THE STATUS OF SOVEREIGNTY IN EAST JERUSALEM AND THE WEST BANK

I. Introduction and Background

The Six Day War of 1967 between Israel and its Arab neighbors left Israel in control of the West Bank of Jordan and East Jerusalem.[1] Both areas had been under the control of the Kingdom of Jordan[2] since the Palestine hostilities of 1948–1949. The debate on the status of sovereignty in these areas, frequently marked by emotion and misconception, has been conducted in the political arena both within the United Nations and without. This Note will first present a brief discussion of the recent history of the area in order to place the legal argument in a proper perspective. Second, the Note will trace the path of sovereignty in these areas, in the context of international law, from the termination of Turkish rule in 1923 to the present. Since Israel remains in control of the two territories, the Note will finally focus on the present status of Israel in the two territories and the attendant legal consequences.

On July 23, 1923, following four hundred years of Turkish rule in Palestine, Turkey signed the Treaty of Lausanne, in which Turkey renounced its rights to all territories outside its frontiers including Palestine.[3] Article 16 of the Treaty stated that the future of those territories was to be settled by the parties concerned.[4] The Council of the League of Nations, (hereinafter the Council), had already granted the Palestine Mandate to Great Britain,[5] and one

1. Israel also occupied the Golan Heights, previously under Syria's control, and the Sinai Peninsula and the Gaza Strip, previously under Egypt's control.

2. For purposes of this Note all references to the Hashemite Kingdom of Jordan and the Hashemite Kingdom of TransJordan, as named prior to 1949, will be shortened to Jordan.

3. Treaty of France with Turkey and Other Instruments 20 (1923). N. Feinberg, The Arab-Israel Conflict in International Law 35 and n.67 (1970).

4. Id.

5. Article 22 of the Covenant of the League of Nations outlined the Mandate system. The Palestine Mandate came into force on September 29, 1923. Feinberg, supra note 3, at 33 and n.61.

Article 22 divided those territories subject to mandates into three groups dependent upon the particular territory's readiness to exist as an independent nation. Palestine, as were all the territories under Turkish rule, was considered an "A" Mandate territory. Those within the "A" class were regarded as prepared for provisional recognition, with need for administrative advice only from the respective Mandatory power. Comment, International Law-Trusteeship Compared with Mandate, 49 Michigan L. Rev. 1199 at 1199 and n.2 (1951) (hereinafter Trusteeship Comment).

year later Great Britain assumed its responsibilities with the object of implementing the Balfour Declaration.[6]

When the Council was dissolved in 1946, the final Assembly noted that although its functions with respect to the mandate territories would terminate, those nations administering territories under mandates would continue to do so for the well-being of the people concerned.[7] Following a period of increasing tension in Palestine, Great Britain, unable on its own to alter the status of the territory, proposed a special session of the General Assembly to consider the Palestine question.[8] Thereafter, a United Nations Special Committee on Palestine was appointed and it reported to the General Assembly in the autumn of 1947.[9]

The result of that assembly was the Palestine Resolution which provided for the establishment of two states, one Jewish and one Arab, within the Mandate territory of Palestine.[10] The Jews accepted this partition despite reservations about the international-

6. The juridical effect of the Balfour Declaration is beyond the scope of this Note. See Mallison, The Zionist-Israel Juridical Claims To Constitute "The Jewish People" Nationality Entity and To Confer Membership in It: Appraisal in Public International Law, 32 Geo. Wash. L. Rev. 983, 1000-25 (1964).

The question of whether Palestine had at some time been promised to the Arab states by Great Britain is treated in depth in Feinberg, supra note 3, at 32-38.

7. Chapter XI of the United Nations Charter applies to all non-self-governing territories, as well as those formerly held under mandates from the League of Nations. The Palestine Mandate was still in existence at the time the Council dissolved and the United Nations was formed. Great Britain, as a Mandatory power, was required to file regular reports with the Secretary-General on the status of the territory. Trusteeship Comment, supra note 5, at 1200.

8. E. Lauterpacht, Jerusalem and the Holy Places 14 (1968).

9. Whether in fact the United Nations was competent to consider the Palestine question is an important issue. Although the Charter provided for the United Nations' continuing interest in the mandates, in 1947 there was no clear authority for the proposition that the General Assembly could convene to alter the status of a Mandate. The General Assembly regarded its own authority as sufficient. Indeed, the General Assembly had earlier considered a similar issue with respect to the Mandate in South-West Africa. United Nations Resolution 65 (I) (Dec. 14, 1946). This authority was subsequently confirmed by the International Court of Justice when it stated that the status of a mandated territory could be altered only with the consent of the United Nations. Advisory Opinion on International Status of South-West Africa, [1950] I.C.J. 128, 141–143.

By the terms of the Mandate, Great Britain was not entitled to terminate the Mandate nor to decide unilaterally Palestine's political future. It is reasonable to conclude that the General Assembly was not acting ultra vires. See E. Lauterpacht, supra note 8, at 15.

10. The Palestine Resolution, officially known as Resolution 189 (II), passed the General Assembly on November 29, 1947. It provided also for the internationalization of Jerusalem and the economic union of the two states.

ization of Jerusalem. Following the Resolution's approval by the General Assembly,[11] the State of Israel was established in Tel Aviv on May 14, 1948. However, the Arab states and the Palestinian Arabs rejected the partition plan,[12] and on May 15, 1948, the day the British Mandate expired, the Arab states invaded Palestine.[13] At the end of three months' fighting in 1948, Israel was in control of the new suburbs of West Jerusalem,[14] while Jordan occupied the city of East Jerusalem and the West Bank.

