

**The Jerusalem Institute for Israel Studies**

**The Historical Basin of Jerusalem**  
**The Status Quo and Alternatives for Agreement**

Edited by: Ruth Lapidot and Amnon Ramon

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**The Historical Basin of Jerusalem**  
**The Status Quo and Alternatives for Agreement**  
**Part A**  
**Editors: Ruth Lapidot and Amnon Ramon**

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## **The Historical Basin Team**

Ora Ahimeir

After publication of the document *Peace Arrangements in Jerusalem*, which was published before the Camp David summit in 2000 and printed in a second edition in 2001, the Jerusalem Institute for Israel Studies (JIIS) decided to continue the approach initiated with this document. We were encouraged by the positive reactions from Israeli and American policy makers, who noted that the material prepared by the JIIS formed the foundation for the discussions at Camp David on the subject of Jerusalem. The orderly and preliminary process of consideration by the JIIS and by a special team established by the Prime Minister's Office shortly before the summit, including experts from the JIIS team, facilitated preparations for the negotiations.

The failure of the Camp David summit, which was due, among other reasons, to the irreconcilable disagreement on the question of Jerusalem, confirmed the basic arguments of the think team: there can be no permanent settlement without discussion of Jerusalem, and the question of Jerusalem is one of the hardest to resolve, if not the hardest. Nevertheless, this issue should not be postponed until the end of the process, since according to the theory of negotiation postponing difficult issues to the end of the process leads to intensified pressure to make greater concessions and does not necessarily promote a settlement. We were also encouraged by the fact that the raising of the subject at Camp David broke a taboo. Since then, policy and opinion makers, as well as sections of the general public in Israel, have been willing to think about and to express opinions on the question of Jerusalem. In preceding years, a false consensus dictated that any discussion or thought about arrangements in Jerusalem was tantamount to subversion and treachery. Since the Camp David summit and the publication of the JIIS' studies, there has been a greater level of willingness to address the difficult and conflict ridden reality that has emerged in Jerusalem and the surrounding metropolis.

A team established after the publication of the document *Peace Arrangements in Jerusalem* focused on the Old City of Jerusalem. Its study, edited by Prof. Ruth

Lapidoth and Amnon Ramon, was published in 2002. The team established immediately thereafter to discuss the Old City basin included nine members of the *Peace Arrangements in Jerusalem* team, who were joined by four experts: Dr. Shmuel Berkowitz (holy places), Prof. Yaacov Bar-Siman-Tov (conflict resolution), Dr. Kobi Michael (security), and Dr. Emanuel Sharon (economics). Prof. Ruth Lapidoth, an authoritative expert in international law, directed the work of the team, which took the form of an ongoing brainstorming session accompanied by marathon discussions. The researchers were asked to prepare background papers to which the team responded, through a process whereby all involved attempted to convince the team of their position. Although the members of the team hold differing political views, the work process reflected purely professional approaches.

As was the case with the study by the original team, the purpose of this study is to examine alternatives for a settlement in Jerusalem as part of a comprehensive settlement of the Israel-Palestinian conflict. The starting point was to examine several alternatives that have some chance of being accepted by both sides and by the international community. However, we did not refrain from examining alternatives that are desirable only by one of the sides – indeed, the first two alternatives reflect in absolute terms the interests of one side only, and almost certainly could not secure the support of the other side. The three remaining alternatives do not reflect one-sided interests, but rather their prospects of being accepted under certain conditions. The alternatives include international involvement in varying degrees, since the basic assumption is that without such international involvement, not only is there no chance of reaching a settlement, but there is also no chance of a settlement being implemented and observed over the long term. This basic assumption is the product of an examination of the lessons to be learned from the Oslo process, and particularly from the failure of the 2000 Camp David summit. It has recently been corroborated in the arrangements for the operation of the Rafiah border crossing, which include the use of inspectors from the European Union. The principal goal of the think team was to offer new ideas to policy makers and to the interested general public; to stimulate thought; to challenge accepted assumptions, in some cases; to base the solutions on up-to-date figures and knowledge; and, above all, to suggest that, despite numerous

difficulties, it may be possible, with great effort, to identify fair arrangements on the question of Jerusalem that will be acceptable to both sides and to the international community.

Lengthy discussions were devoted to the selection and definition of the subject. We decided to focus on the historical basin of Jerusalem, which includes the vast majority of the holy sites in the city and which forms the focus of the fiercest national, political, religious and cultural disagreements. To a large extent, the historical basin, which includes the Temple Mount, forms the heart of the conflict. We hope that special arrangements in this area will enable calmer and more objective discussion of questions relating to the other parts of the city, which are not regarded as especially holy.

The main innovation in our study is the discussion of international involvement. We feel that such involvement offers some chance of a settlement, albeit not in the immediate term, as shall be explained below.

As is the usual practice in the JIIS, the team has held and will continue to hold public discussions and meetings with policy makers in order to disseminate and explain its ideas.

The team sees this document as a preliminary study providing the infrastructure for detailed studies relating to each of the issues it raises. A detailed summary of the team's work will be published during 2006 (including a collection of articles discussing the various issues in detail). At the time of publication, discussion about Jerusalem may seem far-removed from the difficult prevailing reality, in which there is almost no real sign of any revival of the peace process or of the possibility of reaching a permanent settlement and the resolution of the dispute. The security (separation) barrier is creating a new reality in Jerusalem that seems to distance any chance of a settlement, and Jewish organizations are engaged in a large-scale effort to consolidate the Jewish presence in the historical basin. However, reality in the Middle

East changes frequently, and the seeds of peace must be sown well in advance so that they can sprout and flourish when the time is right.

Lastly, it is interesting to note that while think tanks involved in promoting peace are usually dominated by men from the academic and security spheres, the three think tanks described above were all driven by women. Professor Ruth Lapidot, Dr. Maya Chosen and myself have initiated, motivated and maintained the work of the teams during a period of more than a decade.

### **Members of the Team**

**Prof. Ruth Lapidot** (Chair) – Emeritus Professor of International Law at the Faculty of Law in the Hebrew University of Jerusalem, and Professor of Law in the academic track of the Administrative College. Prof. Lapidot is a member of the register of arbitrators in the Standing Court of Arbitration in the Hague, and a senior researcher at the Jerusalem Institute for Israel Studies. She formerly served as the legal advisor to the Israel Foreign Ministry, and as a member of the arbitration team appointed to examine the dispute between Israel and Egypt relating to the Taba area. Prof. Lapidot has published over ten books and documents on Jerusalem, including: *The Old City*, 2002, Jerusalem Institute for Israel Studies; *Jerusalem, the Capital of Israel*, The Harry and Michael Sacher Institute for Legislative Research and Comparative Law, Faculty of Law, Hebrew University of Jerusalem, 1999; *Autonomy – Flexible Solutions to Ethnic Conflict*, United States Institute of Peace Press, 1997.

**Ora Ahimeir** – director of the Jerusalem Institute for Israel Studies, has edited books and publications on Jerusalem, the status of women in Israel and Hebrew culture in the Land of Israel, including: *1900-2000, One Hundred Years of Culture – Hebrew Creativity in the Land of Israel* (with Haim Beer), Am Oved & Yediot Aharonot, 2000; *Jerusalem a City and Its Future* (with Marshall Breger), Syracuse University Press, 2002.

**Prof. Yaacov Bar-Siman-Tov** – head of the Jerusalem Institute for Israel Studies, Professor of International Relations and head of the Swiss Institute for Conflict

Research at the Hebrew University in Jerusalem. Prof. Bar-Siman-Tov is an expert in conflict management and in the Israeli-Arab dispute. His publications include: *Stable Peace among Nations*, Roman and Littlefield, 2000; *From Conflict Resolution to Reconciliation*, Oxford University Press, 2004; *The Israeli-Palestinian Conflict, From Peace Process to Violent Confrontation 2000-2005* (ed.), Jerusalem Institute for Israel Studies, 2005.

**Dr. Shmuel Berkowitz** – attorney and expert on Jerusalem and on the holy places of the different religions in Israel and in the Territories. A fellow of the Jerusalem Institute for Israel Studies, and a lecturer at the Faculty of Law in the Hebrew University of Jerusalem and at the Yad Ben Zvi Institute. His book *The Wars of the Holy Places – The Struggle for Jerusalem and the Holy Places in Israel, Judea, Samaria and the Gaza Strip*, published by the Jerusalem Institute for Israel Studies and Hed Artzi publications, 2000, received an award from the Jaffee Center for Strategic Studies in 2001. Additional publications include: *The Temple Mount and the Western Wall in Israeli Law*, Jerusalem Institute for Israel Studies, 2001.

**Dr. Moshe Hirsch** – former Deputy Dean of the Faculty of Law at the Hebrew University of Jerusalem and fellow at the Jerusalem Institute for Israel Studies. An expert in international and environmental law. Among other issues, his publications relate to Jerusalem and the relations between Israel and the European Union, and include: *Whither Jerusalem? Proposal for the Future of the City* (with Devora Haussen-Kuriel, supervised by Ruth Lapidoth), Jerusalem Institute for Israel Studies, 1994; *International Involvement in the “Holy Basin” in Jerusalem – Possible Alternatives* (with Kobi Michael), Jerusalem Institute for Israel Studies, 2003.

**Dr. Yifrach Zilberman** – anthropologist, Senior Lecturer in the Faculty of Israel Studies at Beit Berl College, and a fellow in the Jerusalem Institute for Israel Studies. Dr. Zilberman is an expert on Palestinian society, and initiated and founded the Israeli-Palestinian Forum for Mediation on Civil and Economic Issues in Jerusalem. His publications relate to Islamic extremist groups in India and to Palestinian society

in Jerusalem, and include: *Jerusalem and Judea – A Portrait of Religious and Political Extremism*, Jerusalem Institute for Israel Studies, 1997.

**Dr. Maya Choshen** – geographer and urban planner, Senior Researcher at the Jerusalem Institute for Israel Studies and Lecturer at the School of Education and the Institute of Urban Studies at the Hebrew University of Jerusalem. Dr. Choshen is the editor of the Jerusalem Statistical Yearbook, and of the accompanying publication *Jerusalem Facts and Figures*, published by the Jerusalem Institute for Israel Studies and the Municipality of Jerusalem; she guides think tanks and directs dozens of projects in the fields of society, planning and education in Jerusalem. Her books and articles published in recent years include: *Sustainable Jerusalem – Issues in Development and Conservation* (editor, with Shlomo Hason and Israel Kimchi), Jerusalem Institute for Israel Studies, 2004; “Yet There Is Something about It – Migration to and from Jerusalem Shaping the Life of the City,” in *Panim*, Journal for Culture, Society and Education, No. 28, Israel Teachers Association in cooperation with the Jerusalem Institute for Israel Studies, 2004; *A Master-Plan for Educational Institutions in East Jerusalem*, submitted to the Jerusalem Education Authority (the study was prepared with Mohammed Nakal, Bilha Piamenta and Israel Kimchi), Jerusalem Institute for Israel Studies, 2003.

**Dr. Kobi Michael** – Research Fellow at the Jerusalem Institute for Israel Studies and at the Truman Research Center for the Advancement of Peace at the Hebrew University of Jerusalem. Lecturer at the National Security College and in the conflict study programs at the Hebrew University of Jerusalem and Tel Aviv University. Dr. Michael’s principal fields of specialization are strategy and national security. In the framework of his research work at the Jerusalem Institute for Israel Studies, he examines the security barrier around Jerusalem and issues relating to the various alternatives and political arrangements in the historical basin. His publications include: *International Involvement in Jerusalem – Background and Ramifications*, Jerusalem Institute for Israel Studies, 2003; *International Involvement in the “Holy Basin” in Jerusalem – Possible Alternatives* (with Moshe Hirsch), Jerusalem Institute for Israel Studies, 2003; *Jerusalem – A Fence Around It* (with Amnon Ramon),

Jerusalem Institute for Israel Studies, 2004; *The Violent Israeli-Palestinian Conflict 2000-2005* (with Yaacov Bar-Siman-Tov, Ephraim Lavi and Daniel Bartal), Jerusalem Institute for Israel Studies, 2005.

**Reuven Merhav** – Fellow at the Jerusalem Institute for Israel Studies and at the Operational Theory Research Institute (OTRI), and former head of the National Project for Ethiopian Jews. An Orientalist with extensive experience in the diplomatic service, Ambassador Merhav served as director-general of the Foreign Ministry, advanced the establishment of diplomatic relations between China and Israel, and played a key role in Operation Solomon to bring Ethiopian Jews to Israel. His publications include: *The Vatican Model and the Jerusalem Question* (with Amnon Ramon and Rotem Giladi), Jerusalem Institute for Israel Studies, 1997; *The Hashemite Kingdom of Jordan and its Roles in a Future Permanent Settlement in Jerusalem* (with Rotem Giladi), Jerusalem Institute for Israel Studies, 1999.

**Israel Kimhi** – coordinator of Jerusalem studies at the Jerusalem Institute for Israel Studies. An urban planner with extensive experience who headed the Planning Policy Division of the Municipality of Jerusalem and has lectured for many years in the Faculty of Geography at the Hebrew University of Jerusalem. Mr. Kimhi has published dozens of works on the subject of Jerusalem, including, most recently: *Sustainable Jerusalem – Issues in Development and Conservation* (editor, with Maya Choshen and Shlomo Hason), Jerusalem Institute for Israel Studies, 2004; *The Quality of the Urban Environment*, Jerusalem Institute for Israel Studies, 2005; *The Separation Barrier in Jerusalem – New Aspects and Possible Alternatives*, Jerusalem Institute for Israel Studies, 2005; and *The Jerusalem Hills and the Judean Plain – A Policy for Conservation and Sustainable Development* (with Maya Choshen and Motti Kaplan), Jerusalem Institute for Israel Studies.

**Dr. Yitzhak Reiter** – Orientalist and expert on the Israeli Arabs and on Islamic institutions in Jerusalem. His publications include: *Islamic Endowments in Jerusalem Under British Mandate*, Frank Cass, 1996; *Sovereignty of God and Man – Sanctity and Political Centrality on the Temple Mount*, Jerusalem Institute for Israel Studies,

2001; *From Jerusalem to Mecca and Back – The Muslim Cohesion around Jerusalem*, Jerusalem Institute for Israel Studies, 2005.

**Amnon Ramon** – Researcher at the Jerusalem Institute for Israel Studies and coordinator of courses at the Yad Ben Zvi Institute. His doctoral thesis addresses the relations between Israel and the Christian denominations relating to the issue of the holy places in Jerusalem. Specializes on issues of Christianity and Jerusalem, the Temple Mount and Jerusalem in the modern era. His publications include: *The Rehavia Neighborhood of Jerusalem*, Yad Ben-Zvi, 1998; *Around the Holy City – Christian Tourist Routes*, the Jerusalem Institute for Israel Studies, 2000; *A City in a Labyrinth – A Lexicon of Modern Jerusalem* (editor), Jerusalem Institute for Israel Studies, 2003; *Jerusalem – A Fence Around It* (with Kobi Michael), Jerusalem Institute for Israel Studies, 2004.

**Dr. Emmanuel Sharon** – chair of the Board of Directors - the Jerusalem Institute for Israel Studies, doctor of economics. Dr. Sharon has served as director-general of the Ministry of Finance, chair of the board of directors of Bank Hapoalim, was a battalion commander in the Golani Brigade, head of the Operations Division and head of the Combat Theory Division in the IDF.

## **Map - The Historical Basin**

□ **Area**

**Entrances to the Historical Basin –**

**From west –**

**From east, north and south –**



## **The Historical Basin – Presentation of the Key Problems**

**Ruth Lapidot**

### **Introduction**<sup>\*</sup>

The discussions that took place at Camp David in the summer of 2000 emphasized the centrality of the question of Jerusalem and the fact that it cannot easily be resolved. It emerged that no resolution of the Israeli-Palestinian conflict, and of the Israeli-Arab conflict in general, can be implemented without a reasonable and agreed solution of the problem of Jerusalem, and, above all, the question of the historical basin, which includes the main holy sites and attracts the attention of hundreds of millions of followers of the three monotheistic religions. This realization led us to intensify our efforts to identify solutions to this problem.

Faithful to the longstanding tradition of the Jerusalem Think Tank in the Jerusalem Institute for Israel Studies, we do not intend to recommend a particular solution. We prefer to offer the public and policy makers a series of alternatives, while noting the advantages and disadvantages of each.

It can be assumed that the issue of Jerusalem as a whole will be raised for discussion in negotiations for a permanent settlement. However, we have focused our discussion on the most problematic area – the historical basin. From a technical perspective, it would have been easier to focus exclusively on the Old City, which is clearly defined by the walls. However, we believe that our study should also address the historical sites that are adjacent to the Old City, i.e. the area of holy and historical sites outside the walls: Mount Zion, the City of David, Kidron Valley and the Mount of Olives, particularly its western slopes (see the section below on the Borders of the Historical Basin).

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\* The author wishes to thank Prof. N. Bar-Yaacov, Prof. Y. Bar-Siman-Tov and Mr. Amnon Ramon for their helpful comments on the manuscript of this sections. Special thanks to Ilanit Segen for her typing and her patience.

We preferred the expression “Historical Basin” to “Holy Basin,” since not all the sections included in the relevant area are holy places. We also felt that the term “Historical Basin” is more neutral and less emotionally charged, although we are, of course, aware of the strength of emotions aroused by the holy places in this basin among the adherents of the three monotheistic faiths.

Two key approaches may be identified in efforts to find a solution to the problem of Jerusalem. The first advocates the territorial division of the city as a whole, including the historical basin.<sup>1</sup> The second approach seeks a special arrangement for the entire city or for the Historical Basin alone, sometimes with the involvement of a third party.<sup>2</sup> The merit of the former approach is its simplicity: each of the sides will enjoy complete control, and perhaps even sovereignty, in a given territory, and will be entitled to exercise its full authority within that area, naturally subject to the rules of international law. Adherents of this approach include some who wish to restrict the freedom of action of the controlling state, to a certain extent, out of consideration for the interests of the other side or of the international community. The latter approach argues that, due to the importance of Jerusalem to both sides and in the light of their interests, it is preferable to introduce a special arrangement, at least in the Historical Basin, such as joint management or functional internalization, so that neither side will be frustrated due to the need to relinquish a given area raising such fierce emotions. This approach is undoubtedly more complex than the former approach of territorial separation. Despite this, we favored this approach, which, we hope, constitutes a form of compromise that both sides will find it easier to accept.

We confined our discussion to five alternatives for such a special arrangement, as summarized below (for details, see the article of Moshe Hirsch below):

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<sup>1</sup> For example, President Clinton’s plan (2000), the Ami Ayalon – Sari Nusseibeh proposals (2002), and the Geneva Initiative of Yossi Beilin and Yasser Abd Rabo (2003).

<sup>2</sup> For example, the proposals of the Economic Cooperation Fund as published in the booklet: Francesca Nardi, ed., *Israelis, Palestinians Coexisting in Jerusalem*, Centro Italiano per la Pace in Medio Oriente, 2001, pp. 259-330; Shaul Arieli, “Jerusalem – On the Path to a Permanent Settlement: Not Division, but Redefinition and Reorganization,” *Strategic Update*, Vol. 8, p. 17.

1. Full Israeli sovereignty and control over the entire Historical Basin, with the possibility of granting autonomy in certain spheres to the Arab population, and of granting special status to the Muslim and Christian holy places. It can be assumed that the Palestinians and the international community will not accept this solution.
2. Full Palestinian sovereignty and control over the entire Historical Basin, with the possibility of granting autonomy in certain spheres to the Jewish residents, and to grant special status to the Jewish and Christian holy places. It can be assumed that Israel will reject this solution.
3. The territorial division of the Basin between the sides, with international supervision by a third party that will assist in monitoring and conflict resolution.
4. Joint management, with a division of authority between the sides and international backing. If the sides fail to implement joint management, management will be transferred to an international body that will also be empowered to help resolve disputes.
5. The Historical Basin will be managed by an international body, and authorities will be delegated to both sides in certain spheres.

