

## THE QUESTION OF JERUSALEM IN THE POST-COLD WAR ERA

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The old global bipolarity has come to an end. The former Eastern Bloc joined the West, together forming the "Global North", asserting preponderance over the "Global South", otherwise known as the Third World during the Cold War era.<sup>1</sup> The demise of the Eastern Bloc has made the North-South contradiction even sharper. The future of world politics may well be determined by the North-South paradigm. Three-quarters of humanity live in the developing nations of the South. The latter may differ in the degree of achievement, size or structure or some may even fall in the gray area in the North-South division, but they have common traits such as facing much more powerful centers in the world arena. The Global North, which may have some pockets of weakness and poverty as well, is generally indifferent as to the rights, views, aspirations and interests of the Global South. While the old East-West Cold War axis is being replaced by the dichotomy between the North and the South, the freedom of movement of the latter is now restricted. The countervailing weight of the Eastern Bloc no longer existing, the United States, the strongest among the Northern countries, is now engaged, much more than ever, in setting the agenda of international politics both within and outside of the United Nations. That world organization now has a new role mostly in the service of the North. The present imbalanced distribution of power is a long way from what the global situation was only a few years ago.

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<sup>1</sup>For an impressive collection of chapters on the so-called "new world order": Phyllis Bennis and Michel Moushabeck, eds., *Altered States*, New York, Olive Branch Press, 1993.

This radical change is also felt in parts of the Middle East. This region has long endured the painful legacy of imperial fragmentation, neo-colonialism, the Mandate system, the policy of divide and rule, political subjugation, economic inequalities, discords exacerbated by the Cold War, exorbitant militarism, favoritism, double standards, repetitive Israeli aggressions, intervention and military occupation. While Russia is reduced, from being a chief player, to a minor appendage, the United States is left as the unrivalled power in the globe, including the Middle East. Likewise, the United States was the initiator and the molder of the recent peace process regarding Palestine.

What should be emphasized is that, in spite of radical changes globally and regionally, the historical and legal features of the Holy City of Jerusalem (Al-Quds) continue to persist. The city's threefold religious vocation and its former sovereignty are incompatible with its present situation as an occupied and annexed land. No matter how the distribution of power is affected elsewhere as a consequence of the "new world order", the following facts remain true: Jerusalem has been wrested away from its legitimate sovereign and endowed with an international status (1947), *de facto* divided between two neighbours (1948), the Western part proclaimed as the capital of the Jewish state (1950), the Eastern part too occupied and annexed by Israel (1967), and proclaimed a united "eternal capital" (1980) for a people other than the previous owners. Consequently, the status of the Holy City remains the stiffest bone of contention between the two main interested parties, the Israelis and the Palestinians.

There should be wide consensus over the international law principle that occupation and annexation cannot impair the legal status of Jerusalem, the metropolis of three great monotheistic religions. In many languages, even the name of the city reflects "holiness" or "sanctuary". Few cities have such emotive force. The religious fervour of the adherents of all three religions is alike. Some interested parties with religious claims also have exclusive political assertions. For instance, a number of Jewish statesmen are quoted as considering Jerusalem as Israel's "eternal capital". The followers of *Naturei Karta*, an orthodox Jewish group, on the other hand, believed state sovereignty to be incompatible with Judaism. For Muslims, Jerusalem, now occupied and annexed, where Islamic states ruled, with short exceptional periods, for almost thirteen centuries from 638 until 1917, was always second in holiness only to Mecca and Medina. A spirit of tolerance and respect for all communities had prevailed under the former long Muslim era, whether during the Arab or Turkish centuries.

While the Mandate system, following the end of the First World War, was set up without any reference to the wishes of the indigenous population, Jerusalem, which constituted a large part of the whole West Bank, served as the center of a very broad economic and demographic hinterland. Being the

center of most of the financial institutions, it had the greatest concentration of the wholesale trade and the independent professions.

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It was these peculiarities that must have forced the formulators of the United Nations partition resolution 181 (29 November 1947) to include a statement regarding a separate international status for Jerusalem. It declared, as is well-known, that this city, including the municipalities plus the surrounding villages and towns, should be established as a "*corpus separatum*" under a special international régime, to be administered by the Trusteeship Council on behalf of the United Nations.