An Armistice Agreement[15] between Israel and Jordan was signed in April, 1949, which had the effect of freezing the rights and claims of the parties at the point of the cessation of hostilities. The Agreement was dictated by military considerations and was not intended to prejudice the position of either party in any peaceful settlement. No such peaceful settlement has ever been realized. Rather, the border between Israel and Jordan was the scene of periodic terrorist attacks and border incursions, incidents which increased with great frequency in the two years preceding the Six Day War. Tension in the area peaked with the mobilization on Israel's border in May, 1967, of the armed forces of Jordan and other Arab states,[16] along with an agreement between Jordan and Egypt

11. The Resolution was accepted by a vote of 33 to 13 with 10 abstentions. Both the United States and the U.S.S.R. voted for the partition.

12. E. Lauterpacht, supra note 8, at 16.

13. [1948-1949] Y.B.U.N. at 171. On May 16, 1948 the King of Jordan cabled the Secretary General of the United Nations: "We were compelled to enter Palestine to protect unarmed Arabs against massacres." Similar cables were sent by the Governments of Egypt and Saudi Arabia. U. N. Doc. S/743, S/748, S/772 (1948) respectively.

14. The suburbs of Jerusalem, known as the new city of Jerusalem, soon became Israel's capital city.

15. 42 United Nations Treaty Series 303.

16. By the end of May, 1967, the Government of Egypt had requested the removal of the United Nations Emergency Force assigned to the area, had advanced the Egyptian army to the Armistice line between Israel and Egypt, and had closed the Straits of Tiran to Israeli shipping. The Jordanian army assumed a similar position of readiness on their Armistice Line and the Iraqi army joined the Jordanians. Meanwhile, the Syrian army massed on their border with Israel. Israel responded with a mobilization of the Reservists.

It is beyond the scope of this Note to discuss in detail the events that culminated in the Six Day War. For a full analysis of those facts, see Yost, The Arab-Israeli War—How It Began, 46 Foreign Affairs 304 (1967-1968); Keesing, The Arab Israel Conflict—The 1967 Campaign (1968); T. Draper, Israel and World Politics (1968). For the Israeli point of view, see Shapira, The Six Day War and the Right of Self-Defence, 6 Israel L. Rev. 65 (1971). For the Arab point of view, see F. Khouri, The Arab-Israeli Dilemma (1968).

which provided for joint military operations in the event of a war with Israel.[17] Finally, on June 5, 1967, the Six Day War began.[18]

II. The Question of Sovereignty[19]

By charting the path of sovereignty through this historical web, Israel's status in East Jerusalem and the West Bank in 1972 is

17. On May 30, 1967, King Hussein of Jordan flew to Cairo, and signed a defense treaty with Egypt. The treaty also provided that an attack on either nation would be considered an attack on the other and that Egypt's Chief of Staff would command both the Jordanian and Egyptian forces in the event of war. The same day, the Foreign Minister of Israel said that Israel would accept any solution to the present state of affairs which guaranteed free and innocent passage of ships through the Gulf of Aqaba. Several days later, Iraq joined the Jordanian-Egyptian Defense Treaty and Libya announced it would fight with Egypt in the Sinai Peninsula. See Keesing, supra note 16, at 18-25; and Yost, supra note 16, at 308–18.

18. While it is generally believed that Israel fired the first shot that began the formal hostilities of the Six Day War, the concepts of aggression and self-defense do not rely on the fact of attack as controlling. Indeed, two resolutions proposed to the General Assembly in the aftermath of the war which would have labeled Israel as the "aggressor" were soundly defeated. A Soviet resolution was defeated by a vote of 57–36 with 23 abstentions (A/L.519) and an Albanian resolution was similarly defeated by a vote of 71–22 with 27 abstentions.

Moreover, it has been convincingly argued that the mobilization of Arab forces at Israel's borders, the closing of the international waterway to Israel, the inability of the United Nations to ease the tension in the area, and the open and frank statements by the Arab governments proclaiming the imminent destruction of the State of Israel were sufficient reasons for Israel to protect its own territorial integrity and political independence under the principles of the United Nations Charter. J. Stone, No Peace—No War in the Middle East 3 (1968). See Yost, supra note 16, at 318.

19. The term "sovereignty" is one of those often used and vaguely defined words in the law. Many volumes have been written and many theories espoused to express what "sovereignty" means. It is not the purpose of this Note to endorse or create a new theory or definition. As used by this writer, the term "sovereignty" will be considered the supreme legal order in a given territory (notwithstanding the extraterritorial nature of a sovereign's power). It is the highest source of power and ultimate source of legality for any act or any person within its control. This concept of sovereignty includes: a) the juristic concept of the state, which, in turn, implies the competence to determine the limits of jurisdiction and the power to promulgate the laws to be applied, and b) the territorial concept of the state, which implies control over territory in a physical sense. While sovereignty connotes the independence of the particular state within those territorial boundaries, the concept of international law as a body of law which controls the conduct between sovereign states demands that a sovereign subject itself to those basic rules of law.