Before discussing the various alternatives in detail, a number of key questions relating to the Basin should be examined:

### **1. The Symbolism of the Historical Basin**

One of the phenomena that make it particularly difficult to find a solution to the question of Jerusalem is the symbolism of the city and the fierce emotions it evokes among many believers.<sup>3</sup> It is hard to imagine a more symbolic city than Jerusalem, and indeed no such city seems to exist anywhere in the world. Approximately three billion people – Jews, Christians and Muslims – attribute special sanctity to the city. There are various grounds for the sanctity and importance of the city as perceived by

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<sup>3</sup> See the article by Ora Ahimeir, “The Historical Basin: Flags, Symbols, Language, Heritage, Culture and Creativity,” to be published in the expanded collection. This sub-section is based in part on the article.

the different religions. It is sometimes difficult to reconcile the poverty of “mundane Jerusalem” with the importance and sanctity attributed to the city by believers, and indeed non-believers. In any case, the symbolic dimension of the city is undoubtedly a powerful factor. The existence and strength of this factor cannot be denied, and it is vital to recognize its capacity to mobilize vast numbers of Israelis and Palestinians, Jews, Muslims and Christians throughout the world. Any agreement or settlement regarding Jerusalem must address the interests of many people who do not live in the city.

This article does not examine the question as to *why* Jews, Christians and Muslims see Jerusalem as a holy and central city to their faith. This question has been elucidated in books that have been published by the Jerusalem Institute for Israel Studies<sup>4</sup> and other institutions. This article has, however, been written out of a sense of awareness of the importance and impact of the myths, different narratives and symbols that surround Jerusalem. We shall not enter into the debate as to who has greater rights to Jerusalem, or which religion mentions the city more times in its scriptures. Our assumption is that the affinity of the religions to Jerusalem is to be respected. Over time, we hope that tolerance and mutual respect will emerge among the adherents of the three religions regarding the traditions and affinities of each one toward the city.

For the purpose of our discussion here, it will suffice if we determine that Jerusalem is a holy and adulated city for several reasons: the historical events and myths that have developed regarding the city or that are attributed thereto; the large number of holy sites that have developed in the city, with their accompanying traditions; the apocalyptic visions relating to future events of cosmic importance that are due to occur in the city according to faith and tradition. Although special sanctity is attributed to specific places, sanctity is also attributed to the city as a whole.

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<sup>4</sup> See, for example: Shmuel Berkowitz, *The Wars of the Holy Places – The Struggle for Jerusalem and the Holy Places in Israel, Judea, Samaria and the Gaza Strip*, published by the Jerusalem Institute for Israel Studies and Hed Artzi publications, 2000; Amnon Ramon, *A City in a Labyrinth – A Lexicon of Modern Jerusalem* (editor), Jerusalem Institute for Israel Studies, 2003, pp. 19-76.

According to Jewish tradition, for example, the Divine Presence dwells on the Temple Mount, from where it radiates to the city of Jerusalem as a whole and thereafter to the Land of Israel. Similar approaches may be found in Christian and Muslim thought.

The borders of the historical city of Jerusalem are relatively well defined and have changed little in recent centuries. Since the British Mandate period, however, and even more so after the establishment of Israel and the Six Day War, the borders of the city have been expanded. The name “Jerusalem” is now applied to the entire municipal area of the city, and the municipality advocates its further expansion. In the public conscience and that of political leaders, almost no distinction is made between historical Jerusalem and the remaining sections of the city, and special symbolism, sanctity and adulation are attributed to everything included under the label “Jerusalem” – housing projects, freeways, interchanges and shopping malls. We believe that it is appropriate to enhance the distinction between the Historical Basin and the remaining sections of the city.

This document relates to the Historical Basin, which includes the key historical sites and the most important holy places and forms the focus of the emotions of the adherents of the three monotheistic religions. This area became the main focus of dispute between the three faiths, and, during the twentieth century, it became the focus of a national conflict between the Zionist movement and the State of Israel and the Palestinian national movement. Since 1967, in particular, we have witnessed repeated attempts by religious zealots to create a catastrophic event in the Historical Basin – mainly around the Temple Mount - that could have disastrous consequences. This phenomenon underscores the need to focus on efforts to identify solutions for the Historical Basin area, which covers a very small territory.

## **2. Criteria for Potential Solutions**

Our goal is to advance a solution that will encourage the cultural and economic flourishing of the Historical Basin, and avoid violent and potentially disastrous incidents. Accordingly, any alternative must be examined in accordance with the following criteria:

- Restraining the tendencies of both sides to aspire to dominance and control;
- Restraining the tendency to exclude<sup>5</sup> the other;
- Encouraging the preservation of the holy places and of historical sites and landscapes;
- Supporting respect for the other's religious and historical traditions;
- Encouraging local culture and creativity;
- Encouraging the economy and tourism while maintaining the unique character of the city;
- Encouraging unifying and common interests.

### **3. The Borders of the Historical Basin<sup>6</sup>**

The terms “historical” and “basin” refer to the area in question. A “basin” is a bowl-shaped area surrounded by hills or ridges. The term “historical” indicates that the area in question was, in accordance with the different traditions, the location of the unique historical and religious events relating to Jerusalem.

In identifying the borders of the Historical Basin, for which a special arrangement is to be proposed, we addressed the following considerations:

- A maximum concentration of the holy places, religious institutions and important historical sites of the city;
- The delineation of borders that can be clearly identified on the ground;
- Relatively few residential areas in all Basin areas, apart from the Old City;
- Separate access to the defined basin from areas populated by Jews, on the one hand, and Muslims, on the other.
- A defined area that can be managed in functional terms separately from the surrounding urban areas;
- An area providing services for visitors, such as parking lots;

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<sup>5</sup> Exclusion: distancing, preventing access, restricting others' movements.

<sup>6</sup> This sub-section is taken in its entirety from the article by Israel Kimhi, “The Historical Basin – Borders and Characteristics,” which will be published in the expanded booklet.

- ❑ An area within which different sections can be distinguished as necessary for appropriate management (e.g. the Temple Mount and the Armenian Quarter).

In light of the above-mentioned considerations, it is possible to define:<sup>7</sup>

- A. A “minimum” basin, including the Old City within the walls;
- B. A slightly larger basin, including the Old City, Mount Zion and the western slope of the Mount of Olives.
- C. A larger basin, including the Old City, Mount Zion, the western slope of the Mount of Olives, the City of David and the Christian institutions to the north of the Damascus Gate.

For the purpose of our discussions, we chose an area whose borders are as follows:<sup>8</sup>

To the west: The wall of the Old City from IDF Square to the southern corner of the Sultan’s Pool (the dam over Hebron Road).

To the south: From the southern edge of the Sultan’s Pool, along the course of Gei Ben-Hinnom to the wall surrounding the Greek Orthodox monastery of Hekel-Dama; thereafter along the southern border of the monastery; and then north to the eastern fence of St. Peter Gallicantio Church (including the surrounding cemeteries). From here, along the southern wall of the Old City until the point where the road curves below the Southern Wall excavations (the Ofel Garden). Then in a straight line along the course of Kidron Vally, and east along the fences of the Jewish cemetery bordering the northern section of Silwan until Jericho Road. Then along the fence of the Jewish cemetery on the Mount of Olives, along Jericho Road, until the end of the burial plots.

To the east: Along the Jewish burial plots on the Mount of Olives through to the fenced section of the Russian Church of the Ascension. Then east to the eastern fence surrounding the compound of the church, and west again as far as Al-Muqassed Hospital. The border line will follow the hospital fence to the west, thus excluding the

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<sup>7</sup> See the attached map on p. 13.

<sup>8</sup> *Ibid.*

hospital from the Basin area. Then along the eastern fence of the Viri Galilei compound (the holiday residence of the Greek Orthodox patriarch).

To the north: From the corner of the Old City wall by IDF Square, along the southern margins of Hazanchanim St. and Sultan Suleiman St. to the northeast corner of the walls of the Old City (the Storks Tower opposite the Rockefeller Museum). Then south along Jericho Road, and north again along Nachal Egoz (Wadi Joz) to the northern fence of the Luigi Cheda Institution (the former Catholic Hospital), and then east along the edge of the built-up area of Aqbat al-Sawana neighborhood until the fence of the Viri Galilei compound.

Two compounds housing religious institutions may be added to this area: the Abraham Monastery (Bait Abuna Ibrahim) on the Mount of Anointment, and the Christian institutions to the north of the Damascus Gate. A further option for extension is the City of David area, including the archeological excavations and important historical sites.

Substantial sections of the borders of the Historical Basin were defined by reference to enduring physical objects such as walls or fences, which clearly and sharply define the area of the Historical Basin. The borders noted above are more or less optimal, and include an area of 2,210 dunams (approximately 5,053 acres). To this one may add the following areas: the area of the Christian institutions to the north of the Damascus Gate – 57 dunams (12 acres); the Mount of Anointment 41 dunams – (10 acres); and the City of David – 194 dunams (49 acres).

Including the City of David adds approximately 4,200 residents to the Historical Basin (including several dozen Jewish families). This population lives in very close proximity to the Old City and relies on services provided within the walls. The topographical structure of the ridge and the road system in the area are also directly connected to the Basin.

As alluded to above, there is no reason why different arrangements cannot apply to different sections of the Basin – for example, a different arrangement for the Old City

within the walls as distinct from the remaining sections of the Basin, and a special arrangement regarding the Temple Mount. Moreover, the proposed borders of the Historical Basin are not an essential condition. If necessary, and if such a solution is preferred by the sides, the special arrangement could be confined only to the Old City within the walls.

#### **4. Profile of the Historical Basin Area and Problems To Be Resolved**

The Basin, and the Old City in particular, were described in detail in the booklet we published in 2002.<sup>9</sup> Accordingly, we shall confine ourselves here to a brief review of the relevant facts and the problems requiring solution. The most prominent features of this area are poverty, congestion and crime, on the one hand, combined with a wealth of historical sites and holy places of the three monotheistic religions, on the other.

##### **A. Population**

At the end of 2003, 35,400 people lived in the Old City, and approximately 40,000 in the whole Historical Basin (according to our broader alternative). The population of the Old City, which includes the majority of the residents of the Basin, was divided as follows: 73 percent Muslims, 18 percent Christians and 9 percent Jews. While the number of Muslims and Jews is rising, the number of Christians is stable and is thus falling in proportionate terms.

Of the above-mentioned groups, the economic condition of the Jewish population, the vast majority of whom are ultra-Orthodox or national-religious Jews, is relatively good. In addition to the permanent Jewish population, yeshiva students attending yeshivot and other religious institutions in the Old City also live in the area. Several dozen Jewish families live in the City of David area (most of whom belong to the national-religious stream).

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<sup>9</sup> Ruth Lapidot and Amnon Ramon, *The Old City: Summary following Discussions of the Think Tank*, Jerusalem Institute for Israel Studies, 2002 (hereinafter: *The Old City*); see also the articles by Israel Kimhi, Maya Choshen and Yifrah Zilberman in the expanded booklet.

The Muslim population faces the worst socioeconomic conditions. This is reflected in overcrowding and in income levels. This situation has led to rising crime and drug trading. One of the main reasons for the high level of overcrowding is the fact that Palestinians with Israeli identity cards who formerly lived in the environs of Jerusalem have now moved into the city itself, fearing that they will lose their Israeli residency status (with the social rights this brings) if they continue to live outside the city. It may be assumed that the construction of the security barrier and the restrictions on the movement of Palestinians into the city have intensified the inflow of Arab residents who hold Israeli identity cards.

Most members of the various Christian communities are Arabs. To these, one should add clergy from abroad who serve in the holy places and religious institutions.. The socioeconomic status of the Christian Arabs is better than that of the Muslims. Many of them engage in commerce and tourism. The three main Christian denominations are the Catholics (the Roman Catholics and the Uniate Churches<sup>10</sup>), the Greek Orthodox and the Armenians (who are not Arabs). Three smaller communities are the Copts (whose base is in Egypt), the Syrian Orthodox and the Ethiopians. The various Christian communities have educational institutions in the Old City attended by children from throughout Jerusalem (including a large proportion of Muslim students).

In discussing the future of the population in the Basin and the various alternatives, attention must also be given to the question of residency and citizenship. Arab residents of the Basin are currently permanent residents of the State of Israel, who hold Israeli identity cards entitling them to move freely around Israel, to work anywhere in Israel, to participate in municipal elections, and, most importantly – to enjoy the social rights current in Israel, mainly national insurance and national health insurance. Permanent residency was granted to these residents automatically in 1967. However, only a minority of these residents are Israeli citizens, since Israel did not

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<sup>10</sup> The Uniate Churches are Eastern communities that accept the authority of the pope; Jerusalem is home to Greek Catholic, Syrian Catholic and Armenian Catholic communities.

grant them Israeli citizenship, although they are entitled to apply for this through a process of naturalization.

If a special arrangement is established in the Historical Basin, the question will arise as to the residency and citizenship of the residents of the area. There are three possibilities: residency and/or citizenship of Israel; of the Palestinian entity (the PNA or the state, when one is established); or of the Basin. The continuation of the current citizenship might be considered, with the possibility for naturalization in the Historical Basin, if such a citizenship is indeed established. It may be assumed that different solutions will be developed in the framework of the different alternatives.

## **B. The Holy Places**

In contrast to the depressing condition of the population of the Basin, the area is rich in holy places and includes numerous important historical sites.<sup>11</sup> This plethora of sites is a mixed blessing – on the one hand, it enhances the status of Jerusalem and encourages tourism and pilgrimage; on the other, some of the sites are sacred to more than one religion, leading to friction and tension.

The subject of the holy places raises three key questions: firstly, what is a holy place? Secondly, what status does it enjoy? Thirdly, how can access and worship be regulated in places that are holy to more than one religion?

1. What is a holy place? As with many familiar and frequently-used terms, the concept of a “holy place” is not clearly defined in international or Israeli law. In the *Encyclopedia of Public International Law*, the term is defined as follows:

Holy places or sacred places are geographically determined localities to which one or more religious communities attribute extraordinary religious significance or consider as subject of divine consecration. Holy places may consist of man-made structures (churches, temples, graves, etc.) or natural objects (trees, groves, hills, rivers, etc.). The entry to or touching

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<sup>11</sup> Shmuel Berkowitz, note 4 above; Lapidoth and Ramon, *The Old City*, pp. 16-24.

of holy places may be connected to rights or duties of the members of the communities concerned or to restrictions and sanctions for non-members. Within the area of a holy place the competence of the local secular authority may be restricted. Holy Places may be of juridical importance within the protecting State as well as between States.<sup>12</sup>

Various dimensions characterize the holy place. Sometimes it is separated from everyday life, and special rules of behavior pertain; believers often attribute traditions of sanctity to the place, which is perceived as a link between heaven and earth. It serves as a meeting place for humans where they engage in collective worship. Sometimes such sites are also associated with traditions relating to supernatural phenomena. Some sites became holy because they are associated with events relating to the emergence of the particular religion. Some believers attribute holiness to the tombs of individuals who are considered holy and considered mediators between humans and God.<sup>13</sup>

In the absence of any definition of the term in Israeli legislation, the Supreme Court has ruled that the sanctity of a site depends on the belief of the followers of the religion that the place should be holy for them.<sup>14</sup> This is an extremely broad definition, and, moreover, a dynamic one – places may acquire holy status over time and their physical dimensions may change. This flexibility has significant disadvantages: firstly, as is well known and as shall be explained following, holy places are subject to a special regime, and hence the possibility to expand the list of holy places entails normative changes and is liable to act as a destabilizing factor. Secondly, the possibility to increase the number of holy places without restriction encourages such inflation for political motives, since

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<sup>12</sup> Christian Rumpf, in Rudolf Bernhardt, ed., *Encyclopedia of Public International Law*, vol. 2, 1995, pp. 863-866.

<sup>13</sup> Ruth Lapidot, "Holy Places," in Nili Cohen and Andreas Heldrich, eds., *The Three Religions*, Munich, 2002, pp. 19-33.

<sup>14</sup> H CJ 267/88, Kolelei Haidra Network, Association, and Rabbi Shlomo Goren v Court of Local Affairs, Piskei Din 43(3), p. 728.

politicians are liable to utilize the profound religious sentiments toward holy places among the public for political purposes.

The results of the tendency to increase the number of holy places can be gauged from the following phenomenon: In 1950, a United Nations body prepared a list of the principal holy sites in the Land of Israel. Thirty of these sites were in Jerusalem.<sup>15</sup> In 2000, three experts – an Israeli Jew, an Armenian Christian and a Palestinian Muslim – prepared a list of holy sites in Jerusalem, which numbered no fewer than 318!<sup>16</sup>

There is currently no exhaustive and binding list of the holy sites in Jerusalem. In the context of any solution in the Historical Basin, the sides will probably need to agree on a closed list of holy sites, to which changes may be made only by mutual consent or in accordance with the decision of an agreed international body.

2. Regarding the status of the holy sites, many countries provide protection from the civil authorities for such sites. In the Declaration of the Establishment of the State of Israel, it was guaranteed that Israel would “protect the holy sites of all the religions,”<sup>17</sup> and details of this protection may be found in the Protection of the Holy Sites Law, 5727-1967,<sup>18</sup> and in the Basic Law: Jerusalem the Capital of Israel, 1980.<sup>19</sup> Specific protection regarding some of the Jewish holy sites was detailed in the Protection of Jewish Holy Sites Regulations, 5741-1981.<sup>20</sup> In

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<sup>15</sup> *UN Doc. T/L 49*, of 7 March 1950.

<sup>16</sup> Yitzhak Reiter, Marlen Eordegian and Marwan Abu-Khalaf, “Between Divine and Human: The Complexity of Holy Places in Jerusalem,” in Moshe Ma’oz and Sari Nusseibeh, eds., *Jerusalem: Points of Friction and Beyond*, 2000, pp. 95-164, at pp. 155-159.

<sup>17</sup> *Official Record*, 5708, No. 1, pp. 1-2, 5 Iyar 5708, 14 May 1948.

<sup>18</sup> *Statute Book*, 5727, p. 75.

<sup>19</sup> *Statue Book*, 5740, p. 139. The law was amended in 2000, but not regarding the issue of the holy sites.

<sup>20</sup> *Regulations Collection*, 5741, p. 1212, and amendment in 5750, p. 190.

addition, various laws include additional provisions in this field, such as the National Parks and Nature Reserves Law, 5723-1963, and the Mines Ordinance of 1925.<sup>21</sup>

The Protection of the Holy Sites Law, 5727-1967, which is the principal law in this context, ensures freedom of access to the holy sites, prohibits desecration or other injury to the site, and prohibits offense to the sentiments of believers. These provisions have been interpreted by the Supreme Court in a long series of rulings that need not be detailed here.<sup>22</sup> The law does not address the question of the freedom of worship. The right of worship is accepted in Israel, in principle, subject to public order. However, the courts do not usually consider themselves to be empowered to discuss this issue in the context of the holy sites, and the authority to address such matters rests with the executive branch.

We should add that, regarding seven Christian holy places, four of which are in the Historical Basin, the “Historical Status Quo” agreement applies.<sup>23</sup> In 1852, the Ottoman Sultan ruled that the rights of possession, access and worship in these sites would remain as they were at that point in time, and that no changes were to be made. The Historical Status Quo received international recognition in the Berlin Convention of 1878, and was reaffirmed in the Foundation Agreement between the Holy See and the State of Israel in 1993<sup>24</sup> and in the Agreement between the Holy See and the PLO in 2005.<sup>25</sup> In those sites to which this arrangement applies, the Historical Status Quo is to be preferred to the generally-accepted arrangement pertaining in the State of Israel, since, as a

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<sup>21</sup> Article 4 of the National Parks and Nature Reserves Law, 5723-1963, *Statute Book*, 5723, p. 149; Mines Ordinance of 1925, *Laws*, Vol. 21, p. 9899.

<sup>22</sup> Ruth Lapidot, *Basic Law: Jerusalem the Capital of Israel*, Jerusalem, 1999, pp. 92-105.

<sup>23</sup> For more details on the status quo, see L.G.A. Cust, *The Status Quo in the Holy Places*, 1929, reprinted in 1980.

<sup>24</sup> Foundation Agreement between the Holy See and the State of Israel, *International Legal Materials*, Vol. 36, 1994, p. 153.

<sup>25</sup> Basic Agreement between the Holy See and the PLO, 2000, [www.palestinian-info](http://www.palestinian-info).

specific law, this takes precedence over a general law.<sup>26</sup> The religious bodies who hold the holy sites effectively enjoy various exemptions in the field of taxation.

Thus far, we have considered the holy places as a single unit. Given the increasing number of holy places in Jerusalem in general, and in the Historical Basin in particular, it would seem appropriate that these be ranked. Such a ranking might be based on the level of sanctity: places that are generally considered to be extremely holy, such as the Temple Mount, the Church of the Holy Sepulcher and the Western Wall, as distinct from places of worship such as churches, monasteries, synagogues and mosques, which would have a lower ranking. A distinction might also be made between active and inactive holy places. The extent of protection and privileges afforded to the different groups might be different.