While a number of non-Arabs who surveyed various aspects of the problem recommended some form of internationalization,<sup>2</sup> the Arabs did not accept such an alternative as a just solution. For instance, a seminar of Arab jurists in Algiers (1967) concluded that the régimes of internationalization presuppose the consent of the state territorially competent, surrendering its sovereignty in a treaty.<sup>3</sup> Nothing of the sort happened, the seminar recorded, in the case of the internationalization of Jerusalem, where the preference of the territorial sovereign was not asked. The world organization could not decide, the seminar asserted, without the compliance of the people concerned, that a part of territory be subjected to a different régime. Internationalization would have been meaningful if there had been discrimination before 1948.

It is also well-known that the proposed international régime never saw the light, however. War broke between Israel and Jordan, ending with a truce (1948), and an armistice agreement (1949), and creating in the process the *de facto* partition of Jerusalem. Annexing West (New) Jerusalem, Israel obtained more territory than the United Nations had granted it two years before. It is true that the truce and the armistice agreements were approved by the U.N. Security Council, but they were provisional measures which could not prejudice the rights of the interested parties.

It is important to remember that the U.N. General Assembly, fully informed of the military operations, adopted resolution 185-S/II (26 April

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<sup>2</sup>An article by the former Mandatory Chief Justice of Palestine: Sir William Fitzgerald, "An International Régime for Jerusalem," *Royal Central Asian Journal*, XXXVII (July-October 1950), pp. 273-283. Also: S. Shepard Jones, "The Status of Jerusalem: Some National and International Aspects," *Law and Contemporary Problems*, XXXIII/1 (Winter 1968), pp. 169-182.

<sup>3</sup>*The Palestine Question*, Beirut, Institute for Palestine Studies, 1969, p. 114. Also: Walid Khalidi, *Jerusalem: The Arab Case*, Amman, Hashemite Kingdom of Jordan, 1967.

1948), which requested the Trusteeship Council to study measures for the protection of the city and its inhabitants and submit proposals. The U.N. Mediator for Palestine Count Folke Bernadotte's progress report also stated that Jerusalem ought to be accorded special and separate treatment.<sup>4</sup> The General Assembly resolution 194 (11 December 1948), which formed the Conciliation Commission for Palestine on the basis of Count Bernadotte's recommendation, stated as well that Jerusalem ought to be dealt with differently.

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Israel, which acquired West Jerusalem at the end of its first war with the Arabs, gave public assurances, prior to its membership in the United Nations, that it would respect the peculiar status of the city. In fact, it was admitted to that international body following pledges that it would honour all its resolutions. Apart from promises to observe resolutions pertaining to boundaries, rights of the Palestinians and the return of the refugees, Israel was also bound to revere the status of Jerusalem. Abba Eban's promise, on behalf of his government, is in the official records of the *ad hoc* political committee. He said: "I do not think that Article 2, paragraph 7, of the Charter, which relates to domestic jurisdiction, could possibly affect the Jerusalem problem since the legal status of Jerusalem is different from that of the territory in which Israel is sovereign."<sup>5</sup>

It may be asserted that, apart from the fact that Article 25 of the U.N. Charter states that the members agree to accept and carry out the decisions of the Security Council, Israel itself is the creation of a U.N. General Assembly resolution and cannot act in breach of the resolution to which it owes its own being.

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It is well-known that both the General Assembly and the Security Council, two principal organs of the U.N., passed since the Partition Resolution (1947), several decisions on Palestine, including Jerusalem.<sup>6</sup> In relation to the latter, the General Assembly confirmed, up until 1967, the

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<sup>4</sup>Folke Bernadotte, *To Jerusalem*, London, Hodder and Stoughton, 1951.

<sup>5</sup>U.N., General Assembly, Official Records, Session 3, Part II, *Ad Hoc* Political Committee, pp. 286-287.

