that presupposes a convergence between Law and Reason. This may

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<sup>107</sup> *Supra*, n. 63 at 43.

<sup>108</sup> J. Ruedy, ‘Guidelines to a Solution’ in A.R. Taylor & R.N. Tetlie, eds., *Palestine: A Search For Truth* (Washington, D.C.: Public Affairs Press, 1970) at 267.

<sup>109</sup> *Supra*, n. 72 at 34.

be supported by two primary propositions. The first proposition is that international law is no more a function of Reason than the elemental passions it seeks to rationalise. The second is that the modalities, concepts and mechanisms that have evolved in international law can be valuable in Jerusalem in that they serve as a common language of discourse, as pragmatic tools for policy-makers, and can ultimately, pave the way for mutually acceptable compromise.

B. *The Fallacy of the Convergence Between Law and Reason*

When international lawyers approach the Jerusalem conflict seeking to clothe the parties' claims in legal discourse and, so they imagine, impartial rationality, the myth that they subscribe to is this:

Law can be ideally conceived as an instrument of resolving . . . conflicts by means of formal rules, applied by a supposedly objective agency. The use of formal concepts has the task, among other objectives, of 'purifying' the conflict of its emotional elements . . . [T]he legal solution presents itself as a rational justification . . .<sup>110</sup>

Therefore, to openly engage and acknowledge the legitimacy of religious claims is anathema to Law's supposed rationality. The assumption that framing Palestinian and Israeli claims in legal terms will dissociate their positions from political manoeuvring is fallacious, throwing into question the benefit of dressing partisan claims in international law parlance.

Two points will be made in the course of deconstructing this myth. First, revisiting the origins of international law will show that its perceived function as a *deus ex machina*—irony fully intended—that cast aside the irrationality of pre-Westphalia religious discourse is misconceived. Second, international law is an ideology unto itself, with its own undercurrents of passion and politics.

(i) *Law and Religion: A Tenuous Distinction*

Kennedy caricatures the perceived relationship between religion and modern international law thus:

Religion is what we had before we had law. Religion is the domain of irrationality and charismatic authority, law the realm of reason and the bureaucratic. International law understands its birth

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110 I. England, 'The Legal Status of the Holy Places in Jerusalem' (1994) 28 *Isr. L.R.* 589 at 589.

as a flooding forth from the darkness of religious strife, *antidote to the passions of faith, on guard against their re-emergence as ideology* . . . Religion . . . was the sign of the inalienably different—which must be puzzled over and *suppressed* and tolerated and denied and accepted and outgrown.<sup>111</sup>

Rarely is it ever so simple. The widely-held belief that the Treaty of Westphalia of 1648, coming as it did after the Catholic-Protestant religious struggle of the Thirty Years' War, 'cleansed' international relations of religion is largely misconstrued.<sup>112</sup> Instead, a picture that captures the interplay between religious and natural law notions on the one hand, and secular and positivist conceptions of law stemming from the Age of Enlightenment on the other, is one that is closer to reality.

Echoes of this interface between religious/naturalist moorings and secular legal forms resonate in modern international law. First, McCoubrey cites instances that mirror the medieval regulation of war. In a fascinating 'parallel with [modern] enforcement of the *jus in bello*,' the Anglo-Saxon Church imposed penitential observances on Norman forces for the 'genocidal "harrying of the north"' subsequent to the Battle of Hastings in 1066.<sup>113</sup> Second, despite the apparently dominant position of the 'auto-limitation theory,' natural law subsists in the current paradigm through the *pacta sunt servanda* principle.<sup>114</sup> This is why a 'positivistic analysis . . . can give only a very incomplete account of the whole phenomenon of law.'<sup>115</sup>

The modern Westphalian conception of international law did not destroy the validity of religious authority in international relations in one fell swoop. Rather, the chronological relationship between notions of authority derived from religion and natural law, and international law, is more in the nature of a spectrum of influence. It is certainly true that the visibility of religion and natural law in international legal parlance has been on the wane since Westphalia. No longer do states approach territorial acquisition as Pope Alexander VI did in the Bulls of 1493 and 1494 when he purported to divide the territory

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111 D. Kennedy, 'Losing Faith in the Secular: Law, Religion, and the Culture of International Governance', in M.W. Janis & C. Evans, eds., *Religion and International Law* (The Hague/Boston/London: Martinus Nijhoff Publishers, 1999) 309 at 313 [emphasis added].