Sovereignty over any particular territory may change as control over the territory changes. However the change must be within those limits of international law. Article 2(4) of the United Nations Charter prohibits the use of force against the territorial integrity or political independence of another State. Therefore, sovereignty anticipates change, and several modes of acquisition of territorial sovereignty are recognized. It is this

ascertainable. The starting point for any modern discussion, and perhaps the source of confusion, is the renunciation of rights by Turkey and the simultaneous devolution of mandatory authority upon Great Britain. As unambiguous as Turkey's sovereign status is prior to 1923, her successor-in-interest has yet to be conclusively determined. At least four approaches have been presented as to the status of sovereignty during the Mandate period: (1) the sovereignty resided in the Council with the Mandatory authority acting as agent for the Council; (2) the grant of the Mandate to Great Britain transferred sovereignty in Palestine to the Mandatory power, subject to the provisions of the Mandate; (3) the sovereignty remained with the native inhabitants of the territory when Turkey renounced its rights in the area; (4) the sovereignty remained suspended during the Mandate period.[20]

Inasmuch as the Council had plenary authority to determine the Mandate,[21] it is arguable that the sovereignty stayed with the Council—the Mandatory power acting merely as an agent of the Council.[22] When the Council's existence terminated, it recognized the United Nations' interest, with the respective mandatory authority, in the realization of self-government for each of the mandates.[23] Sovereignty, the argument continues, would have devolved upon the new international body. This approach lacks validity, however, as the Council neither claimed sovereignty for itself, nor conveyed in a formal agreement any facsimile thereof to the United Nations.[24]

Although the native inhabitants of the region did not become citizens of the Mandatory power, and the mandatories had expressly disclaimed sovereignty over the respective mandate, one may suggest that the sovereignty lay in the particular mandatory, subject to the provisions of the mandate.[25] Article II of the Mandate entrust-

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concept of territorial change in sovereignty (and the supreme authority which flows with that sovereignty) which underlies the discussion of this Note. See generally Friedmann, et al, International Law 440 et seq. (1969); H. Lauterpacht, I Oppenheim's International Law 113 et seq. (6th ed. 1940).

20. The question arises because neither the Covenant of the League of Nations nor the United Nations Charter, which recognizes the principles of Article 22, provides an answer. See Trusteeship Comment, supra note 5, at 1204.

21. E. Lauterpacht, supra note 8, at 14.

22. In 1923, for example, Great Britain and Belgium agreed to modify the common frontier of their East Africa Mandate territories, and requested the consent of the Council to amend the Mandates accordingly. [1946–1947] Y.B.U.N. 575.

23. See note 5 supra and accompanying text.

24. Trusteeship Comment, supra note 5, at 1205.

25. Id. at 1206.

ed Great Britain with safeguarding the civil and religious rights of the inhabitants of Palestine irrespective of race and religion.[20] In 1923, an Order in Council, issued by the British Government, authorized the High Commissioner in Palestine to promulgate such ordinances as were necessary for the peace, good order, and government of the country and were not inconsistent with the Mandate.[27] Article 46 of an initial Order in Council fixed the law to be applied to the territory, incorporating English common law and equity into the laws of Palestine and into the ancient religious laws.[28] It is therefore evident that Great Britain exercised many attributes of judicial and legislative sovereignty.

Alternatively, sovereignty may have rested with the native inhabitants of the specific territories. As the primary objective of the mandate system was to prepare the non-self-governing territories for self-government, one may argue that once that goal of self-government was realized, the sovereignty vested in the people of the territory so recognized.[29] The argument vesting sovereignty in the people is advanced by the Council's recognition of this area as an "A" Mandate (i.e. prepared for provisional recognition).[30] To the extent the ultimate self-governing state lacks the stature of a government fully representative of those native inhabitants, or fails to integrate those inhabitants into the Government, it may militate against this proposition. Nevertheless, in light of the principles of the Man-

26. 8 League of Nations Off. J. 1007, 1008 (1922).

27. This ORDER IN COUNCIL gave the High Commissioner, a British subject, full legislative powers. PALESTINE ORDER IN COUNCIL (May 4, 1923). Relying on this grant of legislative authority, the High Commissioner promulgated an Ordinance expropriating certain springs for the purpose of supplying water to the City of Jerusalem. Overruling the Supreme Court of Palestine, the Privy Council in Jerusalem-Jaffee District v. Suleiman Murra, A. C. Privy Council 321 (1926) held that such Ordinance was not ultra vires as defined within Article 2 of the Covenant of the League of Nations, and that the appeal to the Privy Council was competent since the jurisdiction under the Mandate was jurisdiction in a foreign country as contemplated in the Foreign Jurisdiction Act, 1890.

With respect to the jurisdiction issue, an additional Order in Council made provision for appeals to the Privy Council from decisions of the Supreme Court of Palestine, sitting as a Court of Appeal or a court of first instance. PALESTINE ORDER IN COUNCIL (Oct. 9, 1924).

28. PALESTINE ORDER IN COUNCIL (Aug. 10, 1922). This Article fixed a mixture of the Ottoman law in force as of November, 1914, existing Orders in Council, common law and doctrines of equity in force in England. The legal ramifications of this Article, particularly the concept of "lacunah," are beyond the scope of this Note.

29. Trusteeship Comment, supra note 5, at 1206; and R. Chowdhurdi, International Mandates and Trusteeship Systems 236 (1955).

30. See discussion of Mandate system, supra note 5.

date system, it would be incongruous to conclude that the sovereignty was otherwise transferred to some third party at the granting of the Mandate.

A fourth approach to the sovereignty issue suggests that the sovereignty remained suspended during the Mandate period. Proponents of this view regard the mandate system generally as alien to the traditional concepts of sovereignty.[31] While the sovereignty is unoccupied or vacant during that period, the proposition does not preclude the vesting of sovereign rights to a proper party following the Mandate's termination. Furthermore, as distinguished from other notions of sovereignty which provided for the passage of title to some third party, this approach neither defeats the Council's objective of self-government for the area,[32] nor eliminates another state's opportunity at some future time to assert a valid claim to title.