<sup>6</sup>*Jerusalem: A Collection of United Nations Documents*, Beirut, Institute for Palestine Studies, 1970; U.N., *The Question of Palestine: 1979-1990*, New York, 1991.

basic provisions of the partition recommendation.<sup>7</sup> In the meantime, Israel moved its ministerial offices to Jerusalem and proclaimed it (23 January 1950) as the capital of the state. Although the General Assembly resolutions, made before and after 1967, are recommendations and therefore are not legally binding, frequent decisions adopted by overwhelming majorities may create customary law.<sup>8</sup>

The Israeli attack of 5 June 1967, on its three neighbours shifted the focus of attention on Jerusalem from the General Assembly to the Security Council. The attack, accompanied by the Judaization of the city,<sup>9</sup> violated the régime in the most flagrant manner. The U.N. Security Council resolution 242 (22 December 1967) does not specifically mention Jerusalem, but it emphasizes "the inadmissibility of the acquisition of territory by war". General Moshe Dayan's order to remove the Israeli flag which an overzealous soldier had hoisted on the Dome of the Rock (*Al-Masjid al-Haram al-Shareef*) could not affect the profound change in the military, political and religious balance of power.<sup>10</sup>

As Israel failed to comply with the terms of the Security Council resolutions, they were generally progressively formulated in stricter language. All resolutions deplored Israel's failure to respect the previous ones, confirmed that all legislative and administrative actions taken by that country to change the status of Jerusalem were totally invalid and called on Israel to rescind previous measures and to take no further steps which might purport to change the status of the city or prejudice the rights of the inhabitants and the interests of the international community, or a just and lasting peace.

Most Security Council resolutions were repetitive, and some were taken on the occasion of new developments. For instance, resolution 271 (15 September 1969) was passed in response to the damage caused to the Al-Aqsa Mosque (21 August 1969). Or resolution 446 (22 March 1979) established a commission to examine the situation relating to the settlements in the Arab territories occupied since 1967.

<sup>7</sup>Henry Cattan, *Palestine and International Law*, London, Longman, 1973, pp. 136-141.

<sup>8</sup>W. Thomas Mallison and Sally V. Mallison, *The Palestine Problem in International Law and World Order*, London, Longman, 1986, pp. 219-220.

<sup>9</sup>Rouhi Al-Khatib, *The Judaization of Jerusalem*, Beirut, P.L.O. Research Center, 1970.

<sup>10</sup>David Hirst, "Rush to Annexation: Israel in Jerusalem," *Journal of Palestine Studies*, 12 (1974), pp. 3-31.

In the meantime, the Camp David accords, realized outside the United Nations, will be remembered for their deference of crucial issues such as the future of Jerusalem, no less than the division of the Palestinian people into separate categories and the assignment to each of these groups distinct permanent fate.<sup>11</sup> Its most important characteristics was that all the basic decisions had been made in the absence of Palestinian representatives and without regard for the well-known rights of the people directly concerned. As it had occurred in the past, in the cases of the Balfour Declaration, the League of Nations Mandate and the U.N. partition recommendation, the Palestinian people were once again confronted with fundamental decisions about their own destiny without its participation.

There were no General Assembly resolutions related to Jerusalem between 1967 and 1980. But when the Knesset declared (30 July 1980) in a so-called "Basic Law" that "united Jerusalem" was to be Israel's capital, the General Assembly responded by adopting resolution 35/169E (15 December 1980), with only Israel voting against it, which reaffirmed that "the acquisition of territory by force is inadmissible". The General Assembly resolutions, more representative of the international community, have repeatedly rejected the Israeli actions that undermined the status of Jerusalem. The Security Council also dealt with the situation brought about by the enactment of the "Basic Law" concerning East Jerusalem. In every case, it reconfirmed that Israeli actions had no legal validity, and constituted violations of the Fourth Geneva Convention (1949).

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I stated above that the question of Jerusalem was colonial rather than religious. Israel, a military occupier, acted there as if it was a sovereign power. That country's action run counter to the Geneva Conventions, signed and ratified by all the Middle Eastern countries. It may be noted in passing that the uncritical support by Christian fundamentalists for the most expansionist actions of the Israeli Government reveals a theological foundation as well. For them, it was done (like the Crusades, the religious wars of the Reformation, the spread of colonialism, the extermination of the original inhabitants of America and slavery there) "all in the name of the Bible".<sup>12</sup>

The Israeli view that it has always acted in defence and acquired Jerusalem in the meantime lawfully cannot be accepted as true in the light of

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<sup>11</sup>Fayez A. Sayegh, *Camp David and Palestine*, New York, Americans for Middle East Understanding, 1978.