3. One of the hardest problems raised in the context of the holy places is that status of sites that are holy to more than one religion or religious denomination, such as the Temple Mount / *Al-Haram Al-Sharif*.<sup>27</sup> Few places in the world carry such sanctity as this mountain. For the Jews, this is the site of the First and Second Temples. For the Muslims, this is the third most holy site – the site where, according to Muslim tradition, Mohammed ascended to heaven during his famous Night Journey. The mount is also of importance to the Christians, due to various events relating to Jesus, although they do not make claims regarding the mount comparable to those of the Muslims and Jews. For political and argumentative reasons, the importance and sanctity of the Temple Mount in the Arab world, and particularly among the Palestinian population, have been

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<sup>26</sup> Lapidoth, Note 21 above, pp. 100-101.

<sup>27</sup> Regarding the Temple Mount, see Yitshak Reiter, ed., *Sovereignty of God and Man: Sanctity and Political Centrality on the Temple Mount*, Jerusalem Institute for Israel Studies, 2001; and the article by Yitshak Reiter, Amnon Ramon and Shmuel Berkowitz on the Temple Mount, see below.

intensified in recent years. Moreover, many Palestinian Muslim leaders have argued that the Jewish Temple was not even located on the Temple Mount.<sup>28</sup>

As is widely known, the Temple Mount is currently under the effective administrative authority of the Muslim *Waqf*. Jews may visit the site during certain hours as determined by the *Waqf* officials, but they may not pray there. A significant minority of rabbis, particularly from the national-religious stream, now believe that Jewish prayer should be permitted in part of the mount, contrary to the Halachic prohibition imposed in 1967, which outlawed such prayer (for Halachic reasons). Among Muslim sages, there is strong and widespread opposition to Jewish prayer on the mount, with the exception of a handful of individuals.<sup>29</sup>

A solution regarding the Temple Mount will have to address the different aspects of the problem: Will any side hold sovereignty over the mount, or will it be agreed that the question of sovereignty be ignored, as proposed in the Principles for an Agreement drafted by Ami Ayalon and Sari Nusseibeh? Will Jews be permitted to pray in a small section of the mount or in the outer surroundings? What visiting rights will non-Muslims enjoy on the mount? Who, and in what conditions, will be permitted to build or excavate on the mount? Who will be responsible for preserving the historical buildings on the mount?

It may be assumed that in other sites (outside the Temple Mount) that are holy to more than one religion, it will be easier to find a solution, such as the physical division of the site, or providing rights of access and worship at different times.

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<sup>28</sup> See Yitzhak Reiter, *From Jerusalem to Mecca and Back – The Muslim Cohesion around Jerusalem*, Jerusalem Institute for Israel Studies, 2005.

<sup>29</sup> Such as Professor Sheikh `Abd Hadi Falachi of Italy. On the Jewish side, mention may be made of Rabbi Shear-Yishuv Cohen, who believes that there is no reasons why both Jews and Muslims should not pray on the Temple Mount.

### **C. Affinities between the Historical Basin and the Remaining Sections of the City**

A special arrangement in the Historical Basin must take into account the strong affinity between the basin and the remaining sections of the city in the religious, commercial, tourism and educational fields and in terms of infrastructure and employment.<sup>30</sup>

**The Basin is a center of religious services:** Due to the large number of holy places of different kinds, the Historical Basin constitutes a major center for believers, attracting tens of thousands of people every day, and hundreds of thousands on important festivals. This religious center serves the entire country, and also provides religious services for pilgrims from abroad. If a peace agreement is reached, a substantial increase can be expected in the number of people visiting the religious centers in the Historical Basin.

An additional religious service provided for the population of Jerusalem is burial in the cemeteries situated within the Historical Basin. All three religions – Jews, Christians and Muslims – maintain cemeteries in the area. Any arrangement must ensure the continued provision of this service, or the location of alternative burial sites for all three faiths outside the Historical Basin.

**The Basin, and the Old City in particular, also serve as a center for commercial services:** The Old City still functions as an economic center for the Arab population of East Jerusalem. Normally, the Jewish population also draws on these commercial services. If calm prevails in the area, it may be expected that the ties between the Old City and the remaining parts of the city will strengthen. This entails the transportation of merchandise of various types to the shops in the Old City, from everyday products to higher-level consumer items. The expected increase in the number of Muslim pilgrims attending Friday prayers, and in the numbers of Christian and Jewish

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<sup>30</sup> See the articles of Israel Kimhi and Maya Choshen in the expanded booklet, as well as Lapidoth and Ramon, *The Old City*, pp. 53-54.

pilgrims and tourists, will add thousands of consumers in the commercial system who are not Jerusalem residents.

**The Basin as a tourist center:** In normal times, almost three million tourists a year visited the Old City. If this situation is restored and peace agreements are signed, the influx of tourists can be expected to grow even further. Even if calm is maintained and the sides merely reach interim agreements, the movement of tourists can be expected to increase. Accordingly, preparations must be made if a special regime is established in the Historical Basin. Coordination with the other parts of the city will be needed in terms of pedestrian access, bus routes, parking places for hundreds of private vehicles and buses in and around the Historical Basin, as well as provisions for the movement of merchandise and products to the markets in the Old City.

**The Basin is home to schools,** yeshivot and Muslim religious institutions attended by large numbers of young people who do not live in the area. The Old City currently constitutes a major educational center. Almost 10,000 students attend institutions within the walls; many of them live in the eastern neighborhoods of the city. Given the severe lack of classrooms in the Arab sector outside the walls, there will continue to be no alternative but to provide such services within the Old City for many years to come. If it is decided to restrict the education system solely to the residents of the Old City, this will require preparations and the construction of new educational institutions in the other sections of the city.

Regarding **infrastructures**, residents of the Historical Basin as a whole, including those of the Old City, are currently completely dependent on water, electricity and communications supplied to the Historical Basin through the systems serving the West of the city, which are controlled exclusively by Israel. The drainage and sewage systems, which are based on the force of gravity, could function independently, though these, too, are connected by various conduits to other sections of East and West Jerusalem. Of all the systems, the communication network is the most flexible, and could be set aside for the Historical Basin alone through the use of a satellite system.

In the field of **employment**, it should be noted that some 4,200 people from other parts of the city work in the Old City. In the remaining parts of the Historical Basin, places of employment are limited to the faculties of the various religious institutions and the employees of Seven Arches Hotel (formerly the Intercontinental Hotel) on the Mount of Olives. Most of the Jews who live in the Jewish Quarter work in the West of the city; only a minority are employed inside the quarter.

#### **D. The Road System to, in and around the Basin**<sup>31</sup>

Sixteen roads currently lead to different parts of the Historical Basin: four from the south, three from the east, six from the north and three from the west. The Basin itself has ten entrances: three from the west, two from the south, two from the east, and three from the north (see map on p. 13). The only road that crosses the entire Basin is the old road from Jerusalem to Jericho. This road formerly connected the areas of Jericho, Al-Azariyah and Abu Dis to Jerusalem, but it is now blocked by the security barrier at Abu Dis junction. Jericho Road is still used by the residents of Ras Al-Amud and Silwan in order to reach the Old City and the Arab business district along Salah Al-Din Street. There is effectively no alternative to this traffic route, with the exception of the problematic "Priests Road", narrow and steep, which leads from Abu Dis junction to the peak of the Mount of Olives, and then on to the Old City.

An additional and important route along the margins of the Basin is Sultan Suleiman St., which connects to Road No. 1 to the north (Engineering Corps St.) and to Paratroopers St. to the south. This road permits traffic to pass along the northern edge of the Historical Basin without entering it. This road also permits entry into the Historical Basin through the northern gates of the Old City (Damascus Gate and Flowers Gate).

Within the Historical Basin, movement is possible among the various holy sites without the need to leave and pass through adjacent areas.

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<sup>31</sup> This section is taken in its entirety from the article by Israel Kimhi in the expanded booklet.

As noted, the Historical Basin has numerous entrances. Completely separate entrances could be allocated for Jewish and Palestinian residents. It could be determined that Jewish residents would not pass through the Arab neighborhoods of East Jerusalem in order to reach the Basin, and, similarly, that Palestinian residents would not have to pass through Jewish neighborhoods.

The large number of entrances to the Historical Basin could complicate efforts to maintain order and to control the flow of merchandise and people into the area. It will almost certainly be necessary to restrict the number of entrances. Palestinian residents could enter the Basin via the historical Jericho Road, the “Priests Road” and the road leading to Augusta Victoria and Al-Tor, and via the junction of Rockefeller and Sultan Suleiman St. to Flowers Gate and Damascus Gate. Jewish residents could conveniently enter the Historical Basin via Jaffa Gate, the New Gate or via the Pope Road to Zion Gate and Dung Gate (see map on p. 13).

The effective **functioning (management ?)** of the Historical Basin could be made easier by allowing for movement **among (between?)** the different parts of the city without the need to cross the Basin at a high level of frequency. In other words, those who have no special need to enter the Basin could circumvent it and reach their destination. One such by-pass road should provide rapid access between the Palestinian neighborhoods to the south of the Basin and those to the north. The need to reduce the number of vehicles in the Historical Basin also relates to the planning need to reduce the volume of traffic in the historical center of the city and in sensitive areas visited by large numbers of pilgrims and pedestrians. In many historical cities around the world, the authorities do their best to reduce motor traffic congestion in ancient quarters – even if it does not include holy places. To this end, by-pass roads are constructed. Jerusalem does not yet offer such roads to a sufficient standard, and it will be necessary to complete the planned “Eastern By-Pass” as quickly as possible. This road is planned to pass to the east of Ras Al-Amud, and can be connected to the Palestinian neighborhoods to the south and east, linking these to the Palestinian neighborhoods to the north of the city.

## **E. The Municipal Structure**<sup>32</sup>

In seeking alternatives for the optimum municipal structure in the Historical Basin, we will need to take into account the special circumstances of Jerusalem.

First, the most prominent characteristic of the Basin as a whole is the large number of holy places within a limited geographic area – a situation that might justify municipal unity. Second, the Old City includes four quarters whose population is distinguished on religious and, in some cases, ethnic lines – a situation that could justify granting personal (i.e. cultural) autonomy to different models, based on the existing model of “neighborhood administrations” introduced in various parts of Jerusalem. Third, the strong affinity to the other sections of the city requires close cooperation on municipal issues. Moreover, it should be assumed that the Basin will rely on the infrastructures of the adjacent areas in the fields of water, sewage and electricity. It may be possible to supply some other municipal services (removal of solid waste, cleaning, etc.) through private contractors, but it should be assumed that, in important fields, the Basin will be dependent on the provision of services and merchandise from the surrounding areas. Fourth, serious consideration should be given to the institutional arrangements: will a special municipal council be required, or will an executive be sufficient? Will the directors of the municipal unit be elected by the residents, or will they be appointed by Israel and the Palestinian entity (the PNA, or the state when it is established)? Although there is a significant difference in the number of residents on each side, Israelis and Palestinians should enjoy equal representation, in order to avoid control by means of a majority that might ignore minority interests. It is interesting to note that President Sadat (in 1978) proposed a joint city council with an equal number of Israelis and Arabs, although his comments related to the city of Jerusalem as a whole.<sup>33</sup>

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<sup>32</sup> See the article by Maya Choshen and Israel Kimhi in the expanded booklet; Lapidoth

<sup>33</sup> Letter from President Sadat to President Carter relating to the 1978 Camp David Summit, *Convention Documents*, No. 857, Vol. 25, p. 509, page 525, para. 7.

The relatively small number of residents, on the one hand, and the enormous importance of the Basin for Israel and the Palestinians, on the other, may justify the appointment of an executive by the two sides.

In addition, it would seem desirable to determine in advance who will accept the position of managing the Basin, if the proposed arrangement fails, and who will be empowered to determine that such failure has indeed occurred.

#### **F. Planning, Building and Conservation<sup>34</sup>**

The Historical Basin is the most sensitive area in Jerusalem in visual terms, including the highest proportion of archeological, cultural and historical sites that must be protected from the ravages of time and human activity. Any construction or development inside or outside the walls is liable to damage some of the most important sites and landscapes in the world. In any future arrangement, it will be necessary to establish special procedures relating to sustainable development in the Basin.

Two key problems arise in this context:

- A. In the Historical Basin, and particularly in the Old City, there is extensive illegal construction, due to overcrowding (exacerbated by immigration into the Old City), poor living conditions and the absence of suitable inspection.
- B. A further problem is the need to find a proper balance between conservation, on the one hand, and development, on the other. The entire Basin effectively constitutes an historical area, and maximum conservation would require the complete cessation of any development and construction. However, the Basin is not just a museum, but also a place where people live, and this demands continued construction and development. In any future arrangement, it will be necessary to find the proper balance between these two poles.

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<sup>34</sup> See the article by Israel Kimhi, "Preserving Sites and Past Heritage," in the expanded booklet: Lapidoth and Ramon, *The Old City*, pp. 40-42.

In this context, it should be recalled that the Old City and the surrounding walls were registered in the Registry of Cultural Sites of Human Heritage by the Jordanian government in 1981. This registration was undertaken under the terms of a convention signed in 1972 under the auspices of UNESCO – a convention that Israel signed only in 1999.<sup>35</sup> The signatories to the convention are obliged to conserve the sites in the registry, and are entitled to request international assistance, technical or financial, to this end. The state must “identify, protect, conserve and transmit [the site] to the following generations.” The state is also obliged to report to UNESCO on any legislative, administrative or other action undertaken in order to implement the covenant. Expert committees visit the sites occasionally. Registration in the registry of sites usually yields benefits in the field of tourism. In 1982, the Old City was also registered in the Registry of Endangered Sites.

The various Christian authorities have also demanded that the unique character of historical Jerusalem, and particularly of the Old City, be maintained.<sup>36</sup>

Due to the difficulties of conservation and international interest, a committee of international experts formerly operated in Jerusalem, advising the mayor on issues of conservation and development.

In formulating alternative solutions for the Historical Basin, attention should be given to all the above elements.

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<sup>35</sup> Lapidoth and Ramon, *The Old City*, pp. 49-52.

<sup>36</sup> See, for example, the position of the Vatican in the book: Moshe Hirsch and Dvora Haussen-Kuriel, *Jerusalem Whither? Proposal for the Future of the City*, Jerusalem Institute for Israel Studies, 1994, pp. 119-120.

## G. Security<sup>37</sup>

It is universally acknowledged that the subject of security in the Historical Basin is extremely problematic. The area is often referred to as a “tinderbox” where every effort must be made to prevent an explosion.

Within the field of security, a distinction is usually made between three aspects: external security, i.e. defense against attack from the outside; internal security, i.e. the struggle against terrorism; and public order, i.e. the “regular” war on crime. It is doubtful whether the issue of external security should be addressed in the Basin: the area is so small and sensitive that it would possibly be better to avoid consideration of this aspect of security. It is interesting to note that, in 1947, the UN Assembly recommended that the separate entity of Greater Jerusalem should be demilitarized and neutral.

Conversely, acts of terrorism originating inside or outside the area, as well as the maintenance of public order, are aspects that must be addressed seriously. Regarding internal security, the threat of terrorist attacks from Jewish, Christian or Muslim extremists is extremely tangible. As for public order, and as we noted above, the Basin, and the Old City in particular, suffer from a high level of crime and drug abuse.

It is highly doubtful whether there is any chance of security cooperation between the sides, given the experience of the joint patrols that operated under the terms of the Israeli-Palestinian interim agreement in the West Bank and Gaza Strip from 1995.<sup>38</sup> Nevertheless, the possibility and essential need for coordination between these parties remains.

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<sup>37</sup> See the article by Kobi Michael, “A Special Regime in the Historical Basin – The Security Dimension: Possible Models for the Three Alternatives” in the expanded booklet; Lapidot and Ramon, *The Old City*, pp. 55-58.

<sup>38</sup> Kobi Michael, *Truth or Fiction? Why Did the Model for Israeli-Palestinian Military and Security Cooperation Fail? A Personal and Retrospective View of an Impossible Hope*, May 1994 – September 2000, Jerusalem, Davis Institute, the Hebrew University of Jerusalem, 2003.

The dimensions of this threat, on the one hand, and the lack of trust between the sides, on the other, requires the intervention of a substantial international force. This force could be empowered to coordinate between the police forces of the sides, to assist, supervise and train them and to resolve conflicts and misunderstandings.

Regarding security arrangements, it is possible, and indeed desirable, to establish different arrangements regarding specific areas within the Basin: The Temple Mount, the Old City, the Mount of Olives and the remaining areas of the Basin.

The authorities and responsibilities of the sides, and of the international force, must be defined in accordance with the details of each different alternative.

#### **H. Law and Jurisdiction<sup>39</sup>**

In this field, substantial differences can be expected between the different alternatives. Accordingly, we shall confine ourselves here to a number of general comments and clarifications.

In any alternative, it seems desirable to us that the parties should agree in advance on the substantial arrangements that will apply in the Basin, particularly in the following areas: human rights, environmental protection, conservation and development arrangements, entry and exit arrangements to and from the Basin, and, in particular, agreed arrangements relating to the holy sites – a list of recognized holy sites, rights of access and worship, particularly in the case of sites that are holy to more than one religion.

Regarding each alternative, we will need to ask ourselves whether Israeli or Palestinian law should apply, or another system (perhaps a combination of these two), or some different arrangement, such as the system of another country. On this issue,

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<sup>39</sup> See the article by Ruth Lapidot, “Law and Jurisdiction,” in the expanded booklet; Lapidot and Ramon, *The Old City*, pp. 59-60.

reference might be made to the extensive efforts in Europe to unify the legal system in different fields.

In discussing the question as to the desirable legal system relating to a given activity, attention may be given to three criteria: the citizenship or residency of the individuals involved (the personal dimension); the place of the incident (the territorial dimension); and its character (the functional dimension). These criteria are relevant both in terms of the law that should apply and in terms of jurisdictional authority. An interesting example of recognition of personal authority in criminal cases may be found in the special arrangement established regarding the Naharayim/Baquara and Tzofar/Al-Ghamar areas in the peace treaty between Israel and Jordan.<sup>40</sup> According to this arrangement, the Israeli landowners who enter the area subject to Jordanian sovereignty and law are subject to Israeli criminal law.

The question arises as to whether some type of combination of Israeli and Palestinian law could be created. Both systems were based, in the distant past, on the Mandatory system, which was influenced by Ottoman and English law, but numerous changes have since been introduced. In Israel, for example, contract law is now influenced by the German system, and numerous changes have been made in the field of the laws of damages.

As for the Palestinian system, the situation is insufficiently clear.<sup>41</sup> While Israel determined on its establishment that the law pertaining prior to the establishment of the state would remain valid, unless modified by or under the authority of the Knesset,<sup>42</sup> the Palestinian Basic Law of 2003 does not define which law applies. It merely states that “the principles of the Islamic Shari`a shall be the principal source for legislation” (Article 4(2)), while the proposed constitution of 2003 states that these principles shall be “an important source for legislation,” and that “civil and religious

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<sup>40</sup> *Convention Documents*, No. 1069, Vol. 32, p. 271, Appendix Ib.

<sup>41</sup> The author wishes to thank the International Agreements and Claims Unit in the Ministry of Justice, which provided material on the Palestinian system.

matters of the followers of the monotheistic religions shall be organized in accordance with the instructions of their religion, within the framework of the law, and in a manner permitting the existence and independence of the Palestinian people” (Article 7).<sup>43</sup>

Palestinian law effectively comprises the following elements: the remnants of Ottoman and English law; Jordanian law (in the West Bank) and Egyptian (in the Gaza Strip); provisions from the Shari`a relating to questions of personal status; and the legislation of the Legislative Council established in 1996. As for the Israel legislation of the Military Governor for the Areas of the West Bank and Gaza, it is unclear which sections thereof still apply regarding the Palestinians in accordance with Palestinian law. In any case, after the establishment of the Palestinian Authority, Chairman Arafat determined that all laws in force before 1967 were once again valid.

It should also be noted that the Palestinian legal system is currently (2005) in a process of fundamental reform.

In light of the above-mentioned information, it is doubtful whether a legal system can be developed for the Historical Basin on the basis of the two relevant systems – the Israeli and the Palestinian legal systems.