Of these approaches, only the latter two retain any validity.[33] If one were to accept the proposition that the Council at one time possessed sovereignty, and successfully transferred it to the United Nations, any claim the United Nations could have asserted terminated with the Mandate. While Great Britain exercised many attributes of sovereignty, its claim similarly would have terminated with the Mandate. Even more important, with respect to both Great

31. The view is most succinctly expressed by Sir (Lord) Arnold McNair in the Advisory Opinion of the International Court of Justice in the International Status of South-West Africa, [1950] I.C.J. 128, 150:

> the Mandates System . . . is a new institution—a new relationship between a territory and its inhabitants on the one hand and the government which represents them internationally on the other—a new species of international government, which does not fit into the old conception of sovereignty and which is alien to it. The doctrine of sovereignty has no application to this new System.

32. In International Status of South-West Africa, Judge McNair further stated:

> if and when the inhabitants of the territory obtain recognition as an independent State, as has already happened in the case of some Mandates, sovereignty will revive and vest in the new State.

[1950] I.C.J. at 150. In this context, the approach to sovereignty which suggests that it remains with the native inhabitants of the area is no different than the approach which suggests that it remains suspended during the Mandate period.

33. Many combinations or novel theories have been offered, although none is as convincing as the theses that sovereignty either remained with the native inhabitants, or remained suspended during the period. For example, the United States asserted that sovereignty under the mandate system vested in the Allied and Associated Powers following World War I. The bases for this approach were several provisions of the Treaty of Versailles and the fact that the Allied Powers chose the Mandatories. The United States ultimately retreated from this position. Trusteeship Comment, supra note 5, at 1204–1205.

Britain and the United Nations, there was no conveyance of sovereignty to another party, although the United Nations attempted to arrange an appropriate political solution. On the other hand, a position that Great Britain, as the agent of the Council and then the United Nations, was limited to safeguarding civil and religious rights would be most compatible with either the proposition that the inhabitants retained the potential for primary authority, or the proposition that the sovereignty remained suspended during the Mandate period.

Under any approach to the status of the sovereignty during that period, it is fundamental that to leave the territory subject to acquisition by some foreign power following the termination of the Mandate would frustrate the policy of preparing the area for self-government. Jordan's invasion of Palestine in 1948 after rejecting the Partition Resolution resulted in Jordan's control of the West Bank and East Jerusalem. Whether Jordan acquired sovereignty at that time or some future time is the next consideration in a determination of sovereignty. In the very least, Jordan's actions must be viewed as a violation of those principles of the Mandate system; the Partition, although a compromise, would have effectuated the objective of self-government for both the Jewish and Arab inhabitants of the area. Furthermore, the action of Jordan was a violation of the principles of Article 2 (4) of the United Nations Charter which imposed on members the duty to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, and to refrain from acting in any manner inconsistent with the purposes of the United Nations.[34] Since the invasion by Jordan was a violation of international law, it therefore did not give rise to any valid legal title.[35]

Even though Jordan was not the legitimate sovereign in the areas it controlled following the war in 1948, it was able to insure its occupation of East Jerusalem and the West Bank by signing the Armistice Agreement with the new State of Israel in 1949. That occupation, characterized as a belligerent occupation under international law,[36] entitled Jordan to exercise military authority over the

34. Although Jordan was not a member of the United Nations until 1955, it has been reasonably suggested that the legality of its conduct is appropriately tested by reference to the United Nations Charter. E. Lauterpacht, supra note 8, at 42.

35. Blum, Missing Reversioners: Reflections on the Status of Judea and Samaria, 3 Israel L. Rev. 280, 283–287 (1968).

36. A prolific writer in this area, Professor Julius Stone, has said of Jordan's status:

the position of the State of Jordan on the West Bank and in East Jerusalem

territory, but did not permit Jordan to acquire sovereignty, unless such sovereignty was attained under a treaty of peace or some other recognized method in international law.[37] The Agreement did not validate for purposes of sovereignty an otherwise invalid occupation, and as provided in its terms, no unilateral act could alter the rights of any party as they existed when the Agreement was signed.[38] Therefore, Jordan's attempt in April, 1950 to annex the territory of East Jerusalem and the West Bank[39] was an invalid act both under the Armistice Agreement and under international law.

It may be argued in Jordan's favor, however, that after nineteen years of occupation it assumed de facto[40] sovereignty in East Jerusalem and the West Bank. Certainly the duration of its presence and the scope of its authority bear heavily on that conclusion. Decisions of the magistrates in both Hebron and Bethlehem[41] demonstrate that an active judiciary under the sovereign name of Jordan

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itself, insofar as it had a legal basis in May 1967, rested on the fact that the State of Jordan had overrun this territory during the 1948 hostilities against Israel. It was a belligerent occupant there.

J. Stone, The Middle East under Cease-Fire 12 (1967). See Blum, supra note 35, at 288.

37. The rights and obligations of a belligerent occupant are also aptly expressed by Stone:

> he does not acquire sovereignty unless it is ceded to him by a treaty of peace (which is the commonest method), or is simply abandoned in his favour without cession, or is acquired by him by virtue of subjugation, that is by extermination of the local sovereign and annexation of his territory.

J. Stone, supra note 36, at 12.

38. 42 United Nations Treaty Series 303.

39. See note 44 infra and accompanying text.

40. For these purposes the term de facto sovereign describes a situation in which a government has been established with an active judiciary, legislative, and executive, in which the inhabitants act as if they were under that government's sovereignty, and in which there exists some amount of world respect for this status. This is to be distinguished from a de jure sovereignty which is also valid under international law.

