The Multiple Borders of Jerusalem:
Policy implications for the future of the city

Mick Dumper
School of Politics
University of Exeter

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Correspondence to: j.anderson@qub.ac.uk; m.komarova@qub.ac.uk

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**Editorial note**

This paper is a contribution to Research Module J1: ‘The impact of the Israeli separation barrier and related infrastructures’. It investigates amongst other things the impact of ‘the wall’ on the use of land and public space, the significance of mobility or its absence, changes in interactions and segregation between Israelis and Palestinians, and alterations in policy. Some material included here was also presented in a paper to the conference on *International Law and Middle East Peace: A Rights-Based Approach to the Israeli-Palestinian Conflict*, 8-11th June 2006, University of Exeter, UK, which is part of an edited volume under review for publication.

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**Biographical note**

Mick Dumper is co-Investigator in the Conflict in Cities project. He is author of *The Politics of Jerusalem since 1967* (Columbia, 1997) and *The Politics of Sacred Space: The Old City of Jerusalem and the Middle East Conflict* (Lynne Reinner, 2002) and a number of publications of the Palestinian refugee issue. He is currently researching on the impact of the separation Wall and on the role of religious sites in Jerusalem on the political negotiations between Israelis and Palestinians. Mick.Dumper@exeter.ac.uk
The Multiple Borders of Jerusalem:
Policy Implications for the Future of the City

Mick Dumper

Abstract

This paper will examine the dynamic nature of Jerusalem’s borders and illustrate how it impacts on the nature of the political agreement between the Israeli and Palestinian leaderships. It will explore the term the multiple borders of the city to illustrate how by disaggregating the different levels and functions of the borders it is possible to see the way forward for a peace agreement on the city. It highlights how the changing Jewish and Israeli discourse on Jerusalem reveals a much greater flexibility than previously supposed and how the political, security and functional borders of the city have been and remains dynamic. The paper also discusses the different approaches to Jerusalem that have been put forward in some of the key proposals emerging from the peace process and attempts to draw together the main points with a view of suggesting possible options for the negotiators.

Keywords: Jerusalem, borders, politics, negotiations, The Wall

The most significant development in the city of Jerusalem in recent years has been the construction of the Israeli separation Wall. It cuts through Palestinian areas, divides neighbours from each other, and isolates the central suburbs of the city from the West Bank and Palestinian hinterland (1) (See Map 1). Comprising over twenty kilometres of concrete to the height of between four and nine metres, with another 57 kilometres of fencing, the Wall will leave 25% of the 253,000 Palestinian residents of East Jerusalem on the West Bank side of it, depriving them of access to families, schools, hospitals, religious sites, and commercial networks (2). Eight out of 12 access roads from the West Bank to Jerusalem have been closed to Palestinians (3). In the education sphere alone, the Wall will cut off some 18,000 pupils and 800 teachers from their schools (4).

The physical and political damage to the functioning of East Jerusalem caused by the construction of the Wall is incalculable—irrespective of the emotional suffering it has caused to separated families. Indeed in enclosing against their will over 180,000 Palestinians (5), the Wall poses as many, if not more, problems for Israel regarding the future of Jerusalem and the legitimacy of its presence there that it seeks to solve.
These are problems which impinge both on the possible future border between the two states, Israel and Palestine, and on the nature of the agreement itself.

(Map 1. The Separation Wall around Jerusalem, March 2007.)