Which legal system, then, should be chosen. It might be worth considering the English system, since this is not completely alien to either side, though any other system could also be appropriate. It is doubtful whether the Palestinians would agree to the application of Israeli law, and it can be assumed that the Israelis would not agree to the application of Palestinian law (on this issue, there will naturally be substantial differences between the different alternatives).

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<sup>42</sup> Section 11 of the Government and Law Arrangements Ordinance, 5708-1948.

<sup>43</sup> An English translation of the Basic Law of 2003 and of the proposed constitution of the same year were published in the booklet *The Palestinian Legal System, Palestinian Legislation and the Palestinian Ministry of Justice*, prepared by the International Agreements and Claims Unit, Ministry of Justice, February 2005.

Regarding jurisdictional authority, consideration should be given, according to the relevant alternative, to the authority of joint courts of Israelis and Palestinians, with or without the involvement of foreign judges, as well as to courts of the international authority that may operate in the Basin.

The party that holds jurisdictional authority will also hold authority for enforcement.

The possibility may also be suggested that individuals might choose to settle their disputes through arbitration or even through mediation.

### **I. General Issues<sup>44</sup>**

Many questions in the economic sphere are raised with regard to the Historical Basin. The essential points might be summarized as follows: First, where will the residents of the Historical Basin find their livelihood and where will they work? Second, how can the numerous expenses relating to the management of the Basin be financed? And, third, how should the entry of people and merchandise into the Basin be managed in such a manner as to prevent smuggling?

Regarding the question of livelihood, it may be assumed that most residents of the Basin will work outside the area, particularly in other parts of Jerusalem. This is indeed the situation at present.

With respect to financing, it may be assumed that the taxes paid by the population of the Basin, which is mainly poor, will not be able to provide the required budget. It would naturally be possible to impose a levy on tourists and other visitors, but these sums will also be insufficient. Presumably, the Palestinian entity and the State of Israel will be required to bear a significant portion of the expenses for management of the Basin. Given the large number of holy sites in the area, it may prove possible to recruit support from religious institutions.

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<sup>44</sup> See the article by Imanuel Sharon, "Financial Ramifications regarding the Alternatives for the Status of the Historical Basin Area" in the expanded booklet.

The most difficult of the principle problems is the need to regulate the entry and exit of people and merchandise, particularly for reasons of security and in order to prevent smuggling. This matter naturally requires different solutions with regard to the various alternatives. If the Basin is to constitute a separate economic unit from the remaining parts of the city, a fence will have to be built around the area; it is doubtful whether this is possible. It is also unclear who would supervise the entry and exit points, and on what conditions a person who arrived in the Basin from country A would be permitted to leave for country B. It will clearly be necessary to provide easier arrangements for people crossing the Basin border on a daily basis, such as residents of the Basin who work outside the area, or students who attend institutions in the Basin.

The economic questions involved in the establishment of a special regime in the Historical Basin are extremely complex, and deserve particular attention and consideration.

#### **J. International Involvement<sup>45</sup>**

Due to the lack of trust between the sides, many people believe that the arrangement in the Historical Basin should include international involvement. Such involvement might be principally in the fields of security, conservation and ensuring a fair regime in the holy places, freedom of access and freedom of worship. The need for such involvement was noted many years ago, when the UN Assembly recommended the establishment of a Jewish state, an Arab state and a separate body for Jerusalem under international administration (Resolution 181(II) dated November 29, 1947).<sup>46</sup> As will be recalled, neither the special body for Jerusalem nor the international presence was actually established.

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<sup>45</sup> See the article by Moshe Hirsch and Shimrit Golan, "International Involvement in the Historical Basin – Principal Characteristics and Alternatives," in the expanded booklet; Moshe Hirsch and Kobi Michael, *International Involvement in the "Holy Basin" in Jerusalem – Possible Alternatives*, Jerusalem Institute for Israel Studies, 2003.

<sup>46</sup> General Assembly resolution 181 (II) on the Future Government of Palestine, *GAOR*, 2nd Session, 1947, pp. 131-151.

During subsequent periods, various international forces were established and operated around Israel: The UN Truce Supervision Organization (UNTSO), established in 1948 and still operational; the UN Emergency Force in the Middle East I (UNEF I – 1957-1967); the second emergency force – UNEF II (1974-1979); the UN Disengagement Observer Force (UNDOF) on the Golan Heights (established in 1948 and still operational); the UN Interim Force in Lebanon (UNIFIL – 1978 to date); the Multi-National Force in Lebanon (MNF), established in 1982 – a Franco-American force that was quickly forced to withdraw due to heavy losses; and the International Force and Observers (1981 to date, established following the 1979 peace treaty between Israel and Egypt), which supervise the restrictions on forces in Sinai and the Southern Negev and ensure passage in the Tiran Straits; The Temporary International Presence in Hebron (TIPH) (since 1997); and, lastly, the massive third party involvement by the European Union and the USA in the agreement regarding the crossings in accordance with the Rafiah Agreement in November 2005.

In other parts of the world, too, there are numerous international authorities or forces whose function varies from case to case. In some cases, the function is to maintain a peace agreement between the sides; sometimes the function is peacemaking, and sometimes it is even to establish the institutions of government in a new or weak nation.

Of international forces outside our region, we would mention the force in the Congo (1960-1964), the force that still serves in Cyprus (since 1974), and the forces in Bosnia-Herzegovina, Kosovo and Macedonia, and East Timor.

The differences between these forces are due to various factors: who established the force (the Security Council, the UN Assembly, another international organization or the parties themselves); who issues instructions and supervises the body; what its composition is (for example, UN forces do not usually include units from countries that are permanent members of the Security Council); who is empowered to decide on the end of its operations; for how long the force was established and who is

empowered to extend its mandate; what are its authorities and functions; and who finances it.

It may be asked whether Israel has had a positive experience with international forces. The first UNEF force left the region in 1967 at the request of Egypt prior to the Six Day War; some likened this to an umbrella that is removed as rain approaches. The work of the second UNEF force ended following the peace accord between Egypt and Israel, due to the Soviet Union's opposition to its continued operations. For the most part, UNIFIL has failed to prevent terrorists from Lebanon from infiltrating Israel; some of its soldiers even photographed the kidnapping of Israeli soldiers by Hizbullah. Moreover, in some cases Israel has caught UNIFIL soldiers attempting to smuggle weapons and drugs.

In Bosnia-Herzegovina and Kosovo, the international forces secured significant successes, but here, too, they are remembered for the miserable episode in Srebrenicza – this area was supposedly under the auspices of the international force, but when Serbs arrived and murdered most of the residents, the international force failed to intervene or prevent the incident.

Accordingly, it would seem that an international presence is no panacea. Nevertheless, we must attempt to draw on this tool in order to overcome the lack of trust between the sides. In particular, and as already mentioned, an international body should assist in security needs, in promoting conservation and in ensuring access and freedom of worship in the holy places, and in resolving local disputes and preventing misunderstandings. Naturally, it will be necessary to provide answers in advance to all the questions presented above regarding the composition, authority, and management of the force. It would seem appropriate to establish both a civil administrative body and a military or police force, in accordance with the functions to be imposed on the body depending on the various alternatives.

## **K. International Status and International Commitments**

A major question is whether the parties to the agreement should grant the Historical Basin any international legal status, and if so – who will be empowered to act on behalf of the Historical Basin in the international arena, and who will be responsible for what happens on the ground.

International status is usually manifested in the following aspects: the ability to bear international rights and obligations; the authority to make conventions; the authority to participate in international discussions; and international responsibility. It should be recalled that many bodies exist that do not enjoy all the above-mentioned authorities, but only some of them. A state holds all these authorities, while other bodies – international organizations and special bodies such as the International Committee of the Red Cross and the Holy See – hold only some.

If the Basin is to form part of a state, no problem will arise, since it will be obvious that the Basin does not have any independent international legal status. If, however, it will constitute an enclave that does not belong to any country, the following questions may be raised: who is empowered to make conventions in the name of the Basin? If citizenship is established for the Basin, who will be empowered to protect the citizens of the Basin abroad (“diplomatic protection”)? Is it appropriate for the Basin to have diplomatic or consular representation in foreign countries, and should foreign countries be represented in the Basin? It may be assumed that the representatives of foreign countries serving in the neighboring countries – Israel, Jordan or the Palestinian Authority – will be empowered by their countries to act in the Basin. The toughest question of all is who will hold international liability for events in the Basin?

This may be an appropriate point at which to refresh our memories regarding various arrangements that have been introduced or proposed in the region. Thus, for example, in the document establishing the British Mandate in Palestine in 1922, it is stated that the mandatory power is empowered to make conventions on behalf of the mandate territory, and it must affiliate in the name of the territory in multi-party conventions in various fields – slave trading, trade in arms and ammunition, the drugs trade,

agreements on equity in commerce, freedom of movement and shipping, air transportation, postal and telegram communications, and literary, artistic or industrial copyright (Article 19).<sup>47</sup> The administration in Palestine was only empowered to sign technical agreements with the neighboring countries, and even this only with the authorization of the mandatory power (Article 18, last part). The foreign relations and defense of the citizens of Palestine abroad rested with the mandatory power (Article 12).

Later, during the period 1947-1950, the United Nations discussed similar questions relating to the recommendation to establish a special body – *Corpus separatum* – under the administration of a governor to be appointed by the Trusteeship Council of the United Nations. As is well known, this plan was never implemented. The UN resolution of November 29, 1947 stated that the governor on behalf of the United Nations be charged with managing the foreign relations of the separate body (Article C2); the Trusteeship Council was to make arrangements for the protection of the citizens of the territory while abroad (Article C11); the proposed Jewish and Arab states would be represented in international Jerusalem (Article C9).<sup>48</sup>

Details of the arrangement were established in the proposed constitution ratified by the Trusteeship Council in 1950.<sup>49</sup> Article 37 refers expressly to foreign relations. Management of foreign relations is due to rest with the governor, including protecting the overseas interests of the citizens and the city. He is empowered to send representatives abroad and to approve the appointment of foreign representatives in the city; he is empowered to sign international conventions in the name of the city; and he is obliged to join conventions and recommendations adopted under the auspices of the United Nations or special institutions with an affinity to the United

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<sup>47</sup> Ruth Lapidot and Moshe Hirsch, eds., *The Arab Israel Conflict and its Resolution: Selected Documents*, Nijhoff, 1992, pp. 25-52.

<sup>48</sup> Note 44 above.

<sup>49</sup> *UN Doc. GAOR*, 5<sup>th</sup> session, 1950, Supp. 9A/12 86, annex2, pp. 19-27. The document also appears in: Ruth Lapidot and Moshe Hirsch, eds., *The Jerusalem Question and its Resolution: Selected Documents*, Nijhoff and the Jerusalem Institute for Israel Studies, 1994, pp. 117-134.

Nations “that may be appropriate for the special circumstances of the city or may help secure the special goals noted in the Preamble to this Constitution.” The conventions were supposed to be brought before the legislative council of Jerusalem for ratification, and, if the council failed to ratify them within six months, the treaty was to be brought before the Trusteeship Council for ratification. The Constitution further established that the Universal Declaration of Human Rights of 1948 would be a guide for goals in the field of human rights (Article 9(15)), and, as and when the Convention on Human Rights took force [the reference is to conventions eventually made in 1966], the provisions would also apply in Jerusalem (Article 9(16)). None of the relevant documents discusses the question of international liability.

What may we learn from these and other precedents? Several ways may be considered to resolve the problem. One possibility is that the management of the foreign relations of the Basin should rest with a particular country (this was the case in Danzig between the two world wars, and in Andorra through 1993). Another possibility is that the international body supervising the activities of the force that may operate in the area will be responsible for foreign relations. Foreign relations should be restricted to a minimum – principally joining conventions and protecting citizens abroad (if the Basin carries its own citizenship) and international liability. Regarding conventions, a list of international conventions that will apply in the Basin should be agreed on in advance, such as a list of conventions in the fields of human rights, environmental protections, medical cooperation, the war on drugs and arms smuggling, money laundering, etc.

Regarding multi-lateral conventions made in the future, a committee of the parties to the agreement could be formed and empowered with deciding on the addition of conventions to the above-mentioned list.

The toughest problem is that of international liability. Consideration could be given to establishing an international fund, by way of a form of insurance in the event that a violation of international law occurs in the Basin requiring the payment of compensation – naturally, in addition to the personal liability of the perpetrators.

In closing this section, we should note that the authorities of the Basin will be obliged to observe not only the conventions binding the Basin, but also international customs law, without any special notification or affiliation.

#### **L. Peaceful Resolution of Disputes<sup>50</sup>**

In section H above, on law and jurisdiction, we discussed the resolution of disputes between the residents of the Basin, between residents and foreigners, and between a resident or a foreigner and the municipal authority. We must now discuss disputes not included in this framework. This refers to disputes between the two sides to the agreement establishing the special regime in the Basin; disputes between these two sides, or either thereof, and the municipal authority; disagreements between either party and the international body operating in the city, or even the body guiding and commanding this body. Disagreements might also emerge between the international authority and one of its employees, or between this authority and a resident of the Basin or another person.

Disputes relating to the rights and obligations of the individual may be managed by the local courts. However, it should be assumed that the international force, the international civilian authority and the body guiding these will not agree to litigation before the local courts.

There is a good chance that practical solutions will be found for all the disputes between private individuals or private bodies and one of the above-mentioned authorities will be resolved through mediation, arbitration or a special administrative court.

The question is more complex in the case of potential disputes between the sides to the agreement, or between these sides (or either thereof) and the international authority.

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<sup>50</sup> The article by Ruth Lapidoth, "Peaceful Resolution of Disputes" in the expanded booklet. J.G. Merrills, *International Dispute Settlement*, 3<sup>rd</sup> ed., Cambridge, 1998; *Handbook on the Peaceful Settlement of Disputes between States*, U.N. Doc. OLA/COD/2394 (1992), Sales no. E.92.V.7.

In international practice, a distinction is customarily made between diplomatic means and judicial means in the resolution of disputes. The difference between these two methods relates to two main points: diplomatic means take into account **all** the relevant circumstances, and the decision has only the status of a **recommendation**. By contrast, judicial means (arbitration or adjudication) take into account, in principle, only legal considerations, and the decision of the judicial body is **binding**. Arbitration is slightly more flexible than adjudication by a court, since the parties to arbitration influence the determination of the legal proceedings, the applicable law and the selection of the arbitrators.

It is important to determine in advance not only the mechanism to be chosen – negotiation, mediation and compromise, on the one hand, or arbitration and adjudication, on the other – but also the identity of the mediator or arbitrator. If possible, for example, it should be agreed in advance that mediation be led by the United States, or by the European Union or the Secretary-General of the United Nations or Russia (the members of the Quartet), or by another country or accepted figure.

If the parties prefer arbitration, it should also be determined in advance who the arbitrators will be, or at least who will appoint them; what law they will enforce; and what procedures will guide their work. Before any specific arbitration, agreement must be reached on a *compromis* addressing these questions, if they were not agreed beforehand.

The sides could also agree that, in the case of certain types of disputes, they prefer a given mechanism, such as mediation, while on other issues they will tend to adopt a different method, such as arbitration.

Moreover, it should be assumed that the establishment of a special regime in the Historical Basin will form part of a more general agreement regarding permanent arrangements between Israel and the Palestinian entity (the Palestinian Authority or state, when it is established). It can be assumed that the general agreement will

include provisions relating to the resolution of conflicts, and these may also apply to disputes relating to the Basin. This is not necessarily the case, however – the sides could decide on a different arrangement in the Basin than in the general agreement.

The agreement between the sides might address only the ways to resolve disputes between them, while the arrangements with the international body should properly be included in the agreement with this body.

Lastly, we should note that in the case of vital national interests, countries are usually reluctant to agree to binding arbitration. Thus, for example, in the Agreed Arrangements for the Deployment of Egyptian Border Guard Forces along the Border in the Rafiah Region (the “Philadelphia” sector), in June 2005, it is stated that disputes regarding the interpretation and implementation of the agreement should be resolved by negotiations, “and shall not be submitted by either party for adjudication by any national or international court or tribunal” (Section 83).

All these factors should be taken into account in addressing the different alternatives.

## **5. The Question of Sovereignty<sup>51</sup>**

Much has already been written about sovereignty in the context of Jerusalem, yet the question continues to be raised. Regarding the alternatives for the future of the Historical Basin, the question arises as to whether the starting assumption should be that someone indeed has sovereignty, or whether it would be better to ignore this question – as was the case in the resolution adopted by the General Assembly of the UN in 1947.<sup>52</sup> In this resolution, which, as will be recalled, advocated the establishment of a “Separate Body” in Greater Jerusalem, the word “sovereignty” was not mentioned; instead, the resolution relates only to administration and powers, effectively providing for international administration. The avoidance of the term

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<sup>51</sup> Lapidoth and Ramon, *The Old City*, pp. 2-15; Ramon, *City in a Labyrinth*, pp. 229-231; Lapidoth, “On Sovereignty,”

<sup>52</sup> See note 45 above.

sovereignty will, it would seem, facilitate the adoption of a compromise in our region in general, and in the Historical Basin in particular.

Due to the importance of this subject, I shall provide a brief review of the relevant aspects of the term sovereignty. Two distinct uses of this term may be noted. On the one hand, the popular use indicates the belief in the right to total and exclusive control – a belief that includes a symbolic and even mystical dimension, and which is often accompanied by strong passions. By contrast, the professional usage of this term refers to full internal control, and independence from external sources, subject to the rules of international law and any commitment the state has undertaken.

As if these two uses of the term were not enough, its significance is often completely distorted. Thus, for example, we hear a senior civil servant declare that “the minister is sovereign to decide...” The reference, presumably, was to the minister's authority to act in accordance with his own discretion, but this usage has nothing to do with the concept of sovereignty.

The concept of sovereignty developed toward the end of the Middle Ages and the beginning of the modern era, and helped a king or prince to free himself from the domination of the pope or emperor. As noted, the term originally referred to full internal control and external independence, though subject to international law and the divine commandments.

From the seventeenth century, the term sovereignty began to acquire a more extreme meaning, implying authority to act without any restrictions. In modern times, sovereignty is once again returning to its original dimensions, and possibly becoming even more restricted. The reasons for this are numerous: federal regimes (which entail the de facto division of sovereignty), democratization, the mutual dependence of nations, the development of international protection for human rights, rapid communication across borders, and the decreasing rigidity of borders – since sovereignty is effectively based on the presence of rigid borders between nations.

The concept of sovereignty has adapted itself to these changes and become more moderate in character. Moreover, modern discourse sometimes refers to shared or divided sovereignty, to quasi-sovereignty, to de jure sovereignty as opposed to de facto sovereignty, to restricted or differential sovereignty, and, in the case of the province of Quebec in Canada – *association-souveraineté* (two terms that are ostensibly diametrically opposed). The tendency is now to emphasize not only the element of control in the concept of sovereignty, but also the responsibility that goes along with this.

Regions already exist in which it has been agreed that sovereignty cannot be acquired (such as the South Pole and the planets and stars). Sometimes, countries agree to disagree on the question of sovereignty (such as the United Kingdom and Argentina in the case of the Falkland or Malvinas Islands); sometimes they agree on a special arrangement due to disagreement on the location of the border (such as the case of the border between Germany and the Netherlands in the Ems-Dollard region).

Despite the declining importance and increasing diversity of the concept of sovereignty, it still exists and is of importance, particularly in the case of new or weak countries, and it may be expected to form the focus of future discussions.

It should be emphasized that consensual concessions over certain authorities do not impair sovereignty, unless the authorities waived are numerous and extensive.<sup>53</sup>

In light of these developments, on the one hand, and the sensitivity to any concession over sovereignty on the Temple Mount, on the other, it would seem preferable to regulate the subject of the Temple Mount by way of the division of authorities or control, and, as far as possible, to avoid discussion of sovereignty. Not all the members of the team, however, share this opinion.

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<sup>53</sup> See Moshe Hirsch's article on the alternatives in this booklet.

## 6. The Basin – An “Open City”?<sup>54</sup>

On various occasions, the idea has been raised that Jerusalem should become an “Open City.”<sup>55</sup> Should this expression be applied to the Historical Basin? In order to answer this question, we must first examine the meaning of this term.

According to the classic and well-known principle from the field of the rules of war, an open city is one that one of the belligerent parties has declared to be “open,” i.e. not defended, and which the other party is entitled to occupy. If the other side agrees to this declaration, it will occupy the city without acts of hostility. The purpose of this rule is to prevent superfluous killing and destruction, and to prevent unnecessary suffering among those not involved in the fighting.