112 H. McCoubrey, 'Natural Law, Religion and the Development of International Law', in M.W. Janis & C. Evans, eds., *Religion and International Law* (The Hague/Boston/London: Martinus Nijhoff Publishers, 1999) 177 at 183.

113 *Ibid.*

114 *Supra*, n. 56 at 284ff.

115 *Supra*, n. 112 at 185.

of the New World between Spain and Portugal.<sup>116</sup> However, the continuing, albeit unacknowledged, presence of religion and natural law is incontrovertible.

Once this is understood, it no longer becomes crucial that religious claims be invalidated and repackaged to fit into the vernacular of Reason. The Supreme Court of Israel explicitly recognised this in the case of *The Temple Mount Faithful*, declaring that:

... there are values so sublime, so above and transcending everything, that the considerations of flexibility and pragmatism of “going beyond the strict rule” or “beyond the letter of the statute” are preferable regarding them than the rigid and inflexible line of the strict legal rule.<sup>117</sup>

With this in mind, international lawyers can overtly engage religious claims without laying themselves exposed to the criticism of allowing the ‘passions of faith’ to override ‘the realm of reason.’

To leave the argument at this, however, would be too simplistic since an overt engagement of religion within the realm of international law is admittedly problematical. While it has the merits of clearly setting out the precise elements operative in the conflict at hand, it also exposes the mutually exclusive sources from whence the parties to the conflict derive their *grundnorm*. As the case of Jerusalem patently shows, ‘religion’ is by no means a monolithic concept. When international law was based solely on theocratic obligation, as it was in the time of Pope Alexander VI, its efficacy was limited. Hence the blithe disregard of the Protestant Queen Elizabeth I for the Pope’s decree, displayed in her statement to the Spanish Ambassador that she did not ‘acknowledge the Spaniards to have any title by donation of the Bishop of Rome.’<sup>118</sup> Therefore, it is crucial to understand that the goal in engaging disparate religious interests within the realm of international law is not resolution, but accommodation of conflicting Truths.

In fact, one might argue that a belief in the utility of international law in itself requires a kind of religious faith. As Kennedy puts it, this kind of faith is ‘an islamo-judeo-christian faith in the secular, sustained

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116 T.J. Lawrence, *The Principles of International Law* (London: MacMillan & Co., Ltd, 1924) at 146. Lawrence narrates the response of the French King Francis I to Emperor Charles V of Spain: ‘By what right do you and the King of Portugal undertake to monopolize the earth? Has Father Adam made you his sole heirs; and if so, where is a copy of the will?’

117 *Supra*, n. 17 at 938. See also accompanying text.

118 *Supra*, n. 116 at 146–7.

by a complex movement, isolating religion, purifying itself in a catechism of anti-formalism, while returning over and over to the idols it has shattered.<sup>119</sup>

(ii) *International Law as Ideology*

Lauterpacht wrote that ‘there is no escape from the fact that all international disputes are “political” to a larger or smaller degree.’<sup>120</sup> Using international law to justify the positions of disputing parties will not change the essential character of that dispute. It is a superficial shroud of ‘legitimacy,’ and at international law, ‘legitimacy’ takes its benchmark from the values of the dominant.