First, Palestinians have returned in large numbers to the central districts in order to demonstrate their Jerusalemite residency and retain the coveted Jerusalem identity card, with the result that the Palestinian population of the city has risen. While, previously Israeli planners worked to a ratio of 70:30 in terms of Israelis to Palestinians, they are now being obliged to work to a ratio of 60:40. Second, the exclusion of the Palestinian national leadership from Jerusalem and its re-location in Ramallah, has created a leadership vacuum into which Palestinian Islamist groups from inside Israel itself have entered. Their political
views are more radical than that of the PLO who were more prepared to negotiate over the city’s future. Third, the wall has re-established Jerusalem as a frontier town for Israeli society and economy. As a result we see the accelerated departure of the educated Israeli middle classes to the coastal plain and the bright lights of Tel Aviv. This flight is compounded by the lack of new investment in the city impacting upon its employment rates. Recent census statistics show that despite all the attempts to develop the city over the past 40 years, Jerusalem is now the poorest city in Israel. Finally, by enclosing so many Palestinians inside the Wall, it weakens its argument of the Israeli government that it cannot accept any Palestinian refugees on the grounds that an increased number of Palestinians inside Israel would undermine the Jewish nature of the state.

Thus the Wall highlights the strategic dilemma confronting the Israeli political elite. By emphasising the importance of security imperatives, it fails to address the fact that Jerusalem is a contested city and an ethnically and nationally mixed one. The simple fact is: that to meet its security concerns the “harder” (i.e. the more impermeable) the border is between Israel and the new Palestinian state, the further east the border will have to go in order to avoid abandoning the Israeli colonies built on the eastern side since 1967. This in turn will include more Palestinians in the city. A “softer border”, that is, one which allows more mobility across the city, will involve extensive cooperation with the new Palestinian government who in turn will insist on an Israeli withdrawal from East Jerusalem based upon UN Security Council Resolutions. The failure of the Israeli government to resolve this dilemma has led to the impasse in the negotiations over the city.

In this context it is important to note the status of Jerusalem in international law. There have been numerous UN resolutions passed on the Jerusalem question (6) (see also Maps 2 and 3). This is particularly the case since 1967 where the inadmissibility of Israeli polices in the eastern part of the city has received consistent re-iteration (7). However, this paper will argue that despite this body of law, there is insufficient legal support for a specific resolution of the problem and what there is, does not take into account the feasibility Jerusalem as a functioning city. Indeed, what is striking is the absence of any mention of Jerusalem in many of the key documents upon which a peace agreement is being negotiated. Jerusalem was not mentioned in the Balfour Declaration in 1917 (8), which was included in the Preamble of the Mandate Charter in 1922, nor was it mentioned elsewhere in the Charter (9). In retrospect, it is quite astonishing that neither was it mentioned in the Declaration of the State of Israel (10) in 1948 nor in UN Security Council Resolution (UNSCR 242) itself (11). There are two notable exceptions to this observation. Jerusalem featured prominently in the Partition Plan of 1947 (UNGAR 181), in which a corpus separatum was recommended and laid out in great detail (12), (Map 2) and it was also
mentioned in the 1988 Declaration of Independence for the State of Palestine (13). However, the current negotiations are based upon Resolution 242 which to a large extent has superseded 181 and there is little appetite on the part of either the Israeli or Palestinian leadership or the international community to re-open the question of a *corpus separatum* (14).

(Map 2. International Zone of Jerusalem as laid down in the Partition Plan, 1947 and borders laid down by the Armistice Agreements, 1949)
(Map 3. Jerusalem: new Israeli municipal border and settlements, after 1967)

The role that UNSCR 242 has played in the negotiations and former peace process is an example of the possibilities left open by the ambiguity of relevant international law. While 242 could be an essential tool in redressing the imbalance of power between the two parties and over control of land and property in the city, it does not deal with a number of additional important factors which need to be addressed before a viable agreement can be signed. UNSCR 242 clearly provides the basic framework for a solution. Translated into an agreement, it would give both Israel and the putative state of Palestine a stake in Jerusalem, and lead to “two capitals in one city”. Nevertheless, it does not specify the relationship between those two halves, nor does it offer solutions for changed conditions in the city since the Israeli occupation of the eastern half in 1967 (15). For example, it does not take into account Palestinian concerns over access to their former properties in the western part of
the city (West Jerusalem) or access to all the Muslim holy places, or Israeli concerns over access to Jewish Holy Places, Jewish owned properties in the eastern part, or Israeli fears over security arrangements. Nor does it address issues of concern to both sides about the viability of the city as a whole. These gaps in UNSCR 242 vis-à-vis major issues of concern to the parties allows for possible areas of agreement over Jerusalem. It is, therefore, a prescription for the status quo ante, but does not provide a formula for establishing Jerusalem as a viable socio-economic unit that meets the political and religious aspirations of the protagonists.