This principle was applied, for example, to several cities during the American Civil War (Colombia and Richmond), to Paris during the Second World War (1940), and to Rome (1944). On the other hand, requests to apply this rule to Manila (1941), Kabul (2001) and Sarajevo (1993) were rejected. Interestingly, it was once proposed that Jerusalem should also have the status of an open city in this sense. The proposal was made in 1967, and came not from either of the warring parties, but from the pope.<sup>56</sup>

The underlying goal of the institution of the open city – to prevent unnecessary death and suffering – also led to the adoption of provisions relating to “unprotected places,” “hospital and security areas,” and “neutralized areas.”<sup>57</sup> These provisions were intended to establish regions in which the elderly, sick, children and mothers of small children could find shelter.

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<sup>54</sup> Ruth Lapidot and Christian Franz, “The Many Faces of the Term Open City,” in Marcelo Kohén, ed., *Liber amicorum Lucius Caflisch*, 2006.

<sup>55</sup> See, for example, the principles proposed by Ami Ayalon and Sari Nusseibeh, 2002; and the Taba discussions in January 2001, as described by the EU representative, Ambassador Miguel Moratinos.

<sup>56</sup> Amnon Ramon, “Israel-Vatican Relations and the Jerusalem Question (1958-1969) – the Israeli Perspective,” 2003, pp. 74-76 (unpublished manuscript).

<sup>57</sup> 1949 Fourth Geneva Convention regarding the Protection of Civilians in War, Articles 14, 15; 1977 Additional Protocol I to the 1949 Fourth Geneva Convention, Article 59.

Recently, the term “open city” has been used in a completely different sense. Thus, for example, some cities in the Soviet Union were described as “open cities,” by contrast to cities that were closed to the diplomatic corps and to tourists. In the economic sphere, this term is used to indicate a city that permits the free flow of factories and employees.

In Bosnia-Herzegovina, the term has been used in a special manner. As will be recalled, the war in this region ended in 1995 with the signing of the Dayton Accords.<sup>58</sup> In order to encourage cities to reaccept refugees, the UN High Commissioner for Refugees initiated a special program: “The Open Cities Initiative of the High Commissioner for Refugees.” A city or local council that announced that it was encouraging minority refugees to return, and that began to implement this announcement, was eligible for international aid. Several cities, including Sarajevo and Konjic, benefited from this initiative.<sup>59</sup>

As already noted above, the term “open city” has also been used with reference to Jerusalem, in the Feisal Hussein proposal (2000), the Beilin—Abu Mazen document (1995), and the Ayalon-Nusseibeh proposal (2002). During the official negotiations at Taba in January 2001, it appears that the idea of making Jerusalem an open city was also raised, as emerges from the report of Ambassador Miguel Moratinos, the EU representative to the peace process:

“Both sides favored the idea of an Open City. The Israeli side suggested the establishment of an open city whose geographical scope encompasses the Old City of Jerusalem plus an area defined as the Holy Basin or Historical basin. The Palestinian side was in favor of an open city provided that continuity and contiguity were preserved. The Palestinians rejected the Israeli proposal regarding the geographic scope of an open city and asserted that the open city is only acceptable if its geographical scope encompasses the full municipal borders of both East and West Jerusalem...

Furthermore the Israeli side proposed a number of special arrangements for Palestinian and Israeli residents of the Open City to guarantee that the Open City arrangement neither adversely affect

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<sup>58</sup> *International Legal Materials*, vol. 35, 1996, pp. 75-183.

<sup>59</sup> See the sources in note 52.

their daily lives nor compromise each party's sovereignty over its section of the Open City.”<sup>60</sup>

No one explained what was meant by this expression. Clearly, the reference is not the usage of the term in international humanitarian law, in Bosnia-Herzegovina or in the economic sphere. By a process of deduction based on other terms in the international arena including the word open, such as open sea, and open skies, we may, perhaps, infer that the reference was to free access to the city. This meaning is also consonant with the fact that the city is replete with holy places, regarding which the concept of freedom of access is customarily accepted.

We believe that it would be dangerous to adopt the term “open city” without establishing in advance the conditions and restrictions on the freedom of access. For example: the citizens and residents of which countries would enjoy free access? What rules would apply to stateless persons? Is it appropriate to distinguish between types of visitors – tourists, pilgrims, researchers, merchants, and the like? What documents would visitors from the different groups be required to carry? How long would the visitor be entitled to stay in the city? Where and to which country would he leave at the end of his visit? What means should be taken on the grounds of security and to prevent smuggling? What reasons and circumstances would justify denying a person the possibility to enter the city? These are all difficult questions, and in the absence of any answer to them, it would be better to avoid the use of the expression “open city” with regard to Jerusalem in general, and the Historical Basin in particular.

## **7. The Basin – An “Extraterritorial” Zone?<sup>61</sup>**

A further expression occasionally heard with reference to certain places in Jerusalem is the term “extraterritorial.”<sup>62</sup> This term literally means “outside the territory,”

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<sup>60</sup> Summary of discussions as prepared by Ambassador Miguel Moratinos for the European Union – <http://www.ue.eu.int/pesc/envoye/cv/moratinos/mandate.htm>.

<sup>61</sup> Ramon, *City in a Labyrinth*, p. 249.

<sup>62</sup> For example, the Beilin – Abu Mazen plan, 1995.

implying that a given building or zone is ostensibly not situated in the territory in which it is actually located.

This expression was adapted to the system of capitulations.<sup>63</sup> The term “capitulation” has two completely different meanings. In the field of the rules of law, it means surrender. By contrast, in the context of the status of foreigners, it refers to agreements that excluded foreign citizens from the authority of the powers of the state in which they were actually present, and imposed on them the laws of their country of origin, based on the fiction that they were ostensibly in the country of origin. These foreigners were subject to the jurisdictional power of the consul of their country of origin who served in the country in which they were present. The capitulation regime also applied in the Ottoman Empire, including in Eretz Israel. In certain cases, such as China, entire regions were subject to the rule of a foreign consul. In these cases, the term “extraterritorial” may indeed have been appropriate.

During a certain period, the status of foreign embassies was also referred to as quasi-extraterritorial, due to the absolute immunity and absence of any authority on the part of the local sovereign to intervene in the embassy.

Today, this fiction is no longer relevant. The regime of capitulations has long since gone, and the immunities enjoyed by embassies have been reduced. Today, it is generally accepted that immunities are essentially functional, that is to say their intention is to assist the embassy in performing its functions, and the fiction that the embassy is actually abroad is no longer relevant.<sup>64</sup> The principle that the embassy is not abroad is manifested, among other ways, in the following aspects: A legal action committed in the embassy was considered to have been committed in the country in which the building is situated; diplomats must respect the laws of the country in

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<sup>63</sup> Ramon, *City in a Labyrinth*, p. 251.

<sup>64</sup> See the Vienna Convention on Diplomatic Relations, 1961, and the review in: Ramon, *City in a Labyrinth*, pp. 252-255.

which they serve; the transfer of a suspect from the embassy building to the police of the territorial state is not considered extradition.

Accordingly, it would seem that the phenomenon of extraterritorialism as defined above is now defunct.

Even if this term still existed, it would not be desirable to employ it with regard to places in Jerusalem, for the following reason: these places do not represent a foreign country, and, accordingly, if they were not subject to local law, no law would apply to them. Those who have employed the term “extraterritorial” in the context of certain places in Jerusalem may have intended to express the idea that a different law will apply to these places than to the remaining parts of the city. However, “extraterritorial” is not the appropriate expression to signify this idea.

In conclusion, we may mention a further use of the term “extraterritorial,” though this would not seem to be the sense referred to by those who use the term in the context of Jerusalem. The reference is to the application of the law of a given country to a person, even when he is situated outside the territory of that country. This term is still current in this sense.

## **8. Summary of the Background Review**

From this review, we have seen that the Historical Basin is problematic in several respects: the profound symbolism associated with its history; the traditions of sanctity and strong, almost mystic passions attributed to the city among hundreds of millions of believers; the large number of holy places, some of which are problematic since they are sacred to more than one religion or religious community, and are sometimes employed to inflame nationalist sentiments; a poor and highly heterogeneous population; and the focus of a political dispute that has religious overtones. The strong affinity of adherents of the monotheistic faiths, on the one hand, and the lack of trust between Israel and the Palestinian Authority, on the other, justify some form of international involvement in the management of this territory, particularly in the fields of security and the conservation and supervision of the holy places.

It is certainly an extremely complex task to plan and establish a special regime for the Historical Basin. However, it can be assumed that no other solution will secure the agreement of both sides and of the international community. Although both sides currently reject this idea out of hand, we believe that this is the approach that can lead to compromise.

Lastly, three questions should be examined: Can anything be learned from the status of the State of the Vatican City in Rome? It must be doubted whether this is indeed possible, due to the fundamental differences between the two cases. Firstly, the Vatican is only holy to one religion, whereas the Historical Basin is holy to three religions and countless religious groups. Secondly, the Vatican is a religious center, whereas the Historical Basin is also home to residents who live in the area on a permanent basis. Thirdly, the Vatican is an enclave within a friendly city, or, at least, it has been such since the Lateran Agreement of 1929, whereas the Historical Basin is surrounded by two peoples who are still mutually hostile.

A more technical question relates to the manner in which the special regime is to be established. In other words, in addition to the agreement between Israel and the Palestinian entity, should the consent of other bodies, such as countries, the United Nations, the European Union, the central bodies of the various religions (such as the Vatican) also be attached? It seems to me that the addition of an open protocol of various nations and bodies would add positive weight to the arrangement.

A further question is whether the arrangement should be secured by international guarantees. As is well known, the Vatican has indeed recommended that international guarantees be provided for the status of Jerusalem. It is unclear whether the reference is to an international convention whose mere existence would constitute a form of guarantee, or to an actual guarantee. It is highly doubtful whether an international guarantee would be more effective than the opening of the agreement to affiliation through an additional protocol.

In conclusion, it is worth quoting one paragraph from the Report and Recommendations of the Mitchell Committee (2001):

The Palestinian Authority and Government of Israel should consider a joint undertaking to preserve and protect holy places sacred to the traditions of Muslims, Jews and Christians. An initiative of this nature might help to reverse a disturbing trend: the increasing use of religious themes to encourage and justify violence.<sup>65</sup>

We hope that a special regime in the Historical Basin will indeed help prevent the danger noted by the authors of the report in the last sentence of this quote.

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<sup>65</sup> Report of The Sharm el-Sheikh Fact Finding Committee, 30 April 2001.

# Principal Alternatives for a Solution in the Historical Basin<sup>1</sup>

Moshe Hirsch<sup>2</sup>

## Introduction

This chapter presents in brief five alternatives for the future management of the Historical Basin in the context of a permanent settlement:

- (1) Full sovereignty and control of the State of Israel throughout the Historical Basin;
- (2) Full Palestinian sovereignty and control throughout the Historical Basin;
- (3) The territorial division of the Basin between the sides, with international supervision;
- (4) Joint management, the division of authorities between the sides, and international backing;
- (5) Management of the Historical Basin by the international body, which will delegate powers to both sides.<sup>3</sup>

The chapter examines the five above-mentioned alternatives. However, we do not intend to recommend one alternative as the optimum one from Israel's viewpoint. Each of the alternatives has advantages and disadvantages, and Israel's decision makers must determine which alternative they find preferable according to a broad

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<sup>1</sup> The five alternatives described in this chapter were formulated during the course of numerous discussions by the think tank of the Jerusalem Institute for Israel Studies on the subject of the Historical Basin during 2004 and 2005. An analysis of the alternatives and the varying characteristics of the international forces was prepared by Moshe Hirsch. In addition, some of the issues were discussed in depth in the study prepared by Moshe Hirsch and Kobi Michael, *International Involvement in the "Historical Basin" in Jerusalem*, Jerusalem Institute for Israel Studies, Jerusalem, 2003.

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<sup>3</sup> In this article, the basis assumption is that the parties indeed wish to reach a permanent settlement. The present discussion does not address the diverse aspects of the permanent settlement, but focuses solely on the Historical Basin.

range of factors, some of which we shall discuss in this chapter. The last part of the chapter summarizes the main advantages and disadvantages of each alternative from Israel's standpoint, and includes a ranking of the five possibilities in accordance with three key criteria. It should be emphasized that we do not claim to have exhausted all the possible alternatives, but rather seek to present some key options.

The alternatives we shall discuss below differ from each other in terms of numerous features. Two of the most prominent aspects are:

1. Granting sovereignty and control over the Historical Basin to Israel or to the Palestinian state (or jointly to both), as opposed to international involvement in the administration of the Historical Basin (i.e., the transfer of certain powers to other countries or to international bodies).

Clearly, an inverse relationship exists between these two components. The more extensive the powers that the sides agree to allocate to an international body, the weaker the control of these sides themselves over the Historical Basin.

2. The territorial division of the Historical Basin between several bodies, as distinct from the management of the Basin as a single territorial unit. Territorial division could be between Israel and the Palestinian state, while the management of the Basin as a single territorial (and administrative) unit could be effected by Israel, by the Palestinians, or by a third party (another country or an international organization).

Past negotiations between the sides on the subject of Jerusalem suggest that Israel and the Palestinians will find it difficult to reach agreement regarding the territorial division of the Historical Basin.<sup>4</sup> If, however, the sides to the dispute manage to reach agreement on this matter, it will obviously be easier to implement an arrangement that clearly defines who is the sovereign in each part of the Basin. Legal arrangements of this type are usually clearer and leave relatively little room for contradictory interpretations and disputes in the future. We shall discuss in depth below the

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<sup>4</sup> However, it is evident that the sides will find it even harder to reach an agreed arrangement including the first alternative (full sovereignty and control by the State of Israel) or the second alternative (full Palestinian sovereignty and control).

advantages and disadvantages of this technique (and others), as well as the mutual relations between these.

The latter stages of the negotiations between the sides on the subject of Jerusalem and the status of the Historical Basin (from the Camp David summit of July 2000 through the Taba discussions of January 2001) show that the Palestinians and the international community will not agree to adopt the first alternative (full Israeli sovereignty and control throughout the Historical Basin), while Israel will not accept the second alternative (full Palestinian sovereignty and control throughout the Basin). **Accordingly, we have chosen in this study to focus mainly on the three remaining alternatives: territorial division with international supervision, joint management with international backing, and broad international management with the delegation of powers to both sides.**

One of the most important aspects of the three alternatives on which we focus is the question of international involvement in the future regime to apply in the Historical Basin. The possibility of international involvement in the resolution of the conflict between Israel and the Palestinians in general, or in resolving the dispute over the future of Jerusalem in particular, has been the subject of extensive attention in recent years. The detailed discussion of this issue reflects general trends in the resolution of international conflicts as these have emerged recently, as well as unique aspects of the Israeli-Palestinian conflict in the context of the Historical Basin. The inclusion of international bodies as a key component in resolving international conflicts is a growing phenomenon. Numerous international forces functioning in different regions of the world have distinct characteristics, particularly in terms of the scope of authorities of the force, the identity of the body responsible for directing and supervising the work of the force, and the identity of the countries dispatching units to the international force (see the detailed discussion below).

The main reasons for granting authorities to an international body in the future regime in the Historical Basin derive from the profound lack of trust between Israel and the Palestinian Authority, from the conflicting interests of the sides in this field, and from the historical and religious importance of the Basin and the holy places it includes to numerous parties in the international arena. To this we must add the doubts among the

decision makers on both sides regarding the limited capacity of the authorities of the other side to enforce the agreed arrangement on private individuals and/or groups that oppose its provisions. **Thus, the most important goals of international involvement in the future regime in the Historical Basin are to enhance the credibility of the arrangement reached by the two sides, to assist in the implementation of the agreed arrangement, and to improve the chances that it will indeed be implemented.**

Accordingly, the relationship between the principal areas of disagreement between the sides and the functions to be allotted to the international body in the Historical Basin also becomes clear. In general terms, the greater the mistrust between the sides, the more evident the need for international involvement. Granting functions to an international body in the Historical Basin naturally involves a weakening of the control of the sides in various fields. Lastly, while international involvement may constitute a significant component in the future regime in the Historical Basin, it should be emphasized that this is only one component in a range of additional factors. Success or failure in realizing the future arrangement in the Historical Basin depends on additional factors not discussed in this work, including political, economic and legal aspects.

### **First Alternative: Full Israeli Sovereignty and Control throughout the Historical Basin**

Realization of this alternative will grant Israel full sovereignty and control throughout the Historical Basin, while allowing a measure of autonomy to the Arab residents, and/or establishing a special status for the Christian and Muslim holy places. This is a simple and relatively clear alternative (as compared to those that follow). This alternative will meet all of the requirements of the State of Israel, at least in the short term. In certain spheres, this alternative constitutes an improvement over the current status quo. It effectively implies the institutionalization and improvement of the existing situation, whereby the internal management of the holy places (such as the Temple Mount) is already delivered to the Muslim (the Waqf) and Christian religious authorities, subject to maintenance of law and order, for which the Israeli security forces are responsible. This alternative would seem to be acceptable to the vast

majority of the Israeli people and Israeli policy makers. However, the previous stages of negotiations on the subject of Jerusalem (in 2000-2001) suggest that the Palestinians and the international community will not accept this alternative.

It should be emphasized that modern sovereignty does not grant the state absolute freedom of action in the relevant territory. Accordingly, recognition of Israeli sovereignty throughout the Historical Basin does not imply that Israel will be released of its obligations in accordance with international law relating to this territory (for detailed discussion of this aspect, see the analysis of the third alternative).

The most complex component of this alternative relates to the possibility of granting autonomy to Palestinian residents living throughout the Historical Basin. Past and present autonomous arrangements differ considerably. The powers granted to autonomous authorities are usually limited to the fields of culture, education, social affairs and religion (including personal status), while powers in the field of defense and foreign relations generally rest exclusively with the central government. It should be noted that the spheres delegated to the autonomous authority are not usually subject to the supervision of central government (excluding exceptional cases, such as deviation from authority, threat or injury to state security, or breaching public order).<sup>5</sup>

Full Israeli sovereignty and control throughout the Historical Basin could also be accompanied by granting special status to Christian and Muslim holy places. This status would include autonomous provisions for these sites. Thus, for example, routine management of these sites could be granted to the members of the religion to whom the site is sacred. Rules could also be established prohibiting, as a general rule, agents of the authorities of central government from entering these sites without the permission of the head of the religious community (naturally, in the absence of potential or actual damage to public order or state security). Granting international

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<sup>5</sup> For detailed discussion, see: Ruth Lapidot, *Autonomy: Flexible Solutions to Ethnic Conflicts*, Washington, DC: United States Institute of Peace Press, 1996.

immunity to the holy places and to the clergy who serve there<sup>6</sup> could provide an additional instrument for reinforcing the independent status of these sites and officials vis-à-vis the State of Israel (which, according to this alternative, would be the sovereign power in the Historical Basin). It should be emphasized, however, that granting immunity to holy places or the clergy serving in them does not amount to the transfer of sovereignty in these sites. Additional restrictions on the exercising of authority by Israel in the Historical Basin could accrue from the rules of international law, both contractual **and customary** (see details in the analysis of the third alternative).

### **Second Alternative: Full Palestinian Sovereignty and Control throughout the Historical Basin**

This is a simple and relatively clear alternative that will grant the Palestinians full sovereignty and control throughout the Historical Basin (in accordance with the border prior to the Six Day War, i.e., not including Mt. Zion, which will remain under Israeli control), and with autonomy for Jewish residents (e.g. in the Jewish Quarter) and special status for the Jewish holy places. In many aspects, such as full sovereignty in the Jewish Quarter, this alternative offers the Palestinians far more extensive control in the Historical Basin than is currently the case. This alternative would be acceptable to the vast majority of the Palestinian people and to policy makers in the Palestinian Authority, but it would seem that the State of Israel would reject it out of hand (for various options regarding the granting of autonomy and special status to the holy places, see the analysis of the first alternative above).

As noted above, modern sovereignty does not grant the state absolute freedom of action in the relevant territory. Accordingly, additional restrictions on the powers of the Palestinian Authority in the Historical Basin might accrue from the rules of international law, **both contractual and customary** (for details, see the analysis of the third alternative).

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<sup>6</sup> For various proposals raised in the past regarding the granting of immunities in the holy places, see Moshe Hirsch and Dvora Haussen-Kuriel, *Jerusalem Whither? Proposal for the Future of the City*, Jerusalem Institute for Israel Studies, 1994, pp. 425-427.