One may also suggest that Jordan did acquire sovereignty over the area through prescription. Lauterpacht defines "prescription":

> acquisition of sovereignty over a territory through continuous and undisturbed exercise of sovereignty over it during such period as is necessary to create under the influence of historical development the general conviction that the present condition of things is in conformity with international order.

H. Lauterpacht, I Oppenheim's International Law 576, (8th ed., 1955).

While some requirement of open and notorious occupation is necessary, neither the Arab state nor Israel recognized Jordan's presence as satisfying this mode of acquisition of sovereignty. For a discussion of prescription generally, see R. Y. Jennings, The Acquisition of Territory in International Law 20–23 (1963). On the possible effects of Israel's silence, see Blum, supra note 35, at 291.

41. See discussion p. 145 infra.

was operative in the West Bank prior to 1967, and has continued to function during Israel's occupation.[42] However, notwithstanding the fact that the Government of Jordan did not consider itself sovereign in the absence of any act of sovereignty, Jordan's attempt to annex the territory of East Jerusalem and the West Bank was not recognized by the world community. The Arab League voted unanimously to reject the annexation;[43] Israel naturally was silent; and Great Britain only recognized it with the reservation that recognition would cease with a final settlement of the status of the area.[44]

Moreover, the status of a de facto sovereign could not have inured to Jordan during the period of 1948–1967. The Armistice Agreement explicitly provided that neither party would gain any military or political advantage under the Agreement, and that neither country's unilateral act would alter the status of the parties. The Agreement may also be viewed as defeating any de facto sovereign claim which Jordan may have had in the area following its nineteen years of occupation. Clearly, it precludes any formal claim, but it would also implicitly prevent any de facto sovereign rights in the area, as the acquisition of those rights would prejudice Israel's political position. Therefore, as of early June, 1967, the sovereignty in East Jerusalem and the West Bank was an open question and Jordan's military occupation of nineteen years was abruptly ending.

At the conclusion of the Six Day War, Israel, having removed Jordan by legitimate measures,[45] occupied East Jerusalem and the West Bank. Israel's occupation of each area advances the analysis of the path of sovereignty to the third and final stage.

Two theses advanced hold that a status of sovereignty arose automatically from Israel's occupation. The first thesis states that sovereignty was unoccupied or vacant during the Mandate period, and Israel, as a lawful occupant, is in a position to fill that

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42. Although the Magistrate of Hebron improperly announced his decision on the validity of Order No. 145 on behalf of the legitimate sovereign of Jordan, it is clear that the courts continue to function enforcing local laws. Even assuming Jordan was the de facto sovereign, such a judgment is not permissible in the context of reviewing the act of a belligerent occupant. Blum, supra note 35, at 300.

43. Jordan's unilateral act of annexation violated a resolution of the Arab League which prohibited annexation of any part of Palestine. After mediation a compromise provided that Jordan's annexation was without prejudice to any future settlement. E. Lauterpacht, supra note 8, at 47, n. 1.

44. Id.

45. See discussion, supra note 18.

vacancy.[46] The second approach to Israel's legal standing rests on the traditional notions of belligerent occupation. Under international law, the status of a belligerent occupant is based on the propositions that some legitimate sovereign was ousted and that the reversionary rights of the sovereign must ultimately be protected.[47] Since Jordan was at most a belligerent occupant from 1948–1967,[48] it was not entitled to the reversionary rights of a legitimate sovereign. With respect to the occupied territories, the argument continues that although Israel itself may be a belligerent occupant, it owes no duty to protect the reversionary rights of a legitimate sovereign[49] and, consequently, is in control of territory to which no one can assert a more valid claim.[50]

Whether sovereignty is regarded as vacant or subject to the most valid claim, one arrives at the conclusion that a void existed in East Jerusalem and the West Bank, and that Israel was in a position to assume sovereignty in the area.

Ignored in each analysis is the interpretation of a sovereignty abated during Jordan's occupation and reserved for the native inhabitants of the territory from the Mandate period. Subscription to this view leads to the conclusion that there was not a void in sovereignty, but rather, a failure to exercise sovereignty on the part of the native inhabitants. As a lawful occupant of the territory, Israel might assert sovereignty in East Jerusalem or the West Bank now, or in the future.[51] However, the sovereign rights would not automatically vest in Israel. Conversely, under the theory which fails to consider the native inhabitants' reserved claim, such an act would be

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46. E. Lauterpacht, supra note 8, at 48.

47. Blum, supra note 35, at 293.

48. Id. at 292.

49. Id. at 294.

50. Professor Blum's argument is that a claim to title is generally not based on an absolute right, but rather on one of relative validity. Jordan's status of a belligerent occupant is founded "at most" on the conditions under which Jordan acquired control of the territory, while Israel's status of "more than" a belligerent occupant arises from the fact that it assumed control of the territory after Jordan's attack in 1967. As there was a void in sovereignty, Blum continues, Israel has the most valid claim to the area.

51. The possible modes of acquisition of sovereignty are annexation of the territory (subjugation) or occupation. The latter is the approach which Professor Blum has suggested. The difficulties with this approach are more applicable from a practical viewpoint to the West Bank where the majority of the population is Arab. There is no doubt that this is central to the position of the present Government of Jordan. However, the same does not apply to East Jerusalem, a city of many religious and ethnic groups, where a majority of the population was Jewish when Turkey left Palestine, and remains Jewish today.

unnecessary as Israel is lawfully in control of a territory to which no other state can show a better title.[52] At the present time, the posture of the Government of Israel may be more indicative of the ultimate resolution of this problem.