<sup>12</sup>Hassan Haddad and Donald Wayner, eds., *All in the Name of the Bible*, Vermont, Amana Books, 1986.

ample evidence of systematic attacks on the indigenous Palestinian people even before the creation of Israel. It is now common knowledge that the Irgun (Etzel), Haganah and LEVI used the massacres, for instance the one at Deir Yassin, to frighten Arabs into leaving Palestine. None other than Menachem Begin, the Irgun leader and later Israel's Prime Minister, took pride in Jewish offensives. He wrote: "We attacked again and again..."<sup>13</sup> To the Arabs it was "a prolonged and tragically successful invasion" by "an alien people...ending in the expulsion of most of the people whose country it was".<sup>14</sup> Historian Toynbee called the killings "comparable to crimes committed against the Jews by the Nazis".<sup>15</sup>

Since "defence" connotes only the preservation of existing values, all post-1967 U.N. resolutions, including the Security Council resolution 242, reject the Israeli claim to the eastern part of the city. The surprise attack in 1967 rules out the Israeli allegation that Jordan was the aggressor then. Therefore, when Jordan was pushed out of East Jerusalem, Israel did not step into a vacuum of sovereignty. Further, international supervision of the Holy Places, without affecting Israeli domination of the city, cannot be accepted as a satisfactory correction of a past wrong. There, certainly, must be full access of all to every Holy site, but justice and international law demand much more than that.

Moreover, although Israel maintains that Jordan has never acquired the status of a legitimate sovereign over the West Bank and that Israel is therefore not an occupying power, the purpose of the Geneva Conventions is not to ascertain the claims of sovereignty but to check the violations of human rights. The principal U.N. organs have repeatedly reaffirmed that the Geneva Conventions were applicable to the Arab territories occupied in 1967. They noted that, not only the displacement of Palestinians, but also the new settlements were illegal.

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The starting point of the recent debate on Al-Quds centers on the Declaration of Principles (1993), agreed upon by Israel and Palestine. The 1993 agreement postpones until 1996 the discussion of three crucial issues, namely, the status of the Holy City, Jewish settlements and the return of the refugees. The agreement did not solve the future status of the city but merely deferred it. The negotiations for its status will be taken up in 1996.

<sup>13</sup>Menachem Begin, *The Revolt*, Tel Aviv, Hadar, 1964, pp. 337-338. Also: H.M.G., Command Paper No. 6873 (24 July 1946).

<sup>14</sup>Rupert Emerson, *From Empire to Nation*, Massachusetts, Harvard College, 1962, p. 314.

<sup>15</sup>Arnold Toynbee, *A Study of History*, Vol. VIII, London, Oxford University Press, 1954, p. 290.

That year will offer three opportunities for Israel: (1) 1996 happens to be the election year both in the United States and in Israel. (2) Israeli policy to settle the Jewish population, especially the new immigrants from the former Soviet Union (and former Yugoslavia) in the Occupied Territories aims to create such a situation that no future government would be able to undo. (3) Israel is also preparing to commemorate the year 1996 as the "3000th anniversary" of Jerusalem as the Jewish capital.

Elections approaching in both the United States and Israel, no statesman or politician in either country can overlook the connection between the status of Jerusalem and electoral support. The pro-Israeli pressure groups in the United States have speeded up their activities to change American policy on the Jerusalem issue. With a view to attract Jewish vote and Zionist backing, several U.S. presidential candidates are expected to pledge support for the removal of the American Embassy from Tel Aviv to Jerusalem. Many members of the U.S. Congress, under pressure from pro-Israeli lobbies, have started urging for the shifting of the diplomatic mission. The election campaigns in the United States and in Israel will accelerate more the competition for firmer control over all parts of the city.

The U.S. Government had signed, on 9 January 1989, a Land Lease and Purchase Agreement with Israel, connected with the acquisition of sites for the construction of two diplomatic facilities within the pre-1947 boundaries of Jerusalem. In accordance with U.N. decisions, endorsed by the United States as well, this land is occupied territory. The U.S.-Israeli agreement is considered a follow-up of the Helms Amendment (1988), which calls for the acquisition of sites in or outside of the Occupied Territories for diplomatic facilities. The 1989 agreement seems to allow the obtainment of land from an occupying power which has no right, according to international law, to sell or rent property. Moreover, the site in question is claimed by the Islamic *waqf* (trust). Not only Israel does not have the right to dispose of property on conquered and occupied land, but such property, according to Islamic law, can only be utilized for a charitable purpose. The new facilities are supposed to be occupied by the United States by mid-1996. The timing conveniently coincides with the elections. There is need to counter these moves before waiting for 1996 because significant changes are planned to take place before that date.