### **Third Alternative: Territorial Division between the Sides, with International Supervision**

This alternative combines the techniques of the division of sovereignty in the Historical Basin with limited international involvement. **The dominant principle in this alternative is the territorial division of the Historical Basin between Israel and the Palestinians (the PA or the Palestinian state, as and when it is established). According to this alternative, the international body will play a relatively limited role.**

**Regarding the territorial division:** after Israel and the Palestinians reach agreement on marking the border between them in the Historical Basin, each side will be the sovereign and the holder of authority in the territory allocated to it in the agreement. On the general level, it is evident that the sides will find it difficult to reach agreement regarding the division of the territory in the Historical Basin. Disagreement on this matter includes the struggle over religious, national and historical symbols, and it can be assumed that the sides will find it difficult to agree on a compromise, particularly on the Temple Mount. Equally, though, it is clear that if the sides can reach agreement on this matter, this alternative will be easier to implement than joint arrangement requiring cooperation between the sides, or arrangements including a large degree of international involvement.

Legal arrangements that include a territorial division are usually clearer and leave relatively little room for conflicting interpretations and future disputes. Thus, for example, if questions arise regarding the authority of either side to undertake a given action in the Basin, it is clear that most such questions can be relatively easily resolved due to the legal preference (albeit not absolute) for that side holding sovereignty in the relevant area.<sup>7</sup>

The territorial division of the Historical Basin between Israel and the Palestinians could be based on a wide range of alternative borders; **we do not intend to**

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<sup>7</sup> This type of arrangement is also the easiest to implement in the economic sphere (customs, taxation, passage of merchandise, etc.)

**recommend any specific territorial division.** However, we do wish to identify five key and general alternatives in this respect:

- A. The Jewish Quarter and the Armenian Quarter will be included in the sovereign territory of the State of Israel. The Muslim Quarter and the Christian Quarter will be under Palestinian sovereignty. The Temple Mount will be included in the sovereign Israeli territory.
- B. The Jewish Quarter and the Armenian Quarter will be included in the sovereign territory of the State of Israel. The Muslim Quarter and the Christian Quarter will be under Palestinian sovereignty. The Temple Mount will be included in the sovereign Palestinian territory.
- C. The Jewish Quarter will be included in the sovereign territory of Israel. The Muslim, Christian and Armenian Quarters will be under Palestinian sovereignty. The Temple Mount will be included in the sovereign Palestinian territory.
- D. The Jewish, Armenian and Christian Quarters will be included in the sovereign territory of Israel. The Muslim Quarter will be under Palestinian sovereignty. The Temple Mount will be included in the sovereign Israeli territory.
- E. Any of the four above-mentioned alternatives, together with the territorial division of the Temple Mount between Israel and the Palestinians.

Regarding the Temple Mount, the possibility might also be considered of applying one of the other alternatives discussed in this chapter – management by an international body or joint management by the sides.<sup>8</sup>

Further key questions to be discussed in the context of the territorial division of the Basin include: what restrictions should be imposed in the agreement on the freedom of action of the sides (ensuring free access to the holy places, freedom of worship, supervision of construction and conservation of antiquities, human rights, conditions of passage, and possibly even restrictions in the security sphere); what will be the scope of criminal jurisdiction of each side over the citizens of the other side who enter

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<sup>8</sup> For detailed discussion of the unique characteristics of the Temple Mount, see Yitzhak Reiter, ed., *Sovereignty of God and Man – Sanctity and Political Centrality in the Temple Mount*, Jerusalem Institute for Israel Studies, 2000. Regarding the alternative arrangements for the Temple Mount, see the article by Reiter, Ramon and Berkowitz below in this booklet.

the territory under its control; and so on. It is highly desirable that these issues should be regulated in detail in the agreement between Israel and the Palestinians.

As already noted, the control or sovereignty of one party over a particular area within the Historical Basin will be restricted in accordance with the international obligations of that party under international law. The international obligations of each country in this respect (including the Palestinian state, as and when it is established) may accrue from international conventions or from the rules of international custom law.

Regarding international conventions, each side that exercises control in the Historical Basin will be required to do so in a manner that is consonant with bilateral conventions signed in the past, particularly agreements signed in this field between Israel and the Palestinians. Multilateral conventions signed by the state in the past may also restrict the exercise of authorities throughout the Historical Basin area. This is the case, for example, with human rights conventions joined by Israel (such as the 1966 Convention on Civil and Political Rights), or conventions regarding environmental protection. These restrictions will apply to the exercising of authority by the state (such as police authorities), even if it is not considered a sovereign power in the Historical Basin. Several international tribunals have ruled that human rights conventions also apply to territories outside the sovereign territory of the state in which the state exercises effective control.

In addition to the duties incumbent on the sides under the terms of multilateral conventions, the special agreement between Israel and the Palestinians on the future of the Historical Basin may impose on each side obligations included in multilateral conventions that have not been joined by either (or both) of the sides. Thus, for example, if a Palestinian state is not established, or if such a state is established<sup>9</sup> but is not a party to certain multilateral conventions (such as human rights conventions), the bilateral agreement between Israel and the Palestinians could include reference to a list of international conventions to which both sides are bound to apply in their relations in the Historical Basin. In place of a technique of reference, the bilateral

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<sup>9</sup> In principle, the control of the Historical Basin could be divided between Israel and a Palestinian state, or between the State of Israel and a Palestinian entity that is not a state.

agreement could also include sections copied from multilateral international conventions (that has not yet been joined by either or both of the sides). The bilateral agreement could also include rules from global conventions with the necessary modifications in the specific context of the Historical Basin.

Additional restrictions on the exercise of control or authority in the Historical Basin could also accrue from the parties' obligations in accordance with the rules of **customary law**. These rules bind all the nations of the world, regardless of the question as to whether or not they have joined any particular convention.<sup>10</sup> Thus, for example, the sides' obligations to maintain freedom of worship and allow access to the holy places may accrue from international custom law.

### **The Function of the International Body**

**Monitoring:** According to this alternative, the sides will (by mutual consent) grant monitoring powers to an international body. The function of this body will be to examine whether the parties are implementing the provisions of the arrangement. These monitoring functions may have important ramifications in terms of the realization of the agreed arrangement. The publication by the observers of clear findings may create international pressure on the contravening side (and, in some cases, even lead to sanctions from international bodies, including non-governmental organizations). In certain cases, the publication of such findings may also provide justification for unilateral actions taken by the side injured by the violation (for example, a temporary deviation from one of the provisions of the agreement). In exceptional cases, the commander of the international body may be empowered to recommend that a given international organization take certain steps required in order to realize the provisions of the agreement.

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<sup>10</sup> A rule of international conduct is considered a custom rule if the majority of nations of the world obey this rule consistently due to a sense of legal commitment. Extensive affiliation to an international convention by states may, in certain circumstances, transform that convention into a "custom convention" binding all nations of the world (regardless of whether they actually joined the convention).

Under this alternative, members of the international monitoring force perform the function of “observers.” They are deployed in the field and examine which of the sides is contravening the provisions of the agreement, and to what extent. When a violation is observed, several possibilities exist for reporting: the members of the international body may report only to the sides; to a joint body (also including third parties); to an external international organization (such as the Security Council); or it may publish the findings by itself. It is highly desirable that the agreement explicitly specify that the sides must allow the members of the international body free movement within the Historical Basin, on the access roads, and in additional areas outside the Historical Basin. In addition, appropriate international immunities should be established (such as personal immunity against detention) enabling the observers to perform their functions effectively and without fear (the immunities are generally functional, applying to actions performed within the framework of their official function).<sup>11</sup>

**Resolution of disputes:** Monitoring operations may also include the resolution of disputes between the parties. Thus, for example, the parties are entitled to empower certain officials in the international body (such as the commander or the legal advisor of the force) to make rulings on certain disputes that may emerge between the parties relating to the implementation and interpretation of the agreement (e.g. disputes relating to freedom of access to the holy places, or to the implementation of repairs in these places). The sides may also choose to establish an international tribunal connected to some extent with the international force that will maintain such monitoring functions. A prominent example of an international body for the resolution of disputes established by the opposing parties in order to supervise the implementation of the provisions of an international agreement is the “Israel-Lebanon Monitoring Group,” established in a memorandum of understanding from 1996. Agreements for the resolution of disputes between the sides may relate to all

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<sup>11</sup> For details on the subject of international forces whose principle function is to monitor the implementation of international agreement, see Moshe Hirsch and Kobi Michael, *International Involvement in the “Historical Basin” in Jerusalem*, Jerusalem Institute of Israel Studies, Jerusalem 2003; Kobi Michael, *International Involvement in Jerusalem – Background and Ramifications*, Jerusalem Institute of Israel Studies, Jerusalem, 2003.

provisions of the agreement, or only to certain of its provisions (such as those relating to the holy places). If the parties agree to establish such a tribunal, the agreement should include an appendix detailing rules relating to the composition of the tribunal, the identity of the body entitled to file complaints (usually the governmental authorities of the sides), the law that shall be applied by the tribunal, and the provisions of the agreements between the sides (and, generally, the rules of international custom law).

It should be noted that many countries are reluctant to relinquish control of issues that have a significant bearing on their national security to the determination of international tribunals. One technique that may alleviate the concern of both sides in this respect is to grant the international body the authority to recommend that the parties adopt certain steps consonant with the provisions of the agreement, but not to adopt decisions that bind the parties (this was the case, for example, in the 1985 trade agreement between the US and Israel).<sup>12</sup> It should be noted that although the decisions of such bodies are not binding on the parties in legal terms, it can be expected that they will have a significant impact on the behavior of the sides, on the reactions of countries participating in the international body, and on the reactions of other countries and international organizations.

One of the main obstacles to the implementation of the agreement reached by the sides is liable to relate to the behavior of extremist individuals and private groups. In addition to the central responsibility of each of the sides to exercise its authority in such circumstances, the sides may also empower the international body to prosecute individuals or groups who violate certain provisions of the agreement, before an international tribunal (or a joint tribunal). In this case, the parties should delineate in the body of the agreement (or in a special appendix) the legal rules that will be enforced by the tribunal (substantive rules regarding offenses, and procedural rules regarding the legal proceedings before the tribunal), as well as methods for realizing the tribunal's decisions regarding convicted individuals. The sides may agree that persons convicted by the tribunal and sentenced to imprisonment should serve their

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<sup>12</sup> See Section 19 of the Free Trade Agreement between the USA and Israel, *International Legal Materials*, 24 (1985) 657.

sentence in the prisons of one of the sides (under the supervision of the international body), in the prisons of other countries that are not a party to the agreement (this is the case, for example, with the international tribunal for crimes committed in Yugoslavia), or in a prison established by the international body.

#### **Fourth Alternative: Joint Management, Division of Authorities between the Sides and International Backing**

In accordance with this alternative, the Historical Basin will, in general, be managed as a single unit,<sup>13</sup> and the sides will exercise jointly most of the administrative and policing powers in the Basin. **As long as the sides manage to administer the Basin efficiently, the international body will have a relatively limited role.** The agreement between the sides will stipulate which authorities are to be exercised jointly by both sides and which will be implemented separately (such as the fields of education and culture). These authorities will be exercised by the side (jointly or separately) in accordance with the provisions of the bilateral agreement. Additional restrictions on exercising these authorities in the Historical Basin may derive from the rules of international law, contractual and custom (see details in the analysis of the Third Alternative). **The international body will take and exercise the authorities of the sides in areas in which joint application fails for any reason.** The agreement between the sides may establish a minimum or maximum period after which the international body shall return (or shall attempt to return) the said authorities to the sides.

#### **Authority of the International Body**

As long as the sides manage to exert their authorities successfully, the international body will have no more than monitoring functions (as in the Third Alternative). It may be considered whether the international body should, at this stage, be granted solely monitoring powers, or should be given administrative and executive authority in limited and sensitive fields (such as the management of one or two holy places, such as the Temple Mount, or maintaining the special character of the Historical

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<sup>13</sup> Israel and the Palestinians could agree that this alternative (joint management with international backing) be applied to a certain part of the Historical Basin, such as the Temple Mount.

Basin). If joint management by the sides fails, the international body will exercise broad authorities (similar to those of the international body in the Fifth Alternative).

Key questions that must be addressed by the agreement in this context include: in which circumstances will the international body take upon itself the authorities of the sides, and who will be empowered to determine that circumstances justifying such a step have indeed developed? The agreement should establish substantive criteria (what will be considered “failure” in the implementation of the joint authorities by the sides in a given field), as well as procedural rules for this purpose. Thus, for example, the agreement should establish which official in the international body is empowered to make the decision regarding the taking of authorities, what procedures must be observed before doing so (consultation with the sides and/or with outside experts), and so on. Naturally, it would be possible to establish that such decisions will be valid only after ratification by an external body (such as an international organization or a head of a body established for this purpose).

If and when the international body takes on any or all of the authorities of the sides, several questions will arise regarding the rules that shall govern the actions of the international body. Clearly, the bilateral agreement must specify a number of rules to be followed by the international body in accordance with this alternative. In addition to rules derived from the bilateral agreement, additional obligations incumbent on the international body will also accrue from general international law (contractual and custom). Since many multilateral conventions cannot be joined by international organizations (such as most of the main human rights conventions), it is highly desirable that the sides specify in the bilateral agreement, or in the establishing documents of the international body, the list of obligations limiting the actions of the body that will exercise authority in the Historical Basin. Here, too, the parties could agree to adopt a technique for referring problems to international conventions binding the organization (although it is not a formal party to these conventions), or could copy into the bilateral agreement a detailed list of obligations drawn from various multilateral conventions (e.g. relating to the obligation to maintain fair legal proceedings). Additional obligations restricting the actions of the international body may accrue from the rules of international custom law. This is the case, for example,

regarding the freedom of worship or the freedom of access to the holy sites (see the Third Alternative for discussion of these aspects).

**Fifth Alternative: Management of the Historical Basin by the International Body, with the Delegation of Authorities to Both Sides**

In accordance with this alternative, the Historical Basin<sup>14</sup> will generally be managed as a single unit. **Under the agreement, and with the consent of both sides, the international body will exercise extensive authorities and manage by itself large areas of the Basin.** However, it is possible that relatively small areas (such as a limited number of holy places regarding which there is no dispute) may be divided between the sides on a territorial basis. Similarly, authority in relatively restricted areas of activity may be allotted to the sides by the international body (for example, in matters relating to religious services and education). In those spheres or territories in which the international body will delegate authorities to the sides, they will be required to exercise their authority in accordance with the bilateral agreement and in accordance with the rules of international contractual and custom law (as detailed in the Third Alternative).

As noted above, the main reason for granting extensive administrative authorities to the international body is the profound lack of confidence between Israel and the Palestinians.

**Authorities of the International Body**

In accordance with this alternative, the international body will not merely be granted monitoring powers, but will actually administer the Historical Basin, and will constitute the source of authority and control in the area. In certain cases, the international body will delegate authorities to the sides in specific territories or fields of activity. According to this alternative, the personnel of the international body will enjoy a wide range of authorities, from protecting the holy places against attack or desecration (including ensuring free access to these places) and ensuring the

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<sup>14</sup> Israel and the Palestinians could agree that this alternative (management by an international body with the delegation of some authorities to the sides) be applied to a certain part of the Historical Basin, such as the Temple Mount.

arrangements for entry into the Historical Basin to a diverse range of authorities in the fields of policing, taxation, planning and building. The personnel of the international body could also be empowered to use force against individuals violating the provisions of the agreement and to prosecute them in judicial tribunals to be established by the international body. It should be emphasized that the greater the scope of authorities granted to the international body, the greater the importance of its composition, its modality of operation and its supervision. Nevertheless, such a process inevitably entails the restriction of the authorities of both sides (this aspect will be discussed in greater depth below).

Most of the international forces established in the past have not been empowered to manage a specific territory. However, a number of international forces (particularly over the past decade) have received such extensive administrative authorities, usually for a limited period of time. The most prominent examples of this over the past decade are the United Nations operations in East Timor (1999-2002), Cambodia (1991-1993) and Kosovo (from 1999).<sup>15</sup>

The international body that will manage the Historical Basin in accordance with this alternative will exercise its authorities in accordance with the bilateral agreement between the sides, and in accordance with its obligations under international law. As noted above, the sides should delineate the obligations incumbent on the international body in detail in the bilateral agreement between them or in the establishment documents of this body. The sides may adopt different techniques to this end. Among other approaches, they could include references to multilateral conventions that the international body will be required to respect in its actions (even if it has not joined these conventions), or it may specify in the bilateral agreement a list of obligations drawn from various international conventions.

### **Who will run the international body?**

International forces operating in different parts of the world show widely divergent characteristics. The principal characteristics for our purposes (in addition to the

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<sup>15</sup> For further discussion, see: Moshe Hirsch and Kobi Michael, *International Involvement in the Historical Basin*, Note 11 above.

functions of the international body) are the identity of the body that guides and supervises the work of the international body, and the identity of the states that will send units to this body.

The three main alternatives regarding the body that will guide and supervise the work of the international body are: (1) An international organization (such as the United Nations, NATO or the European Union); (2) A special multinational organization established by the sides for the purpose of this mission (an ad hoc force); (3) States (such as the United States, Canada or Switzerland).

The most common of these alternatives is the allotment of such tasks to the United Nations, which has acquired extensive experience in these types of operations. The involvement of the United Nations in guiding the force leads to the almost automatic application of a fixed corpus of rules developed by the organization over the years, and accordingly the extent of influence by the sides to the conflict over these vital rules is relatively limited.

The influence of the sides in shaping the rules that control the direction and supervision of the work of the international body is increased dramatically if the sides formulate by themselves an ad hoc international mechanism, as in the case of the International Multinational Force of Observers (MFO) in Sinai. The tremendous and exceptional importance attributed by Israel and the Palestinian to the regime that will apply in the Historical Basin, the expected aspiration of both sides to influence the general development of the direction and supervision of the international force in the area, and concern among Israeli politicians regarding the inability of the United Nations to exercise its authorities in a neutral manner all create grave doubt regarding the likelihood that Israel would agree to grant this responsibility to the U.N. Accordingly, the two main alternatives remaining in this matter are to charge an ad hoc organization with the direction and supervision of the international force, or to refer to a specific state or several states.

A further important characteristic of international bodies relates to the organizational or national affiliation of the personnel in the intervening force. The principal alternatives facing the sides are an international force comprising national units from

several countries, or the forces of a single country. Naturally, the countries selected by the sides will be ones in which each side has confidence (thus, for example, it is difficult to imagine that countries that do not maintain diplomatic relations with Israel will be included in the composition of the international body). One of the main limitations of international forces is the heterogeneity of the force, which may inhibit its smooth functioning. Appointing a single country that will send units to the intervening force reduces the heterogeneity of the force and ensures more consistent policy. On the other hand, it would seem that few countries would be willing to undertake such a task, and the sides might find it difficult to agree on the identity of the country whose forces would comprise the international body.

In order to reach a compromise between the conflicting aspirations of Israel and the Palestinians regarding the identity of the countries that will supervise the work of the international body and contribute units, and in order to enhance the trust between the sides and this body, consideration should be given to dividing the authorities between two distinct international bodies that will operate in the Historical Basin. One will be active in the civilian and administrative sphere, and the other in the sphere of policing and security. The body empowered to act in the civilian and administrative sphere could include units from several countries (such as Canada and Australia), while the force empowered to act in the field of policing and defense could include units from the USA and other NATO member countries.

### **What is the Desirable Alternative? Different Criteria and Priorities**

An analysis of the five alternatives discussed above inevitably leads to the question as to which is the most desirable alternative for the State of Israel. The discussion in this chapter above suggests that, given the complexity and enormous sensitivity of this subject, it is impossible to provide a single simple answer to this question. Each of the alternatives has advantages and disadvantages, and selection of the optimal alternative depends on the basic assumptions of Israeli policy, political and international circumstances, and priorities of Israeli decision makers at any given point in time. Selection of the most desirable alternative for Israel also depends on the following factors: (A) the scope and strength of Israeli control in the Historical Basin; (B) the

likelihood that the sides will reach an agreed arrangement; (C) the likelihood that the agreed arrangement will be implemented successfully.

The likelihood that the agreement will actually be implemented successfully depends on: (1) the number of bodies involved in managing the Basin; (2) the simplicity and clarity of the agreement; (3) the management of the Basin as a single territorial unit (see detailed discussion below). We shall begin by discussing the advantages and disadvantages of each alternative, and then rank the alternatives in accordance with each of the three criteria above.