III. Israel's Posture and the Consequences of its Actions

A. *The West Bank*

It is abundantly clear that the Government of Israel considers itself no more than a military occupant in the West Bank. Israel has limited its activity by assiduously following a state occupation policy of "non-presence, non-interference, and open bridges."[53] Although the events of the last four years would militate against a conclusion claiming Israel's sovereignty over the West Bank, it remains important to examine the consequences of the approach which suggests that Israel is sovereign, as well as to examine the consequences of Israel's stated position of a military occupant.

Assuming Israel was not an unlawful occupant and as stated, had not acquired the status of a sovereign, what are the parameters of its authority? As a belligerent occupant under Article 43 of the Hague Regulations of 1907, Israel has the responsibility for ensuring public order and safety while respecting, unless prevented, the laws in force in the occupied country.[54] While traditional international law limits the scope of the law-making function of the occupant to changes necessitated by military considerations,[55] the more modern approach permits the occupant to promulgate those administrative ordinances and regulations necessary to protect his interest. However, like the traditional view, the more modern approach restricts the occupant's ability to alter the statutory laws or constitutional laws of the legitimate sovereign.[56] The actual limits of the authority are more constructively analyzed in the context of an actual decree of the Military Government in the West Bank.

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52. The logical extension of Blum's analysis is that Israel is sovereign in the area absent any further diplomatic act. Blum, supra note 35, at 294.

53. Coordinator of Government Operations in the Administered Territories, Ministry of Defense, Three Years of Military Government 1967–1970 (June 1970).

54. J. Scott, 2 Hague Peace Conference of 1899 and 1907, 397 (1909).

55. H. Lauterpacht, II International Law 437 (7th ed. 1952).

56. Friedmann, supra note 19, at 907–8; H. Kelsen, Principles of International Law 141 (2 ed., edited by Tucker 1967). For an example of the exercise of this authority, see Jerusalem-Jaffee District v. Suleiman Murra, supra note 27.

On October 23, 1967, the Commanding Officer of the Israel Defence Forces in the West Bank promulgated Order No. 145 which legitimated the status of Israeli advocates in the courts of the West Bank.[57] Arab lawyers in the area were on strike. In order to maintain the proper administration of justice, the Officer authorized the appearance of Israeli advocates in the courts for a period not to exceed six months. The validity of the Order was challenged before two Magistrates in the West Bank, one in Bethlehem and one in Hebron. Opposite conclusions were reached. The Hebron Magistrate claimed that Jordan remained the legitimate sovereign, and that since the Order was not required for the protection of Israel's military forces, it was ultra vires an occupying authority.[58] To the contrary, the Bethlehem Magistrate took the more modern view of occupation under international law, and concluded that Israel was in a valid position to promulgate orders necessary for the well-being of the population. Since the Preamble of Order No. 145 indicated the importance of the Order to the effective operation of the courts, the Magistrate reasoned that the Order was a proper exercise of that power.[59]

Order No. 145 raised several significant issues. Was the Order within the limits of the authority of a belligerent occupant? What was the obligation of the local courts to administer the Order? What would be the consequences if such an Order were inconsistent with an existing law? All these questions, save the last one, were treated by a leading commentator.[60] Briefly, the analysis defines Israel's authority as encompassing protection of the public order and safety. Within those limits, an Order to insure the administration of and access to local courts by authorizing the appearance of Israeli advocates was permissible. Order No. 145 is plainly within the prescribed boundary of an occupant's authority and therefore, it is beyond the review of the courts.[61]

If one accepts the thesis that Israel is the sovereign because it holds the most valid title (or because there was a vacancy in sovereignty now filled by Israel's occupation), the discussion of the legitimacy of Order No. 145, or any similar order, is largely irrelevant. As a sovereign, Israel could promulgate such an order without

57. Blum, supra note 35, at 279.
58. Id. at 280.
59. Id.
60. Id. at 297-301.
61. Id. at 299.

question, and a local court would be compelled to follow it.[62] In comparison, assuming *arguendo* the validity of Jordan's de facto sovereignty claim and recognizing Israel's apparent belligerent occupant status, the discussion would not be irrelevant if the Order proposed a change in substantive or constitutional law in the territory, or if a conflict arose in the application of law.[63] Under the rules of law for belligerent occupation, Israel would be acting outside its authority if one of the orders had the former effect.[64]

What would emerge is a clash between a de facto occupant (Israel) and a de facto sovereign (Jordan). Since Israel has assumed the role of a military occupant of its own volition, it may be argued that the Government would change its public posture to that of a sovereign before the above dilemma reached the crisis stage.[65]

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62. Professor Blum engages in the discussion only on the assumption that it may be irrelevant, given the validity of his thesis. It must be remembered that under his analysis, Israel is a sovereign in the territory. At this point the view of the writer of this Note takes a sharp turn away from Blum's analysis, and the consequences will be very evident.

63. As expressed by Glahn, the distinction in the legislative authority of an occupant is well-defined:

> It is held that administrative regulations and executive orders are quite sharply distinct from the constitutional and statute law of a country and that they do not constitute as important or as vital a part of the latter's legal structure. Hence the occupant is held to have the power to interfere and to enact such regulations and ordinances as are deemed fitting and proper.

Glahn, The Occupation of Enemy Territory 99 (1957), as cited in Blum, supra note 35, at 296.

64. See text accompanying notes 56 and 57 supra.

65. One would presume that Israel would assert sovereignty in the West Bank in much the same way that it has in East Jerusalem, that is, through annexation of the territory. (The operating assumption is that annexation of East Jerusalem constituted an act of sovereignty. See discussion supra notes 67–69). A very substantial hurdle under any approach to sovereignty in the West Bank remains, i.e. a large proportion of the population of the West Bank is Arab. Supra note 52.