The founding of new colonies in the Occupied Territories, now even more widened by the immigration of Jews mainly from the former Soviet Union, defies the U.N. Charter, the resolutions of the same body and the Geneva Conventions, to which both the United States and Israel are signatories. As a result of the Soviet, and later Russian, desire to qualify for full membership in the so-called "free world", the Jews from Russia and the former Soviet republics, massively migrated to Israel and were directed

mainly to the Occupied Territories. These settlements are illegal within the meaning of the Geneva Conventions.

The fact that they continue to be established is a telling example of the inadequacy of international law in terms of enforcement.<sup>16</sup> They keep extending while the talks of the peace process continue. Under the circumstances, *al-intifadah* (the uprising) was not an "event", but an inevitable sequence to the past.<sup>17</sup> The experiences of the past engendered a level of defiance, especially among the "occupation generation". Settlements which were military and paramilitary outposts in 1967 have gradually turned into civilian residences. Those around Jerusalem have had, from the very beginning, a civilian character. The unusual rush creates additional problems such as the water crisis.<sup>18</sup> Israel has given priority to its own needs at the expense of the rights of the Palestinians. Its control of the water resources in the Occupied Territories is a violation of the Geneva Conventions.

U.S. aid to Israel to facilitate these illegal activities makes the assistance itself illegal and also weakens the prospects for peace. Although most of the newcomers prefer the Mediterranean coast, and although international law does not allow the occupying power to alter the occupied territory, the Israeli Government encourages them to settle in the Occupied Territories, including Jerusalem, through material incentives. International law expects the occupied territory to be preserved the way it is until the withdrawal of the occupier.

Both Israel's occupation and new Jewish settlements are illegal. The direct aid, grants and loan guarantees of the United States assist Israel in that unlawful act. Stating that American aid basically helps immigrants, Israel did not hesitate to describe the loan guarantees as humanitarian, but the U.N. Commission on Human Rights found them unlawful on the basis of the Geneva Conventions. Apart from the early (1991) initial aid of 45 million dollars and a further guarantee for a loan of 400 million dollars, the United States granted another guarantee for a 10 billion dollar loan. In the meantime, Israel continued with the Jewish settlements, deprived its rightful owners from the use of their lands, expelled some of the Palestinians to foreign countries, and mistreated many of them as evidenced in the breaking of arms. A number of new settlers also physically attacked the Palestinians.

<sup>16</sup>Towards a Strategy for the Enforcement of Human Rights in the Israeli Occupied West Bank and Gaza, London, The Labour Middle East Council and The Conservative Middle East Council, 1986.

<sup>17</sup>Joseph Schechla, "The Past as Prologue to the *Intifadah*," *Without Prejudice*, 1/2 (1988), pp. 68-99.

<sup>18</sup>Türkkaya Ataöv, *The Use of Palestinian Waters and International Law*, London, EAFORD, 1982.

All of these acts are violations of the Geneva Conventions. The United States has been aware of these illegalities. They are summarized in the U.S. State Department human rights reports submitted to the Congress. The channeling of such large sums to Israel is assistance in violation of international law.

Israel is also preparing to commemorate the so-called "3000th anniversary" of Jerusalem as the capital. The year 1996 is not necessarily the 3000th anniversary of Al-Quds as the capital of the ancient Jewish state. But the occasion, apparently pre-planned with a particular purpose, once more conveniently coincides with the date of final negotiations to decide the future of this city, Holy for all three religions, and not only for one. In addition to 14 million Jews, the future of Jerusalem concerns the whole of the Muslim and the Christian world, the two adding up more than two billion people. Both Muslims and Christians share the same victimhood under military occupation.

In summary, elections scheduled to be held both in the United States and in Israel in 1996, the year bilateral negotiations for the future status of the city are going to be held, is already activating the powerful pro-Israeli lobby in the United States and the contending politicians in Israel to succumb to demands contrary to legality and the rights of the Palestinian people. The settlement of the new Jewish immigrants is illegal, and ought to be stopped. There should be international action against states that shift their embassies to a territory defined as "occupied" by international law. The drive to celebrate the "anniversary" needs to be countered as well because it seems to be connected with the political motive to legitimise an occupation.