This paper will examine the dynamic nature of Jerusalem’s borders and illustrate how it impacts on the nature of the political agreement between the Israeli and Palestinian leaderships. It will also show how what I have termed the multiple borders of the city provides both challenges and opportunities for negotiators. By disaggregating the different levels and functions of the borders it is possible to see the way forward for a peace agreement on the city. The first of three sections of this paper builds upon this notion of multiple borders to examine the opportunities and challenges that this ambiguity opens up. In particular, it outlines the changing Jewish and Israeli discourse on Jerusalem revealing a much greater flexibility than previously supposed. It highlights how the city is located within a matrix of political, security and functional borders, and how these multiple borders have been and remain dynamic. The second section discusses the different approaches to Jerusalem that have been put forward in some of the key proposals emerging from the peace process. Rather than suggesting another formula for agreement, I focus on areas in which further progress can be made. The third concluding section attempts to draw together the main points with a view of suggesting possible options for the negotiators.

**Multiple borders**

This section seeks to establish two main points: the first is the often-overlooked fact that Jewish, Zionist and Israeli perspectives on Jerusalem have been subject to significant changes; and the second is that Israel’s extension of authority over East Jerusalem has been a more scattered and diluted authority than most policy-makers and the public realize.

Although controversial, it is clear that Jerusalem was not always so central to Jewish and Zionist political and religious discourse before 1967 (16). Clearly the religious link between Judaism and Jerusalem is very strong, indeed, zion means Jerusalem in Old Hebrew. For Israelis and Jews, Jerusalem is the ancient capital of the Hebrew kingdom and the site of Solomon’s and Herod’s temples. The section of the enclosure wall of the Temple has become the central edifice in Judaism and its further excavation and exposure by the Israeli government since 1967 has made it the site for worship, prayer and national ceremonies.
The Mount of Olives is also an important site of veneration and burial as is the tomb of David on Mount Zion. It is important to remember that Jews were expelled several times from Jerusalem and since the time of Herod they were unable to pray at the site of the destroyed Temple and their numbers and activities were closely monitored. For these and other reasons the idea of Jerusalem was reconfigured and permeated instead the liturgy and prayer of Judaism. It is also this long experience of qualified access to their holy sites that led to the euphoria in 1967, when Israeli forces occupied the Old City of Jerusalem. For the first time in nearly 2000 years they were able to access the Wailing Wall freely and without restriction.

Nevertheless, there is also much evidence to suggest that the role of the Temple Mount underwent considerable change (17). For example, the current emphasis on the centrality of the Western (Wailing) Wall should be juxtaposed with earlier Jewish traditions in which it was not so central. There is evidence, for example, that in the 15th Century, the dominant Jewish rituals took place on Mount Zion and the Mount of Olives, from where lamentations over the destruction of the Temple took place (18). Similarly, the official Israeli history of the Wailing Wall refers to the fact that there is no mention of the Wall in the written sources of the medieval period (19).

It is also accepted among historians that Jerusalem had a secondary place in early Zionist discourse, and, indeed, that it was considered a burden in their pre-state strategies (20). Associated with the past and with decadent orientalist imagery, it did not fit into the vision of the brave new world of the kibbutz and the metropolis of Tel Aviv. As a consequence, it did not receive so much attention in the settlement planning of the first and second aliyas (21). Indeed, some have even argued that the Zionist leadership was prepared to sacrifice Jerusalem in its pursuit of the establishment of a state (22).