However, this hurdle has been limited to some extent as a sprinkling of Jewish settlements have appeared on the West Bank following the Six Day War. These settlements are not only in areas previously unsettled, but also are in areas where Jewish settlements existed prior to the war in 1948, e.g. Kfar Etzion. The land of this group of settlements was purchased from the Arab landowners during the 1920's and 1930's.

One may also regard the return to these settlements as an indication of a bifurcated Government policy. While the Government has acted primarily as a belligerent occupant, the establishment of Jewish settlements can be viewed as a manifest act of a sovereign.

Another isolated manifest act of a sovereign by the Government of Israel is the order legitimizing the appearance of Israeli advocates in the local courts of the West Bank. Although the argument was previously made that the Order was a proper one within the scope of a belligerent occupant, one may also argue that, since that order has never been rescinded, the constant appearance of Israeli advocates as officers of the local courts constitutes the manifest acts of a sover-

However that political alternative would not be available if the clash were framed before the Israel Supreme Court as a question of the application of conflicting laws.[66] Absent a unilateral change in Israel's status, Israel is confined to those rights and obligations of an occupant. The potential dilemma of a conflict arising from the application of laws or from a desire on Israel's part to overrule an existing law promulgated by Jordan is always present.

B. *East Jerusalem*

In contrast to the Government of Israel's deliberate posture of a military occupant in the West Bank, the Government has assumed the attributes of a sovereign in East Jerusalem and has not restricted itself to protecting civil rights or maintaining order. On June 28, 1967, the Government of Israel published a series of Amendments and Orders, the cumulative effect of which was to annex East Jerusalem into the area of the municipality of West Jerusalem (the new city and capital of the State of Israel). A physically and legally united city was created. The Act of Parliament authorizing an inclusion of new territories provided: "The law, jurisdiction, and administration of the State shall extend to any area of Eretz Israel designated by the Government by order."[67] The authority to extend the boundaries of Israel was granted to the Minister of the Interior, by the Order of the Government.[68]

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eign. See discussion p. 145 supra. The two examples given above are intended to demonstrate: (1) that the Government's policy with respect to the West Bank may not be as clearly defined as has been suggested earlier, and (2) that it may be simplifying the analysis of the Government's policy in the West Bank to regard that geographical area as one unit, since political considerations may override the legal claims.

66. Although Jordan was not a de jure sovereign, it arrogated the rights of a de facto sovereign. Supra note 46. Very real problems exist in the enforcement in the West Bank of a judgment by an Israeli court. For example, in Hanzalis v. Greek Orthodox Patriarchate Religious Court, 23 P.D. 260 (1969), discussed in note 75 infra, a question existed as to the enforcement of an order of the Israel Supreme Court instructing the devolution of a decedent's land in the West Bank. The Attorney General of the State of Israel argued that the court should abstain from granting an order which would have no legal effect. The issue was complicated by the religious court which was sitting in East Jerusalem, which also had jurisdiction over certain of these matters. The jurisdiction of the religious courts under the Israeli law which is now in force in East Jerusalem, as opposed to the religious courts' jurisdiction under Jordanian law, presents a continuing conflict.

67. Law and Administrative Ordinance (Amendment No. 11) Law, 1967.

68. The Order was in two parts. First, an Amendment was passed to the Municipalities Ordinance 1967 empowering the Minister of the Interior to enlarge the area of a particular municipality by proclamation. Second, the proclamation of the Minister was issued incorporating the area of East Jerusalem into the district of Jerusalem.

To many, Israel's unilateral acts constitute a manifest act of sovereignty.[69] Although the Arab citizens of East Jerusalem have not yet been granted citizenship in Israel, and have only been permitted to vote in municipal elections, one may suggest that this situation represents a political decision rather than proof of a belligerent occupant status. However, one learned scholar concluded in October, 1968 that the actions by the Government of Israel did not constitute an act of sovereignty.[70] He offered in support of this position a statement made in July, 1967 by the Foreign Minister of Israel which spoke of the integration of Jerusalem for administrative and municipal purposes.[71] This argument was made four years ago and may no longer be valid, since Jerusalem now effectively exists as one unified city. Moreover, at least two decisions of the Israel Supreme Court since the purported annexation of East Jerusalem have rested on the proposition that the unified city of Jerusalem became an inseparable part of Israel.[72]

If sovereignty is the correct analysis, one should examine the consequences of that conclusion in the context of the status of sovereignty during the Mandate period.

The thesis that was developed earlier suggested a sovereignty reserved for the native inhabitants of the area, or at least a sovereignty suspended during the Mandate period. Neither approach precludes Israel, as a lawful occupant of the area, from asserting sovereignty now. By integrating Jerusalem into one municipal entity, Israel may even be credited with aiding in the implementation of a goal of the mandate system, the self-government of the area. How can Israel's manifest acts of annexation be valid, when similar acts by Jordan in 1950 had no such effect?

The simplest and clearest answer is that Israel's occupation of East Jerusalem did not result from an illegal use of force. Rather it was an act carried out in self-defense and therefore could give rise to a valid title.[73] To the contrary, Jordan's occupation from

69. Opinion of Agranat, J., President of the Israel Supreme Court in Ben Dov v. Minister of Religious Affairs, 22 P.D. 440 (1968), quoted from Comment, Christian Religious Courts and the Unification of Jerusalem, 5 Israeli L. Rev. 120 at 132 (1970); and opinion of Silberg, J., Deputy President of the Israel Supreme Court in Hanzalis, at 120.