### **Advantages and Disadvantages of Each Alternative**

**First Alternative – full Israeli sovereignty and control throughout the Historical Basin.** The evident advantages lie in granting control to the State of Israel throughout the Historical Basin, and in the higher probability that an agreement including this alternative will be implemented. This alternative presents a relatively clear arrangement whereby a single body is responsible for administration in the Basin, and for the administration of the Basin as a single territorial unit. The prominent disadvantage of this Basin lies in the low probability that the Palestinians and the international community would agree to accept it.

**Second Alternative – full Palestinian sovereignty and control throughout the Historical Basin.** The advantages of this alternative lie in the relatively high probability that an agreement including this alternative will be implemented (assuming Israel's consent). This alternative (like its predecessor) present a clear arrangement that involves a single key body in managing the Basin, and administration of the Basin as a single territorial unit. The prominent disadvantages are the elimination (or virtual elimination) of Israeli control throughout the Historical Basin, and the very low probability that the State of Israel would agree to accept it.

**Third Alternative – territorial division of the Historical Basin between Israel and the Palestinians, with international supervision.** The advantages of this alternative lie in the relatively high probability that Israel and Palestinians will agree to the arrangement in accordance with this alternative, which grants control over part of the Historical Basin to Israel, and in the relatively high probability that the arrangement

will be implemented successfully. This alternative entails a relatively clear arrangement and the involvement of a relatively small number of bodies in the management of the Basin. However, the Historical Basin is not managed as a single territorial unit under this alternative.

**Fourth Alternative – joint management of the Basin by Israel and the Palestinians, a division of authorities between the two sides, and international backing.** The advantages of this alternative lies in the relatively high probability that the sides will agree to it. However, it has prominent disadvantages in terms of the relatively low probability that it could be implemented successfully (due to the large number of bodies involved in managing the Basin, which is liable to lead to numerous disputes and conflicts between the sides), as well as the relatively limited scope of Israeli control in the Historical Basin.

**Fifth Alternative – management of the Basin by an international body, with delegation of authorities in certain fields to Israel and the Palestinians.** The advantages of this alternative lie in the moderate probability that the sides will accept it. Its prominent disadvantages are the low probability that the agreement would be implemented successfully (the large number of bodies involved in managing the Basin, and a relatively unclear arrangement), as well as the relatively limited scope of Israeli control in the Historical Basin.

### **Ranking the Alternatives**

Several factors may influence the choice of the desirable alternative from Israel's perspective. The most important factors in this context are: (A) the scope and strength of the control enjoyed by the State of Israel in the Historical Basin; (B) the probability that the sides will reach an agreement; (C) the probability that the agreement will be implemented successfully.

As we shall see below, these factors are clearly inter-related. For example, the adoption of an alternative that greatly increases Israel's control of the Basin may reduce the probability that the sides will be able to reach an agreement.

**A. Scope and strength of the control of the Historical Basin by the State of Israel:** It is fairly obvious that Israel will, in general, prefer arrangements that grant it maximum control over developments in the Historical Basin, and will attempt to reduce the scope of control of the Palestinians or of international bodies in this area. Regarding the possible allocation of authorities to the Palestinians or to an international body, it would seem that Israel will prepare to grant these to an international body in which it has confidence. From this perspective, the desirable order of priorities for the State of Israel would seem to be as follows:

- (1) Full Israeli sovereignty and control throughout the Historical Basin;
- (2) Territorial division of the Basin between the parties, with international supervision (however, if this alternative is indeed adopted by the sides, Israel will probably seek to enhance the supervisory authorities of the international body in that section of the Basin under Palestinian sovereignty);
- (3) Joint management of the Basin by Israel and the Palestinians, the division of authorities between the sides, and international backing in the event that joint management fails;
- (4) Management of the Historical Basin by an international body, with the delegation of authorities to both sides;
- (5) Full Palestinian sovereignty and control throughout the Historical Basin.

Israeli decision makers might agree to the transfer of certain functions to an international body in which they have confidence, given the lack of trust between Israel and the Palestinians, and with the objective of enhancing the reliability of the arrangement agreed by the sides. Clearly, the greater the confidence of Israeli decision makers in the international body, the greater their willingness to transfer more extensive authorities to this body.

**B. Probability that the sides will reach an agreement:** It would seem that Israel and the Palestinians will not be able to reach agreement on the adoption of the alternatives that grant full sovereignty and control to either Israel or the Palestinians throughout the Historical Basin (the first or second alternatives). The dispute on this matter includes a struggle over religious, national and

historical symbols, and it can be assumed that the sides to the conflict will find it difficult to reach an agreement whereby one side enjoys complete control of all these assets. Accordingly, it is obvious that Israel will vigorously oppose the adoption of the second alternative, and that the Palestinians will not agree to the adoption of the first alternative. On the other hand, it would seem that the prospects of finding an agreed arrangement increase when we turn to those alternatives that include a dimension of compromise (alternatives 3, 4 and 5). One type of compromise is the territorial division of the Basin (the third alternative), which leaves each side with a given area under its own sovereignty, with international supervision of the agreed arrangement. The struggle with regard to this alternative would almost certainly center on the nature of this territorial division. Although the allocation of partial or full authorities to an international body inevitably limits the authorities of the sides, it can also soften the sense of loss on both sides, since the compromises are not made directly to the other side. From this perspective, it would seem that the desirable order of the alternatives for Israel, **assuming that it is not possible to ensure full Israeli sovereignty throughout the Basin**, are as follows:

- (1) Territorial division of the Historical Basin between the sides, with international supervision;
- (2) Joint management of the Basin by Israel and the Palestinians, the division of authorities between the sides, and international backing in the event that joint management fails;
- (3) Management of the Historical Basin by the international body, with the delegation of authorities to both sides;
- (4) Full Palestinians sovereignty and control throughout the Historical Basin.

Here, too, it can be assumed that the greater the confidence among Israeli decision makers in the international body, the greater their willingness to transfer more substantial authorities.

- C. Probability that the agreement will be successfully implemented:** Realization of the arrangement agreed by the two sides depends on numerous factors; we shall focus here on three: **The number of bodies involved in the management of the Historical Basin; the relative simplicity (or clarity) of**

**the provisions in the arrangement; and the management of the Historical Basin as a single territorial unit (as opposed to its territorial division).**

**The greater the number of countries and bodies involved in the management of the Historical Basin** the greater the questions and tensions regarding the division of responsibilities among the different bodies, and the greater the problems resulting from the difficulty in coordinating among the different bodies active in the Basin. From this perspective, it would seem that the desirable order of priorities for Israel is as follows:

- (1) Territorial division of the Basin between the sides, with international supervision;<sup>16</sup>
- (2) Management of the Historical Basin by an international body, with the delegation of authorities to both sides;
- (3) Joint management, the division of authorities between the sides, and international backing in the event that joint management fails.

Regarding all the alternatives that include the transfer of authorities to a third party (another country or an international body), it will generally be preferable for the authorities to be transferred to a single country rather than to an international body including several countries; furthermore, it will be preferable to secure agreement for one international body comprising several countries, rather than the allocation of authorities to several international bodies (each comprising several countries).

**A relatively clear and simple arrangement** can be expected to enhance the prospects that the agreement will be implemented successfully. Vague and complex arrangements are liable to increase the number of disputes between the sides relating to how the provisions in the agreement are interpreted, and the

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<sup>16</sup> The alternatives of full Israeli or Palestinian sovereignty and control throughout the Historical Basin also reduce the number of countries and bodies involved in the management of the area. However, it is obvious that Israel and the Palestinians will not prefer such an arrangement, for the considerations discussed above.

number of conflicts arising between the sides during implementation. From this perspective, it would seem that the order of priorities for Israel is as follows:

- (1) Full Israeli sovereignty and control in the Historical Basin;<sup>17</sup>
- (2) Territorial division of the Basin between the sides, with international supervision;
- (3) Management of the Basin by an international body, with the delegation of authorities to both sides;
- (4) Joint management, the division of authorities between the sides, and international backing in the event that joint management fails.

**Management of the Basin as a single territorial unit** may offer clear advantages in certain fields. One example of this is addressing environmental hazards, where effective attention requires as closely integrated an administrative system as possible. The same applies to the development and implementation of effective policy in the field of various infrastructures (such as transport). If the Historical Basin is not managed in the future as a single territorial unit by a single body, it is highly desirable that coordination and mechanisms for cooperation be created among all the bodies involved (the countries and the relevant international bodies). From this perspective, the order of priorities for Israel would seem to be as follows:

- (1) Full Israeli sovereignty and control in the Historical Basin;<sup>18</sup>
- (2) Management of the Basin by an international body, with the delegation of authorities to both sides;
- (3) Joint management, the division of authorities between the sides, and international backing in the event that joint management fails.
- (4) Territorial division of the Basin between the sides, with international supervision.

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<sup>17</sup> The alternative of full Palestinian sovereignty and control throughout the Historical Basin also constitutes a relatively clear arrangement, but it is also clear that Israel will not prefer this arrangement, for the considerations detailed above.

<sup>18</sup> In theory, one could also include here the alternative of full Palestinian sovereignty and control. However, for the reasons already stated, it is clear that this alternative is not acceptable to Israel

In conclusion, we must recall that an international body may indeed play a significant role in the future regime as determined by the sides for the management of the Historical Basin. However, it is evident that an international body does not constitute a “miracle cure” removing all the obstacles in the way of the implementation of an agreement. Realizing a future agreement in the Historical Basin in Jerusalem depends on additional factors relating to the sides themselves, as well as additional aspects that have not been discussed in this chapter.

# Alternative Arrangements for the Temple Mount and the Western Wall

Yitzhak Reiter, Amnon Ramon, Shmuel Berkowitz

## 1. Background: The Importance and Centrality of the Issue of the Temple Mount / Al-Haram Al-Sharif from the Jewish and Muslim Standpoints

The question of the Temple Mount is undoubtedly the hardest to resolve or regulate in the Historical Basin, as shown during the discussions at the second Camp David Summit (summer of 2000) and the reactions to the proposals raised by President Clinton in his famous plan from December 2000.<sup>1</sup> From the perspective of both Jews and Muslims, the Temple Mount / *Al-Haram Al-Sharif* is a symbol of religious and national identity, and hence it is also a serious bone of contention.

The sanctity of the Temple Mount in Jewish tradition is due primarily to its status as the location of the First and Second Temples. The sanctity of the site for Jews does not relate to a specific event, but to the fact that, according to Jewish tradition, it is the place where God dwells and the site of the Ark of the Covenant – the ancient focus of worship of the Children of Israel (Kings 1:8).

For some 1900 years, from the destruction of the Second Temple (in 70 ACE) and until 1967, Jewish worship on the Temple Mount **closed** almost completely; beginning in the seventh century the site became a central focus of sanctity and worship for Islam. Jewish pilgrims did visit the Mount when permitted to do so by the authorities (mainly through the end of the 12<sup>th</sup> century). As a generalization, it may be stated that the Temple Mount was “out of bounds” for Jews from the destruction through 1967. However, with the assistance of the Ottoman authorities, the Western Wall became the most important place of prayer in the Jewish world from the 16<sup>th</sup> century on, due to its status as a “remnant of the Temple.”

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<sup>1</sup> For further discussion of this subject and others relating to the Temple Mount, see: Y. Reiter, ed., *Sovereignty of God and Man – Sanctity and Political Centrality on the Temple Mount*, Jerusalem Institute of Israel Studies, 2001 (hereinafter: Reiter, *Sovereignty of God and Man*).

It was only in the late nineteenth century that the Muslim Ottoman authorities began to allow prominent Jewish guests to visit the Temple Mount. During the British Mandate period (from 1928), the Mount was open to non-Muslim visitors on a paying basis (but not to prayer). During the Jordanian period (1967-1948), Jews were not permitted to visit either the Temple Mount or the Western Wall.

The Six Day War (1967) created a new reality, as the Temple Mount was occupied by Israel. Then Minister of Defense Moshe Dayan established the principles of the new status quo on the Mount: internal management and control of the site were given to the Muslim Waqf, while the Israeli authorities were responsible for the external shell of security and for overall security on the Mount.<sup>2</sup> Jews began to enjoy free access to the site via the Mughrabi Gate, but are not permitted to pray within the site. All Jewish ritual activity has been transferred to the Western Wall, which is the western retaining wall of the Temple Mount. This situation has been institutionalized through tacit agreements with the leaders of the Waqf and with the Jordanian authorities, and has received *de facto* recognition from the Israeli government and Supreme Court.

The new status quo created on the Temple Mount by Moshe Dayan was intended to neutralize the religious element in the Jewish-Arab conflict. Dayan believed that Muslim management of the site would prevent eruptions and enable the Muslim population in the Territories and throughout the Muslim world to adapt to the new reality of Israeli **occupation**. (conquest) ??

In 1967, the prohibition against Jewish worship on the Mount did not provoke widespread opposition among the Jewish public, due to the religious edict of the Chief Rabbinate and of the leading religious rulers of the Orthodox and Ultra-Orthodox communities prohibiting Jews from visiting the Temple Mount out of religious considerations relating to the laws of ritual purity and impurity. Dayan's decision and the Halachic prohibition against Jews entering the site prevented messianic fervor on the Jewish side and possible clashes between Jewish and Muslim zealots on the Temple Mount. In recent years, however, there has been a gradual erosion in the

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<sup>2</sup> This responsibility was manifested in an Israeli police outpost positioned on the Temple Mount since 1967.

Halachic prohibition, and many rabbis, particularly from the national-religious camp, now support Jews entering “permitted areas” that, they believe, are outside the confines of the Temple and hence permissible for entry. This process has led to an increase in the number of Jews visiting the site, and to the establishment of organizations that advocate Jewish prayer in the “permitted areas.” While this is a minority position, it is one that is growing.<sup>3</sup> In addition, some extremist Jewish groups see the Temple Mount as an ideal site for creating a provocation in order to thwart political moves (an example is the attempt by the Revava movement, during the campaign against Israel’s disengagement from the Gaza Strip, to bring ten thousands Jews for a mass demonstration and show of force on the Temple Mount).<sup>4</sup>

A significant change in the perceived status of the Temple Mount among significant sections of the Israeli Jewish public was seen following the second Camp David Summit (in the summer of 2000) and the subsequent Israeli-Palestinian negotiations through to the Taba talks (January 2001). The denials by the Palestinian negotiations of the Jewish affinity to the Temple Mount, and the willingness of the Israeli government headed by Ehud Barak to consider such proposals as the suspension of sovereignty on the Mount, or the vertical separation of sovereignty (Palestinians above, in the area of the mosques, and Israel below, inside the mount and at the Western Wall),<sup>5</sup> paradoxically led to a strengthening of the status of the Temple Mount even among non-religious Jews, who tend to see the site as a key national symbol.

The Palestinian and Islamic ethos identifies the Temple Mount with the term mentioned in the Koran as the Mosque of *Al-Aqsa* – the entire site, and not merely the mosque building – as associated with the Koranic verse (1:17) relating the journey of the Prophet Mohammed from the Holy Mosque (Mecca) to the Furthest Mosque (*Al-*

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<sup>3</sup> See: Amnon Ramon, *Beyond the Western Wall: The Attitude of the State of Israel and the Different Sections of the Jewish Public toward the Temple Mount (1967-1999)*; Reiter, *Sovereignty of God and Man*, pp. 113-142).

<sup>4</sup> See: Nadav Shragai, “A Provocation that Became a Threat,” *Ha’aretz*, April 10, 2005.

<sup>5</sup> On these ideas and others raised at Camp David, see: Gilad Sher, *Within Reach*, Yediot Aharonot, Tel Aviv, 2001, pp. 181, 218, 228, 231, 233, 248, 285, 331, 361 and *passim*.

*Aqsa* in Arabic means “the furthest”). Islamic tradition relates that Mohammed rose into the heavens from the rock (under the Dome of the Rock), and it was here that the commandment was given relating to the five daily prayers incumbent on the Muslim believer.

From the seventh century through 1967 (with the exception of 88 years of Crusader rule and 30 years of British rule), the Temple Mount / *Al-Haram Al-Sharif* was under full Muslim control. This long period consolidated a strong affinity between Islam and Muslim believers and the Mount, whose sanctity was actually enhanced during periods when the Mount was under the control of “infidels.”

Although the sacred site has been under the internal management and control of the Muslim Waqf since 1967, Muslims consider it to be “desecrated” and constantly threatened by the Israeli-Jewish side in the conflict. The actions and failings of the Israeli-Jewish side, which is perceived as controlling the Temple Mount since the Six Day War, have played into the hands of Muslim elements. The arson attack on the Al-Aqsa Mosque in August 1969 marked the start of a media and propaganda campaign that has, for the past decade, adopted the slogan “Al-Aqsa Is in Danger!” This psychological campaign seeks to establish that, as long as East Jerusalem (and, in particular, the Historical Basin and the holy places) are under Israeli control and sovereignty, the Al-Aqsa site is in danger, and it is the religious duty of every Muslim to act to secure its liberation. At the same time, there has been a strengthening of the Palestinian and Muslim rejection of the Jewish connection to the Temple Mount and to its status as the site of the First and Second Temples, even though this rejection is contrary to early Muslim sources<sup>6</sup> and to Christian tradition, which recognizes the Jewish connection to the Mount.

For both sides, then, the Temple Mount is a charged and explosive site to be treated with the utmost caution. In addition to developing agreement on the key questions relating to the authorities for the management and control of the site, attention must

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<sup>6</sup> Yitzhak Reiter, *From Jerusalem to Mecca and Back – Muslim Solidarity on Jerusalem*, Jerusalem Institute of Israel Studies, Jerusalem, 2005, pp. 35-42.

also be given to the way the agreement can be “marketed” in order to secure acceptance by the majority of Israeli Jewish and Palestinian Muslim communities.

**2. Constraints Mitigating against an Accord on the Question of the Temple Mount / *Al-Haram Al-Sharif***

- A. The Palestinians have adopted a consistent and forceful position that utterly rejects any Jewish right to pray in any part of the site, and negates recognition of any legitimacy for any Israeli status or authority in connection with the Temple Mount. While the leaders of the Waqf, who have varying connections with Jordan and the Palestinian Authority, have reached informal practical arrangements with the Israeli authorities regarding provisions for security, entry and behavior on the site, they consider these quiet agreements to be no more than a temporary provision “as long as the occupation prevails.” Their position regarding the permanent settlement is completely different, and they believe that the Mount should be under full Palestinian control and sovereignty.
  
- B. An additional factor impeding the possibility of compromise on the Temple Mount is the approach encouraged by the Palestinian leadership to present the profound connection to Jerusalem as being not merely a Palestinian matter, but a concern for the entire Muslim nation. This idea has been absorbed and internalized in the Muslim world, to the extent that at academic and semi-formal meetings of Israelis, Palestinians and representatives from the Arab nations, the latter express more extreme opinions regarding the possibility of compromise in Jerusalem than do the Palestinian representatives themselves. The Second Camp David summit, in the summer of 2000, illustrated the well-known fact that the question of the Muslim holy places in Jerusalem, and the question of East Jerusalem in general, is no longer a merely Palestinian issue. Evidence of this could be seen during the trans-Atlantic discussions chaired by President Clinton in July 2000, at the request of Yasser Arafat, with Arab leaders in order to hear their opinions on the compromise proposals he raised on the subject of Jerusalem. The Palestinian side sought to secure support from the Arab and Muslim world, and was more successful in this than it could have anticipated,

and possibly even than it would have liked. The Palestinians now find themselves “shackled,” to a large extent, on the question of the Temple Mount / Al-Haram Al-Sharif, and restricted in terms of their leeway. Any proposal raised at the negotiating table on the question of Jerusalem will require the consent of key Arab and Islamic elements, principally the rulers of Egypt, Saudi Arabia, Morocco, Jordan and the rich Gulf States on whose financial support the Palestinians depend. The implication is that the room for political maneuvering on the holy places in Jerusalem has been reduced, and that discussion of the holy places in Jerusalem now belongs to a broader political context of foreign relations.

- C. Among the negotiators on behalf of the Palestinian Authority, there is a mistaken evaluation regarding the position of the Israeli public and leadership relating to possible solutions for the Historical Basin in general, and the Temple Mount – Al-Haram Al-Sharif in particular. The Palestinian representatives believe that, at the moment of truth, the Israeli side will be willing to accept full Palestinian sovereignty over the Temple Mount / Al-Haram Al-Sharif, in return for Palestinian recognition of Israeli control in the Western Wall plaza and the Jewish Quarter. They wrongly believe that the Temple Mount is not so sacred to the Jews, and that Israel is merely using the Mount as a bargaining chip to secure achievements on other issues on the table (such as the return of refugees and the right of return). This evaluation is based mainly on the Halachic evaluation prohibiting Jews from entering the Temple Mount, on the secular character of the Israeli regime and large sections of Israeli society, and on the fact that Israel has refrained from taking full control of the Temple Mount since 1967. These Palestinian elements are unaware of the processes Israeli society has undergone over the past generation and of the growing importance of the Temple Mount as a national symbol, particularly after the second Camp David summit.
  