Indeed, the mechanism of internationalisation, Wilde argues, is above all a policy institution in that it is used to promote certain policy goals in relation to the internationalised territory. For example, the chosen policy goal in Kosovo and Bosnia-Herzegovina was to push through the ‘democratic’ ideal of governance. This was done by, *inter alia*, ‘[introducing] individuals with democratic experience alongside local appointees perceived in lacking in such experience’ in Bosnia-Herzegovina.<sup>121</sup> With specific reference to Jerusalem, Berman observes that ‘some Zionist writers saw the international legal idea of the attenuation of sovereignty as the key to implementing their plans for Palestine . . . [Such] ideas show how the seemingly neutral form of internationalisation can serve partisan substantive positions.’<sup>122</sup>

This is not to give credence to the criticism that international law can only be a superfluous device through which politics goes in at one end to emerge as politics at the other. Rather, the point is to show that ‘politics is much closer to the heart of the system [in international law] . . . and power much more in evidence.’<sup>123</sup> Therefore, ‘politicization’ should not be seen as a blight on international law’s utility in helping to resolve the conflict in Jerusalem. It is merely a reflection of the system, imperfect as it is, in which international law must function. Without a truly impartial arbiter to settle differences, it is inevitable

119 *Supra*, n. 111 at 316.

120 H. Lauterpacht, *The Function of Law in the International Community* (Oxford: Clarendon Press, 1933) at 155.

121 See Wilde, *supra*, n. 81, and SC Res. 1244 (1999), UN SCOR, 4011th Mtg., UN Doc. S/RES/1244 (1999) as an illustration of the manner in which international law tends to take on prevailing political values. Resolution 1244 (1999) decided, *inter alia*, that the international civil presence in Kosovo would ‘organiz[e] and [oversee] the development of provisional institutions for *democratic and autonomous self-government* pending a political settlement, including the holding of elections.’ [emphasis added].

122 *Supra*, n. 1 at 826–7.

123 M.N. Shaw, *International Law* (Cambridge: Cambridge University Press, 1997) at 11.

that in a decentralized system of this nature politics surfaces more often than in systems of domestic law.

## V. CONCLUSION

In Jerusalem, a framework for resolution based on prevailing notions of sovereignty, self-determination and title to territory will not accomplish the elusive 'just and lasting peace.' They carry connotations of mutual exclusivity which are incompatible with crafting the future of a city that must be shared to satisfy all claims to it. As Edward Said put it, this shared future has to come of 'projecting an image of the whole of Jerusalem that is truer to its complex mixture of religions, histories, and cultures than the one of Jerusalem as something that we would like to slice back into two parts.'<sup>124</sup>

### A. *Law as Language*

Essentially, international legal discourse presents itself as a common language of dialogue between parties to the conflict in Jerusalem. This is not the same as asserting that international law 'rationalises' the conflict. Relying on religious fiat alone is, needless to say, not constructive: neither side recognises the legitimacy of the other's source of authority, and this approach would only be a throwback to the Catholic church carving up the New World, which held no credence with Europe's Protestant powers for this very reason.

Palestinians and Israelis can use the language of international law to articulate their claims in a common idiom. The universal principle of *audi alteram partem*, unique to the discipline of law, will ensure that the grievances of all sides with an interest in the conflict will be heard in this common language—if the protagonists to the conflict have the political will to listen. On a purely pragmatic analysis, it is in the interests of all to attempt to bring about peace. If law begins to be perceived as a useful mechanism for communicating interests and reaching genuine compromise rather than as a vernacular for antagonistic accusation, this pragmatism may encourage negotiations among Palestinians, Israelis and other interested parties.

The mechanisms and institutions that have evolved within the framework of international law may prove invaluable in maintaining whatever compromise is eventually reached. While internationalisation, as the concept systematically applied to past phenomena of the international frontier, is not a suitable response to the Jerusalem conflict, its basic structure—which allows for more than one entity to

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124 E.W. Said, 'Projecting Jerusalem' (1995) 25 J. Palest. St. 5 at 11.

claim the disputed territory as their own—is indispensable in making Said’s projection of Jerusalem a reality.<sup>125</sup>

### B. *A Shift Away from the Current Paradigm?*

One might then ask how law as language can serve any constructive purpose when it has, thus far, served none. The answer is that it is, as emphasized above, contingent on the adoption of a new paradigm of international law that decisively discards exclusive conceptions of sovereignty and territorial ownership.