Furthermore, the nature of Israeli consolidation over Jerusalem has been scrutinized more closely, revealing a number of ambiguities in its position. Studies by Lustick have drawn attention to the fact that Israel seems to have refrained from fully annexing the eastern part of the city. It has not, for example, imposed citizenship on the inhabitants in the same way it did in the areas that it occupied but which fell outside the borders allocated to Israel by the 1947 Partition Plan - Galilee and the Little Triangle. Furthermore, as Lustick points out, the Basic Law of 1980 declaring Jerusalem as the “complete and united” capital of Israel omitted referring to any specific boundaries. Indeed, his analysis is that the ambiguity over annexation is a deliberate policy designed to avoid international censure and to maintain internal unity over the question of Jerusalem (23). In 2000, an amendment was passed to the Basic Law whereby it could not be repealed without a two-thirds majority of the Knesset
(24). While clearly an attempt to consolidate Israeli hegemony, it also serves to underline its fragility and lack of consensus by establishing legal hurdles in the way of any change.

This fragility is despite the extensive settlement building programme in East Jerusalem exclusively for Israeli Jewish nationals, which since 1967 has succeeded in creating a demographic revolution (25). Over 180,000 Israeli Jews now live in settlements constructed in East Jerusalem; there are now more Israeli Jews living in East Jerusalem than there are Palestinians (26) (See Map 3). The colonisation programme has also had a dramatic impact on property ownership and land use, with 35% of East Jerusalem now expropriated or under effective Israeli control and 80% placed beyond use of Palestinians through planning and zoning decisions (27). Closely connected to these policies are the Israeli restrictions on Palestinian residency rights and access to East Jerusalem based on security considerations that have stifled political, social and economic life for the Palestinians. The erection of the separation Wall, described earlier, between some of the inner and outer suburbs of East Jerusalem is the culmination of a “closure” policy which has been in existence since 1992. Taken together, these acts have sought to consolidate Israeli physical control over Jerusalem, both west and east (28). In addition, the position of the US government that the final status of Jerusalem is to be determined by negotiations creates little pressure on Israel to reconsider its policies.

Nevertheless an enduring characteristic of the Israeli occupation of East Jerusalem is the failure to construct a hegemonic presence in East Jerusalem. Despite the huge investment in housing, infrastructure, political and diplomatic capital, despite the marginalisation of Palestinian representation, the expense and deployment of military personnel, East Jerusalem is still regarded by the international community as occupied territory, and by its own citizens and by many, if not most Israelis, as not quite Israel. Poll findings routinely identify most areas of East Jerusalem as dispensable in the eyes of Israelis if it is in the interests of a broader peace agreement with the Palestinians (29). A recent poll indicates that up to 55% of adult Israelis are willing to relinquish the Palestinian neighbourhoods in return for a peace agreement with Palestinians (30). Indeed, on closer examination, Israeli political control and claims to sovereignty over Jerusalem are undermined by numerous gaps and weaknesses in its exercise of that control.

At the Camp David summit in 2000, therefore, the Israeli offers to the Palestinians over the Jerusalem issue were based upon a perception of political control and presence in East Jerusalem which did not accord with the reality on the ground. A little background is necessary to explain this assertion. When Israel occupied East Jerusalem in 1967, one of the first laws it passed was to extend the West Jerusalem (Israeli) municipality to
encompass the Jordanian Arab Jerusalem municipality and areas around it. On the same day, however, it also passed a law, the Law and Administration Ordinance Law, whose ostensible purpose was to integrate East Jerusalem into the Israeli legal system. A significant part of this law was a series of “exemptions” that made the Israeli presence less intrusive in East Jerusalem. This has led to a lack of congruity between political borders, the security borders, the consistent application of legal jurisdiction and the varying degrees of service provision in East Jerusalem, hence the term multiple borders (See Map 4, below). For example, the law exempted East Jerusalem from many health and safety regulations, from labour laws and from laws on registration of businesses and money-changers (31).