To rectify the illegal situation in Jerusalem is the obligation of the international community.<sup>19</sup> The negotiations which started the peace process in the Middle East, however, were totally outside the context of the United Nations. A token U.N. representative was a silent observer. The United States, which acted in the Gulf crisis (1991) with Security Council backing, prevented the same world organization from playing an active role in the peace process concerning Palestine. The Soviet Union was only a formal co-sponsor. The United States, which set up the stage as it had done at Camp David, accepted this time direct Palestinian representatives. So did Israel. The elimination of the Eastern Bloc (1989-91) and Iraq's invasion of Kuwait

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<sup>19</sup>Türkkaya Ataöv, "The International Peace Conference on the Middle East is a legal obligation and a political necessity," *Question of Palestine: Legal Aspects*, New York, United Nations, 1992, pp. 456-460. Also: Türkkaya Ataöv, "The Status of Jerusalem as a Question of International Law," *The Legal Aspects of the Palestine Problem with Special Regard to the Question of Jerusalem*, ed., Hans Koechler, Vienna, I.P.O., 1981, pp. 133-143.

(1990) gave the United States the opportunity to have virtually the last say in the Middle East. Russia is transformed into a quiet supporter of American initiatives, and Iraq reduced to a power eager to preserve its territorial integrity. Under the circumstances, Israel, which is friendly to the United States but which can no longer enjoy the same degree of freedom of movement, aims to pursue policies, not only to legitimize permanent Israeli settlements, but also to tolerate the appalling massacre against Palestinian worshippers in the Mosque of Ibrahim in Hebron (25 February 1994).<sup>20</sup>

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The turbulent part of Jerusalem's history must come to an end. Its present status, decided through the use of force, violates international law, the resolutions of the world community and Israel's own pledge before its admission to U.N. membership. The international community never recognized Israel's unilateral claims. The majority of the countries still keep their embassies in Tel Aviv. Both the General Assembly and the Security Council have repeatedly emphasized the illegality of the Israeli attempt to annex the Holy City, an enforced alternative denying the legitimate interests of others as well as the consensus in the authorized organs of the world community.

Sovereignty over Jerusalem was always vested in the people of Palestine. It cannot be lost as a result of occupation or annexation.<sup>21</sup> Moreover, peace in the area will depend on the fate of the Holy City. Its final status should be decided in negotiations, to be conducted in accordance with the requirements of international law. The delaying of the question, ostensibly on account of complexities, makes it even more difficult to resolve.

Jerusalem may become the capital of both the states of Israel and Palestine. The Jewish sector may be recognized as the capital of the former, and the Arab sector that of the latter. Then, neither the Israelis nor the Palestinians will be deprived of considering the Holy City their capital.<sup>22</sup> While Jerusalem may be divided into Jewish and Arab municipal sectors, in a way reminiscent of the report of the "Fitzgerald Commission" (1946),<sup>23</sup> the

<sup>20</sup>The Massacre in Al-Haram al-Ibrahim al-Sharif, Jerusalem, Palestine Human Rights Information Center, 1994.

<sup>21</sup>Henry Cattan, "The Status of Jerusalem Under International Law and United Nations Resolutions," *Journal of Palestine Studies*, 39 (1981), pp. 3-15.

<sup>22</sup>Sami Hadawi, *Bitter Harvest: Palestine, 1914-1979*, Delmar, New York, The Caravan Books, 1979, pp. 296-297.

<sup>23</sup>Sir William Fitzgerald, "The Holy Places of Palestine in History and in Politics," *International Affairs*, XXVI (January 1950), pp. 1-10.

metropolises, permanently but equitably united, should be "open city" for the adherents of all the great faiths, making it once more, and this time hopefully eternally, "The City of the Prince of Peace".

The first major step to increase the Palestinian potential is unified Arab support. The Gulf War eroded Arab solidarity. There is now a need for firm and undivided consensus on the question of Jerusalem. The end of the Cold War and the consequences of the Kuwaiti crisis should not be permitted to remove the rights of the Palestinians in respect to Jerusalem from the agenda of the world community, foremost that of the Arab countries.