70. E. Lauterpacht, supra note 8, at 50.

71. Id.

72. Supra note 69.

73. Supra notes 16–18. However, it ought to be recognized that the General Assembly of the United Nations passed a resolution calling upon Israel to rescind all actions taken to change the status of Jerusalem and declaring those acts invalid. G. A. Res. 2253, U.N. GAOR, Supp 1, at 4, U.N. Doc. A/L 527 (1967) The validity of the United Nations' resolution is questionable. First, the same

1948–1967 was the result of illegal action, which could not affect territorial change.[74]

The Government's purported act of annexation of East Jerusalem casts further doubt on the thesis that Israel assumed a sovereign status by virtue of its occupation. It would be difficult to contend that the ordinance incorporating East Jerusalem into a unified city merely confirmed an existing status quo. Opinions in a recent case before the Israel Supreme Court rely on the Ordinance as fixing the status of sovereignty,[75] and no mention is made of Israel assuming that position prior to the Ordinance.

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session of the General Assembly failed to recognize Israel as the aggressor nation. Second, the legal history of sovereignty as discussed in this Note suggests Israel has a valid claim to the sovereignty. Third, the resolution is not binding on the parties, but merely expresses the assembly's opinion.

74. Supra note 13.

75. For example in Hanzalis v. Greek Orthodox Patriarchate Court, 23 P.D. 260 (1969), the Israel Supreme Court held that the Court had jurisdiction to probate a will of a deceased resident of East Jerusalem. The High Court enjoined the Greek Orthodox religious court, sitting in East Jerusalem, from asserting jurisdiction since the Israel Succession Law provided for the jurisdiction of religious courts in decedents' matters only if all interested parties consented in writing. The petitioner in Hanzalis, the decedent's husband, would not consent. Troubling the Court was the fact that the property left by the decedent was located in the West Bank. As the Registrar of Lands in Jericho would not recognize any judicial order from the Israel Supreme Court and as the religious court would be a competent court where the property was situated, it was argued that the Supreme Court should dismiss the petition. Halevi, J. treated the issue squarely. He held that East Jerusalem is now part of the sovereign territory of Israel and therefore, a religious court operating within its boundary could apply foreign law only to the extent it was permitted under the laws of the State of Israel. Under the circumstances of this case, the religious court did not have jurisdiction. Silberg, J., concurring with Halevi, J., reached his conclusion for different reasons. Although he recognized the sovereignty of Israel in East Jerusalem, the Justice was prepared to deny the petition since it appeared that the petitioner would be unable to succeed ultimately in the recovery of the property due to the refusal of the Land Registrar in the West Bank to comply with the court's order. The Court, however, received an affidavit at the eleventh hour by a lawyer in the West Bank which stated that exclusive jurisdiction under Jordanian law rested with the civil court and that the Foreign Judgments Law in Jordan would permit the execution of the judgment of the Israel District Court. Since there was actually a remedy available to the petitioner, Silberg, J. was willing to grant the injunction.

Witkon, J., dissenting, reaches a different conclusion, although maintaining Israel's sovereignty over East Jerusalem. As the jurisdiction of the religious court extends in both the West Bank and East Jerusalem, Witkon, J. reasoned that the religious court should be treated as if it were sitting in the West Bank and not in East Jerusalem. This approach does not prejudice the jurisdiction of the Israeli judicial authorities if the property is situated within Israel's sovereign territory. It is clear that there will be at least two problems with the application of Israeli law in East Jerusalem as exemplified by Hanzalis: (1) whether a judgment will be executed in the West Bank by Jordan authorities, and (2) whether Israeli law will apply in light of the peculiar nature of the several religious courts.

IV. Conclusion

One may conclude that Israel's presence in East Jerusalem and the West Bank has led to anomalous results. Israel's claim to sovereignty in each area is the same, yet the Government's policies with respect to each area have been different. Its actions in the West Bank do not correspond to what some consider its status to be, namely, that of a sovereign. That policy, however, may be deliberate.

Israel's failure to make a declaration of sovereignty may very well be evidence that the Government does not adhere to the thesis that it enjoys sovereign status absent any further diplomatic act. Or, it may be argued that Israel recognizes its own sovereignty, but for political reasons or otherwise chooses not to so declare.

As an example of these political considerations, an appropriate question is what Israel would relinquish if, pursuant to a peaceful settlement with Jordan, Israel withdrew from the West Bank. Depending on which approach to the sovereignty issue one follows, Israel's withdrawal may have very different and critical consequences. If sovereign, Israel may transfer sovereignty to Jordan through cession.[76] The transfer would permit the acquisition by Jordan of a status which it could not acquire itself. If a belligerent occupant, Israel's voluntary relinquishment of its rights would not confer sovereignty upon Jordan. While it is possible to cloud the terms of any peaceful settlement so as not to confer sovereignty upon Jordan, the problem is merely raised as an example of the dilemma facing Israel in either approach.

Israel's conduct in East Jerusalem since the Six Day War compels a different conclusion. The promulgation of the Administrative Ordinance incorporating East Jerusalem into a unified city is tantamount to sovereignty. Jerusalem has now been a united city for five years and Israel's position appears secure. The consequences of this status as far as the application of Israeli law and the other manifestations of sovereignty in the territory remain to be further defined.

Though just and reasonable political considerations may have motivated differing policies with respect to East Jerusalem and the West Bank, these policies have had and will continue to have inconsistent results.

Alan Levine

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76. Cession is the transfer of territorial sovereignty by one State to another State. It is bilateral and can only occur through an agreement in which it was clear the transfer of an actual sovereignty was intended. R. Jennings, supra note 40, at 16.