In the days of empire, new conceptions of the relationship between territory and sovereignty had to be sought in order to accommodate colonialism; this resulted in varieties of ‘trusteeship’ that ‘shade off into one another,’<sup>126</sup> one of its hues being the protectorate. As Anghie notes, ‘protectorates were a rather common technique by which European states exercised extensive control over non-European states, while not officially assuming sovereignty over those states.’<sup>127</sup> During the mid-twentieth century, the waves of decolonization rendered anything that reeked of neo-imperialism unfashionable; implicitly, though, the concept of trusteeship subsists in the U.N. Charter and, as we have seen, continues to be applied in East Timor and Kosovo.

Of more importance, however, are the conceptions of territory that were initially alien to the Eurocentric, secularist construct of international law: notions of stewardship and the common heritage of mankind, and conceptions of spiritual attachment to land inherent in the philosophies of indigenous peoples. These conceptions have already been imported into the discourse of international law, which amply demonstrates its ability to adapt these ideas to its existing framework without losing their essential meaning. The significance of territorial possession to indigenous peoples bears some notable parallels to Jerusalem’s meaning to Palestinians and Israelis. For example, the indigenous people of Australia regard their land thus: ‘Aborigines view land as a religious phenomenon, and believe that the relationship between themselves and the land originated with the Dreaming. . . . Aborigines view rights to land as originating with the design of the world rather than with alienable legal title.’<sup>128</sup>

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<sup>125</sup> *Ibid.*

<sup>126</sup> *Supra*, n. 38 at 49.

<sup>127</sup> *Supra*, n. 38 at 54.

<sup>128</sup> R.P. Hill, ‘Blackfellas and Whitefellas: Aboriginal Land Rights, the Mabo Decision, and the Meaning of Land’ (1995) 17 *Human Rights Quarterly* 303 at 309. The UN Draft Declaration on the Rights of Indigenous Peoples makes a remarkable attempt to incorporate the centrality of land to the indigenous worldview in its elucidation

The idea of sharing a particular piece of the globe is more apparent in Arvid Pardo's conception of the 'common heritage of mankind.' This concept, first presented by then-Ambassador Pardo to the U.N. in 1967, postulated that future scrambles for domination of the ocean's vast, as yet unexploitable deep sea resources be precluded by declaring the entire area 'a common heritage of mankind, to be developed by the United Nations for the benefit of all the nations, large and small.'<sup>129</sup> The idea was subsequently incorporated into Article 136 of the United Nations Convention on the Law of the Sea<sup>130</sup> and in Article XI of the Agreement Governing the Activities of States on the Moon and other Celestial Bodies.<sup>131</sup>

If Jerusalem is indeed 'a sacred trust of civilization,' then the reasoning behind Pardo's idea also applies to the city. International law must be used to devise a way for the city to be shared between its national claimants—the Palestinians and Israelis—and yet accord freedom of access to all of Christianity, the Jewish Diaspora and the Muslim *ummah*.

### C. *Re-imagining Jerusalem*

As it happens, the prospects are promising. In the last decade, there has been a discernible trend in the nature of proposals for Jerusalem's future. This trend is the willingness to accommodate and articulate the 'competing fantasies of [the] nationalist and religious adversaries'<sup>132</sup> in the conflict. This has been achieved using the discourse of international law by adapting familiar concepts and ideas in order to create a realm where these 'competing fantasies' may meet and ultimately fuse in some form of middle ground.

The most important reworking of the current paradigm has taken place with respect to the idea of sovereignty. The limitations of the contemporary meaning of sovereignty, with its necessarily exclusive

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of the rights and obligations of indigenous peoples at international law. See especially the Preamble, Article 25 and Article 27, UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Draft United Nations Declaration on the Rights of Indigenous Peoples*, UN Doc. E/CN.4/1995/2 (1994).