As a result, the Palestinian Arab commercial system was allowed to continue the practices of the Jordanian era. Significantly, the draconian Israeli Absentee Property Law of 1950 was amended to exempt the residents of East Jerusalem from provisions that would otherwise have classified them as Jordanian, and technically residents or citizens of an “enemy” state, who were liable to have their property confiscated (32). The same law also prevented them from claiming their properties in West Jerusalem.

These exemptions were not mere technicalities but established a parallel system of justice, security, political representation and administration in East Jerusalem which was neither identical to that which pertained to Israel nor to the rest of the Occupied Palestinian territories. Thus, in the same vein, concessions were made to the Muslim and Christian religious establishments which allowed a significant degree of autonomy in their internal administrative arrangements over the Muslim and Christian Holy Places. One should recall that significant parts of East Jerusalem and, in particular, the Old City are owned and administered by the churches or an Islamic foundation, known as the Awqaf Administration. The Awqaf Administration during most of the period since 1967 was funded by the Jordanian government, which also appointed most of the senior personnel. Thus, the Awqaf, a semi-autonomous administration employing several hundreds of people and carrying out significant building works and communal activities, is directed by both the Jordanian government and the PLO, in the heart of territory that Israel was claiming as its capital.

The Israeli presence in East Jerusalem is limited in other ways. For example, the education system and curricula in Palestinian schools in Jerusalem is almost identical to that in the West Bank and under Palestinian jurisdiction. The only concession to the Israeli curriculum is the teaching of Hebrew but the final matriculation (the tawjihi) is the same as that taken by other Palestinians in Ramallah and Gaza. The water supplied to the northern Palestinian suburbs is piped by the Palestinian Ramallah Water Undertaking while electrical
(Map 4. The multiple borders of Jerusalem 2006)
power in all Palestinian areas is supplied by the Palestinian-owned East Jerusalem Electricity Company.

These factors should also be seen in the context of the wholesale neglect of the Palestinian residential areas by both the Israeli Municipality of Jerusalem and the central government as they create a detachment from the Israeli state which is quite significant. According to a 1994 report, while Palestinians made up 28% of the city’s population, they only received between 2 and 12% of the municipal budget across the various departments (33). Another report detailed further discrepancies: there are 680 kilometres of roads in West Jerusalem, in contrast to only 86 kilometres in East Jerusalem; there are 1,079 public gardens in West Jerusalem and only 29 in East Jerusalem; and there are 650 kilometres of sewage lines in West Jerusalem as opposed to only 76 kilometres in East Jerusalem. Gaps in services between the two communities of over 500% have been identified (34).

These policies have led to a seriously inadequate provision of basic municipal services, infrastructural development and welfare programmes in the Palestinian areas of East Jerusalem. In an attempt to fill the vacuum left by the Israeli state, Palestinian and foreign charitable associations, religious organisations, the PLO and the Jordanian government have all stepped in. The result is that East Jerusalem consists of a series of Palestinian enclaves detached to a large extent from the Israeli polity. It is significant that customary and tribal law has been revived among the Palestinian residents of many of these enclaves. After nearly forty years of occupation, the most visible element of the Israeli state that in these areas is the restrictive planning laws and the security forces. This could not have been the intention of those who passed the various laws of absorption in 1967, and indeed of the Basic Law in 1980. If it was the intention to create controlled urban ghettos on the apartheid-era South African model, then demographic spread of the Palestinian population has rendered it a failure and undermined the Zionist vision of a Jewish Jerusalem.