- D. As noted above, Palestinian construction work on the Temple Mount, the willingness of the Barak government to make concessions regarding sovereignty on the site, and the denial of the Jewish affinity to the Temple Mount and the Western Wall by Yasser Arafat all, paradoxically, strengthened the status of the

Temple Mount in the Israeli conscience. This development has been identified in opinion polls, the most recent of which showed that only 9 percent of Jews are willing to accept exclusive Palestinian sovereignty in the site as part of a peace agreement, while 51 percent insist on exclusive Israeli sovereignty over the Temple Mount.<sup>7</sup> These positions within the Jewish public (and particularly in religious and ultra-Orthodox circles) will make it very difficult for the Israeli leadership to be flexible on the question of the Temple Mount. It is evident that any Israeli concession in terms of Israeli sovereignty on the site (or even the official institutionalization of the status quo) will provoke too strong reactions among significant sections of the Jewish public **to be feasible ??**. Strong opposition will come not only from the national-religious and ultra-Orthodox sectors, but also from within the non-religious population. Extremist Jewish groups and organizations active on the issue of the Temple Mount can also be expected to take various forms of action (including the use of violence and provocations) in order to thwart any attempt to reach a compromise on this issue.

- E. As on the Palestinian side, the Israeli leadership also incorrectly evaluates the processes that Jerusalem has undergone in the Palestinian psyche and that of the entire Arab and Muslim world.<sup>8</sup> The demand for “residual” or “divisional” Israeli sovereignty on the Temple Mount, as raised by the Israeli side during the Camp David discussions in July 2000, is an example of the misunderstanding of the potential room for maneuvering – which is almost non-existent – on the Palestinian side, in light of the processes presented above.
- F. Accordingly, the leeway on both sides in terms of a compromise on this sensitive issue is extremely limited, due to pressure from influential religious circles (on both sides) and from significant segments of the Israeli and Palestinian populations, who view any compromise on the Temple Mount as

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<sup>7</sup> Nadav Shragai, “Survey: 91% of Jews Unwilling to Give the Western Wall for Peace,” *Haaretz*, March 10, 2005.

<sup>8</sup> See: Yitzhak Reiter, *From Jerusalem to Mecca and Back*, Jerusalem Institute for Israel Studies, Jerusalem, 2005, pp. 81-114.

injuring the holies of sites (in both the religious and national senses) and their most precious assets. It is in this context that various figures (on both sides) have argued in the name of religion (and in the name of God) that politicians and mere mortals have no right to make concessions on such a sacred subject that properly belongs to God.

Despite these tremendous difficulties, we could not refrain from examining this issue, which constitutes the greatest stumbling block threatening any effort to achieve a permanent peace settlement in the Middle East. We chose to examine the alternatives proposed by Moshe Hirsch in his article,<sup>9</sup> although it is equally possible to propose special alternatives for arrangements on the Temple Mount that are not necessarily congruous with the alternatives for the Historical Basin, such as the management of the Temple Mount by an international body and the division of sovereignty between Israel and the Palestinian state in the remaining parts of the Historical Basin. However, the prospects for the realization of such alternatives would seem to be extremely slight.

### **3. Discussion of the Alternatives for an Arrangement in the Temple Mount and the Western Wall**

#### **First Alternative: Full Israeli Sovereignty and Control throughout the Historical Basin**

Implementation of this alternative regarding the Temple Mount could take place according to one of the following secondary alternatives:

- A. Granting special status to the Muslim Waqf in terms of the management of the Temple Mount, such as autonomy, diplomatic status, or a similar arrangement, alongside a similar special status for Christian and Jewish bodies in managing their holy places.<sup>10</sup> Places sacred to more than one religious community would be managed according to the existing status quo.

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<sup>9</sup> See Moshe Hirsch's article on the alternatives in this booklet.

<sup>10</sup> Shmuel Berkowitz proposed that the area of the mosques on the Temple Mount should be the location of the Palestinian diplomatic delegation in Jerusalem, thus granting it the status and immunity established in accordance with the rules of international law. See: S. Berkowitz, *The*

In any arrangement, provisions will be ensured for entry into the Temple Mount area by Israeli and non-Muslim visitors. Entry into the site by senior Israeli government officials could be conditioned on prior consultation and coordination with the Muslim Waqf. The directors of the Waqf could be granted international immunity.

- B. The continuation of the status quo, in accordance with which the Temple Mount is managed by the Muslim Waqf, subject to Jordanian control and with a level of affinity to the Palestinian Authority. Israel is responsible for overall security and for the external shell of the site (through the police outpost on the Mount, the Makhkama building and at the Mughrabi Gate). Jews are entitled to visit the Temple Mount area, but not to engage in prayer or ritual.
  
- C. Strengthening Israeli control beyond that provided by the current status quo. This secondary alternatives presents a situation that is preferable to that pertaining at present from Israel's perspective. Strengthening Israeli control of the Mount could, in theory, be manifested in four spheres: In the more vigorous enforcement of planning and building laws and the Antiquities Law; in greater Israeli involvement in the routine management of the site (opening and closing hours, who is entitled to enter, censoring the sermons on Fridays, and such like); in enabling Jews to pray in the site on certain dates and in specific locations; in establishing a stronger presence of the security forces within the Temple Mount area in order to enhance Israeli security control and maintain public order.

In our estimation, any change in the status quo created on the Temple Mount since 1967 would lead to violent and widespread reactions among the Muslim population and to fierce international opposition. It is important to emphasize that strengthening Israeli control over the Temple Mount does not necessarily imply permitting Jews to pray on the Mount or changing the rules of the de facto status quo that has emerged since 1967 in terms of ritual and prayer. It is highly likely that changes in this field would lead to a major outburst of the utmost ferocity, in Jerusalem and in wider

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*Wars of the Holy Places*, Jerusalem Institute of Israel Studies and Hed Artzi, Jerusalem, 2000, p. 425.

circles in the Arab and Muslim world. However, attention could be given in this alternative to establishing closer Israeli supervision of building and planning activities by the Muslim bodies in the Temple Mount, and to enforcing at least some of the Israeli laws in the fields of planning, building and antiquities. In all the alternatives, the Waqf should be prohibited from undertaking archeological excavations and construction work on the Temple Mount, with the exception of routine maintenance work to be undertaken with Israeli authorization. In secondary alternative B, it should be ensured that the Muslim body managing the activities in the Temple Mount site act to prevent inciting statements in the Friday sermons.

**Evaluation:** It is evident that these alternatives (including the first secondary alternative) will not be acceptable to the Palestinian and Arab side, and there is no chance that they could lead to a settlement of the status in the Historical Basin.

### **Second Alternative: Full Palestinian Sovereignty and Control throughout the Historical Basin**

In this alternative, the Palestinians would enjoy legal sovereignty and full legal authority in the Temple Mount site. However, within the framework of the agreement between the sides, it would be possible to include restrictions intended to prevent injury to the character of the site and to the interests of the members of other faiths on the Mount. Current Israeli security control over the external shell and the gates to the Temple Mount would be removed and Israel would no longer restrict entry into the site. However, Jews and non-Muslims would continue to be entitled to enter the site for the purposes of visiting and tourism only, at fixed hours as agreed by the sides.<sup>11</sup>

In addition, the State of Israel will be required to establish provisions enabling Muslim and Christian citizens of Israel to enter their holy places under Palestinian sovereignty and control, including the Temple Mount. Jews will enjoy the right of access and worship at the Western Wall, which will be managed by the Jewish religious authorities with an autonomous or diplomatic status, similar to the

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<sup>11</sup> Similarly, the right of access and worship of Jews would be maintained in other holy places, such as the cemetery on the Mount of Olives, the Tomb of Zachariah, Yad Avshalom and other Jewish holy places to be included in the sovereign territory of the Palestinian state, as and when it is established.

management of the Temple Mount by the Muslim Waqf, under Israeli supervision, according to the first alternative. Muslims will be permitted to enter their holy places within Israeli territory, such as the Tomb of David – Nabi Daoud – on Mt. Zion.

**Evaluation:** This alternative would be acceptable to the Palestinians and to many countries, but would be utterly rejected by Israel. Accordingly, there is no chance that it could lead to a settlement in the Historical Basin.

### **Third Alternative: Territorial Division between the Sides, with International Supervision**

The territorial division of control in the Historical Basin is a solution that reflects the needs of both sides to maintain effective control over the sites that are most important to them: The Temple Mount / Al-Haram Al-Sharif for the Muslims, and the Western Wall and the Jewish Quarter for the Jews.<sup>12</sup>

Accordingly, in this alternative the Temple Mount will be under Palestinian sovereignty, while the Western Wall and the Western Wall Tunnel (excluding the northern exit, and including the Jewish Quarter and the access road thereto) will be under Israeli sovereignty. The Palestinian side will be subject to restrictions in certain aspects relating to the Temple Mount in order to protect Israeli interests, while restrictions would also be imposed on Israel, particularly in terms of excavations and activities in the Western Wall and Western Wall Tunnel areas. Works will only be undertaken on the Temple Mount or at the Western Wall with the agreement of both sides. In the absence of agreement between the sides, the head of the international supervisory mechanism will determine the issue. The sovereignty of each side will include jurisdictional authority. The agreement would ensure the presence of an access road to the Western Wall under Israeli control (such as the Pope Road, which leads from the Sultan's Pool to the Western Wall and the Jewish Quarter via Dung Gate).

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<sup>12</sup> Israeli sovereignty over the Temple Mount in accordance with this alternative is, in our opinion, a relatively theoretical possibility, and appears in Alternative C above. See also the article by Moshe Hirsch on the alternatives in this booklet.

Possible restrictions on the Palestinian side might include: denial of access to a restricted area on the Temple Mount plaza from where it is possible to throw stones down to the Western Wall plaza; ensuring free access for non-Muslim visitors and tourists (without prayer or other religious ceremonies), and for Israeli Muslim citizens (without any particular restrictions). Access to the Temple Mount will be permitted during agreed hours and with agreed entry arrangements (no fee will be charged for visiting the Temple Plaza, while a reasonable fee will be charged for visits to the Dome of the Rock, the Al-Aqsa Mosque, and the Islamic Museum; modest dress and behavior will be mandated); maintaining the existing character of the site; and prohibiting demolition, construction or excavation works unless these are agreed by both sides.

Due to the special status of the Al-Haram Al-Sharif site (Al-Aqsa) in the Muslim world, this possibility will take into consideration including in the international supervisory body representatives of Muslim countries that maintain diplomatic relations with Israel (Turkey, Jordan, Egypt, Qatar, Morocco and such like), as well as a representative of the Muslim citizens of the State of Israel. A representative on behalf of UNESCO could also be included.<sup>13</sup>

**Evaluation:** In certain circumstances, this alternative might be acceptable to Palestinian and international opinion. However, on the Israeli side (both among the Israeli leadership and among the Jewish public), the chances of it being accepted in the foreseeable future are very slight.

#### **Fourth Alternative: Joint management, the division of authorities between the sides and international backing**

In this alternative, the Temple Mount will be managed by the Muslim Waqf, while the Western Wall (including the Western Wall Tunnel) will be managed by an Israeli Jewish authority. Joint Israeli-Palestinian management will be effected in terms of maintaining order and security, supervising entry into the site, and addressing

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<sup>13</sup> A detailed model for an international supervisory mechanism for the holy places was proposed by Shmuel Berkowitz in his doctorate thesis. See: S. Berkowitz, *The Legal Status of the Holy Places*, thesis toward an LL.D. degree, the Hebrew University of Jerusalem, 5738, pp. 375-377.

maintenance and renovation problems. No national flags will be flown over the Temple Mount or the Western Wall, and no prominent signs will be erected manifesting the sovereignty of each country. An international body with substantive powers will maintain supervisory and monitoring operations in order to ascertain that the sides are maintaining their commitment to the agreement, and will be empowered to impose sanctions on any side that fails to do so.<sup>14</sup>

Jurisdictional authorities will be determined in accordance with the citizenship of the person suspected of breaking the law; in the case of foreign visitors, authority will be determined according to the point through which the suspect entered the Historical Basin (through Israeli territory or through the territory of the Palestinian state). In the event that the joint management arrangement collapses, jurisdictional authorities will be transferred to the international body. Jurisdictional authority relating to the violation of the arrangement will rest with a joint committee of both sides and the international body.

The international body will ensure the implementation of the provisions of the agreement relating to the following issues: freedom of access and entrance arrangements for visitors; prohibiting prayer by non-Muslim visitors to the Temple Mount; prohibiting excavation, construction, demolition and such like; prohibiting changes to the character of the site or attempts to display signs of national sovereignty; maintaining public order and security; and prohibiting political activities, including incitement of any type.

If the sides fail to respect the undertakings they made in the context of joint management, the international body will be empowered to take over the management and operation of the site pending the resolution of the dispute between the sides and the emergence of conditions permitting the reapplication of the agreement.

**Evaluation:** Both sides will find it difficult to accept this alternative. The Palestinians will not accept Israeli involvement in security matters on the Temple Mount, while the Israelis will not accept Palestinian involvement in the affairs of the Western Wall,

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<sup>14</sup> See the article by Moshe Hirsch in this booklet.

and will be reluctant to accept the exclusive management of the Temple Mount by the Muslim Waqf. Nevertheless, this alternative seems more realistic than the preceding ones, albeit not in the foreseeable future.

**Fifth Alternative: Management of the Historical Basin by an International Body, with the Delegation of Authorities to Both Sides**

In this alternative, the international body will constitute the source of authority for control in the Temple Mount and Western Wall, and will delegate some of its authorities to the religious bodies that currently manage the sites (the Waqf on the Temple Mount and the Chief Rabbinate and/or the Western Wall Heritage Fund in the Western Wall and the Western Wall Tunnel). This delegation will apply provided that the sides respect the rules, restrictions and undertakings adopted regarding the management of the sites. The most important managerial function of the international body will be in the security sphere; it will refrain from intervening in the arrangements for ritual procedures and in the routine management of the Temple Mount and the Western Wall.

The international body will maintain strict supervision through a strong international police force, ensuring the maintenance of arrangements in the following fields:

- Refraining from displaying symbols of national sovereignty on the Temple Mount;
- Ensuring freedom of worship for the sides (Muslims on the Temple Mount and Jews at the Western Wall) and free access for visitors;
- Maintaining the existing character of the sites and refraining from unilateral excavation, construction or demolition.

In the event that either side violates the undertakings and restrictions it accepted in the agreement, the international body will be able to assume the authorities delegated to the sides, pending the situation's return to its former status.

Jurisdictional authority in areas relating to ensuring the undertakings (with the exception of minor offenses by private individuals) will rest with the international body, which will establish a special tribunal for this purpose and possibly even maintain its own detention facility.

**Evaluation:** Of all the alternatives mentioned here, this is the most realistic, particularly if the period of management by the international body is presented as an interim one. This will enable both sides to argue that they have not waived their sovereignty over the Temple Mount and Western Wall, and will effectively continue to manage both sides in accordance with the practices that have developed since 1967. An important condition for realizing this alternative is that both sides must have confidence in the international body and its ability to manage the holy place in a fair manner. However, it should be assumed that extremist groups on both sides will see the international control of the Mount as tantamount to sacrilege, and will attempt to struggle against this control by all means possible. A further weakness of this alternative lies in the profound difficulty of persuading key elements in the international arena (particularly the United States) to join the international body – a complex mission liable to entail difficult and unforeseeable complications.

**Conclusion: The Division of Responsibilities on the Temple Mount and at the Western Wall according to the Different Alternatives**

<b>Area of Action</b>	<b>Alternative A</b>	<b>Alternative B</b>	<b>Alternative C</b>	<b>Alternative D</b>	<b>Alternative E</b>
Sovereignty (control)	Israeli (not all the manifestations of sovereignty will be realized in practice)	Palestinian	Palestinian on the Temple Mount and Israel at the Western Wall and Western Wall Tunnel	Suspended	The international body is the source of authority, but does not intervene in routine management and ritual arrangements
Jurisdictional authority	Israeli	Palestinian	Palestinian on the Temple Mount and Israel at the Western Wall and Western Wall Tunnel	Individuals – according to citizenship or according to the point of entry into the Historical Basin; in the case of the violation of arrangements by either side - the joint committee under international auspices.	An international body in accordance with a special agreement
Security in the “shell”	Israeli	Palestinian	Geographical division between Palestinian and Israeli security services.	Geographical division under international supervision.	International body.

<b>Area of Action</b>	<b>Alternative A</b>	<b>Alternative B</b>	<b>Alternative C</b>	<b>Alternative D</b>	<b>Alternative E</b>
Policing and public order	Israeli in the shell, with the authority to enter the site in the case of violent incidents; guarding by the Waqf inside the site.	Palestinian; guarding of the Western Wall with Israeli involvement.	Palestinian on the Temple Mount and Israeli in the Western Wall plaza.	Palestinian on the Temple Mount and Israeli in the Western Wall plaza and in the access to the Western Wall from the Jewish Quarter, under international supervision.	International body.
Management	By a committee of the Waqf, including Israeli (Muslim) representatives.	Palestinian	Muslim Palestinian on the Temple Mount; Israeli Jewish in the Western Wall Plaza.	Muslim on the Temple Mount and Israeli Jewish in the Western Wall plaza.	The international body will empower the Muslim Palestinian side to manage the Temple Mount and the Israeli Jewish side to manage the Western Wall plaza.
Symbols and flags	No flags, except on the Makhkama building, which serves a security function.	As determined by the Palestinians.	According to sovereignty.	No flags or national symbols.	No flags or national symbols.

<b>Area of Action</b>	<b>Alternative A</b>	<b>Alternative B</b>	<b>Alternative C</b>	<b>Alternative D</b>	<b>Alternative E</b>
Freedom of access (entry by visitors, but not for prayer or ritual)	The only restrictions on entry will be for reasons of security and public order.	Access by non-Muslims will be ensured at agreed times.	Ensured under international supervision; the access road to the Western Wall and Jewish Quarter will also be ensured.	Ensured under international supervision.	Ensured under international supervision.
Freedom of worship	The situation in which Jews refrain from exercising their right of worship will continue.	Muslims only.	Muslims on the Temple Mount and Jews in the Western Wall plaza.	Muslims on the Temple Mount and Jews in the Western Wall plaza.	Muslims on the Temple Mount and Jews in the Western Wall plaza.
Rules of behavior	As coordinated by the sides.	As determined by the Muslims.	By sovereignty and custom.	With restricted supervision and according to custom.	As agreed, under the supervision of the international body.
Excavation, building, demolition	According to Israeli law.	According to Palestinian law.	Unilateral actions will be prevented.	Unilateral actions will be prevented.	Restrictions, under the supervision of the international body.
Authority of the international body	None.	None.	Monitoring and restricted supervision to ensure compliance with the restrictions and rights as detailed above; participation in the multilateral managing group.	Close monitoring and supervision to ensure compliance with the sides' undertakings; authority to remove management from the side violating its undertakings in a substantive and ongoing manner.	Full powers as the source of authority; delegation of managing authorities to the religious bodies, but these can be removed in the case of substantive and ongoing violations.

## **Map of Jewish Sites and Institutions in the Old City Area**

Editor: Gadi Wexler

Legend

Yeshivot, Kollelim and synagogues

Public institutions

Educational institutions

Sites and museums

Jewish residences in the Old City (outside the Jewish Quarter) and in the City of David

Area of the Jewish Quarter

## **Map of Muslim Sites and Institutions in the Old City Area**

Editor: Amnon Ramon and Mohammed Nakal

Legend

Mosque

Active educational institution

Museum/library

Muslim site of historical or religious importance

Administrative and service building

## **Map of Christian Sites and Institutions in the Old City Area**

Editor: Amnon Ramon

### Legend

Catholic institutions (including the Uniate Churches)

Greek Orthodox institutions

Armenian Orthodox institutions

Protestant institutions

Copt Orthodox institutions

Ethiopian institutions

Syrian Orthodox institutions

“White” Russian institutions (outside Russia)

Site under the authority of the Ministry of Religious Affairs