129 L.B. Sohn, 'Managing the Law of the Sea: Ambassador Pardo's Forgotten Second Idea' (1997) 36 Colum. J. Transnat'l L. 285 at 287. Baslar argues that the common heritage of mankind is in fact a natural law concept: see C.C. Joyner, 'Book Review: The Concept of the Common Heritage of Mankind in International Law' (1999) 13 Emory Int'l L. Rev. 615.

130 10 Dec 1982, online: UN Division for Ocean Affairs and the Law of the Sea <[http://www.un.org/Depts/los/convention\\_agreements/texts/unclos/closindx.htm](http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm)> (last modified: 27 Feb 2002) (entered into force: 16 Nov 1994).

131 18 Dec 1979, 18 I.L.M. 1434 (entered into force 11 Jul 1984).

132 *Supra*, n. 1 at 823.

quality, have already been detailed and may be shortly summed up in Lapidoth's caution regarding 'arid discussions about sovereignty':

Sovereignty is an abstract notion with a strong emotional appeal. People get carried away by this concept and are reluctant to compromise about it. Therefore it may be advisable to leave this notion aside . . . It may be helpful if in the negotiations, instead of bickering about sovereignty, the parties would emphasize the division or sharing of powers among the various neighbourhoods and boroughs.<sup>133</sup>

Hence the emergence of new conceptions of sovereignty<sup>134</sup> that both seek to emphasise functional competence over exclusive possession, and articulate the image of Jerusalem held in the minds of both Palestinians and Israelis.

The general direction appears to be towards a united Jerusalem as the shared capital of both Israel and a Palestinian.<sup>135</sup> In addition, Berman cites the proposal for Jerusalem put forward by the Jordanian government official Adnan Abu Odeh as the 'exemplification' of the approach that Berman advocates in relation to Jerusalem. Berman outlines the key aspect of Abu Odeh's plan which, he argues, epitomizes the manner in which international law must operate if it is to be of any utility at all in the conflict:

[I]n the Arab mind, Muslims and Christians alike, Al-Quds would extend as far as their own holy sites in the walled city. Yerushalaim, to the Jewish mind, would stretch as far as their holy sites inside the city . . . Thus Jews and Arabs (Muslims and Christians) alike would not lose the city so holy to them . . . In this framework the issue of Jerusalem would be resolved not only as a symbol of peace but also as an embodiment of its essence.

This recalls Said's concept of 'projecting Jerusalem,' and, as Berman further argues, is 'the most advanced kind of thinking about internationalism's relationship to nationalism: the explicit provision of a place for fantasy within the details of a complex legal/administrative plan for a disputed territory.'<sup>136</sup>

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133 R. Lapidoth, 'Jerusalem and the Peace Process' (1994) Isr. L.R. 402 at 433–4.

134 *Supra*, n. 21.

135 *Supra*, n. 60 at 138–9; *supra*, n. 21 at 27–8. A notable recent misstep is the Geneva Accord. While its framers laudably recognised in art. 6(2) that any workable solution must involve the sharing of the city between Israelis and Palestinians, sub-section (3) arguably negates the value of sub-section (2) by making reference, once again, to the limiting concept of sovereignty: *supra*, n. 5.

136 *Supra*, n. 1 at 833.

If this paradigm shift can be achieved, there will be a place for international law in Jerusalem. Concepts such as 'sovereignty,' 'self-determination' and 'laws of occupation under the Fourth Geneva Convention' cloud the real dynamics of the conflict, stifling the voices straining to be heard beneath the veneer of false rationality. The true utility of international law with respect to Jerusalem and other similar conflicts can only be apparent if it is perceived as a common language for dialogue, and as a template for constructing mechanisms that allow fantasy to subsist within a workable system of governance. Resolution is not within the power of our legal framework, but accommodation is.