One could also argue that Israeli failure to impose citizenship, the persistent boycott of Israeli institutions and municipal elections by Palestinian residents, their mass resignation from the East Jerusalem police force in 1987 and the collapse of the neighbourhood council schemes during the first intifada, led to a network of alternative representative bodies. It also led to East Jerusalemites referral of internal issues to the Palestinian National Authority and its appointees, thus ignoring Israeli institutions such as the Knesset and Municipal council. The Netanyahu government tried, after 1996, to shut down this ‘alternative administration’ by shutting down the PLO-run Orient House and professional organisations such as the Jerusalem Chamber of Commerce. However, these were replaced by the Awqaf Administration and church leadership, al-Quds University, and a myriad of smaller research
and social institutions seeking to fill the gap rather than to resort to Israeli institutions. Palestinian elections that allowed East Jerusalemites to participate in Presidential and legislative council elections—held under the Oslo Accord electoral law—only exacerbated the failure of Israeli administrations to function in the eastern part of the city. The election of Jerusalem parliamentarians to the Palestinian Legislative Council, while ineffective in delivering benefits to their constituencies, has formalised the exclusion of Palestinians from the Israeli polity (35).

It is important not to overstate this argument. We should recognise, for example, that the health and National Insurance system in East Jerusalem is a prime motivation for many East Jerusalemites, who had sought residency in the outlying suburbs in the seventies and eighties, to try and return to the central Israeli-controlled parts of the city in the nineties. Similarly, the supply of water and power is still subject to Israeli controls and oversight in the context of their occupation of the West Bank, and that the resulting “ghetto-ization” of the Palestinian population in East Jerusalem offers many security advantages to the Israeli authorities.

Nevertheless, taken as a whole, these exemptions, lacunae, anomalies, passive resistances mean that the city has numerous sub-political borders (See Map 4). This is not to ignore the municipal border, but there are also other important delineations criss-crossing Jerusalem which amount to its multiple borders. As we have seen there is the religious border which ignores both the Armistice lines and the post 1967 borders, there is a commercial and banking border that distinguished Palestinian from Israeli areas, there is an educational border which does the same, there is a water border that incorporates parts of East Jerusalem into the West Bank, there is an electricity border that does the same, there is a service provision border that creates neglected enclaves within the city, and an electoral border which also runs down to the Armistice Lines of the 1967.

Significantly, since the first intifada, there was a separate security border which had not been congruent with the municipal borders, and which now forms the basis of the separation Wall running through Jerusalem. While significantly changing the points of access between the outer suburbs and the centre of Jerusalem, the point here is that this new security border is also not congruent with the borders of the state of Israel or the municipal provision borders established in 1967. Trying to identify which parts of East Jerusalem are fully under Israeli jurisdiction, or are as Israeli as pre-1967 Israel, is a complex if not impossible task. Finally, and most importantly, in terms of the peace negotiations, there has been a failure on the part of the Israelis to assert hegemonic control over East Jerusalem and to make it as Israeli as
pre-1967 Israel (36). The Israeli government are not making concessions over land and property which are entirely theirs to do so.

**Jerusalem and the “peace process”**

The previous section has established that there is greater flexibility on the future of the city through both the antecedents and discourse of the dominant Israel/Jewish party to the conflict and as a result of gaps in Israeli control and authority in East Jerusalem. This section examines how the future of Jerusalem has been dealt with in discussions among policy makers and academics prior to and in the course of what has been termed the peace process since the Madrid Conference of 1991 and the Oslo Accords in 1993.

There are a plethora of peace proposals on Jerusalem. A publication in 1995 listed 63 of the main ones, and there have been scores more since that date (37). Following the Madrid Conference in 1991 a number of proposals emerged that focused in more detail on the notion of a dual capital. This was a logical consequence of Israel’s gradual acceptance of the creation of a Palestinian state in the West Bank and the Gaza Strip, known as the 2-state solution. One of these proposals was the “non-paper” agreement between the former Israeli Justice Minister Yossi Beilin and at that time PLO General Secretary Mahmud Abbas (Abu Mazen), known as the Abu Mazen-Beilin Plan. The Plan was never officially published and remained a document for discussion only. However, the detailed and wide-ranging nature of the plan, and its status as the basis for Israeli and American proposals during the Camp David summit in July 2000, has made it a reference point for subsequent negotiation. The plan proposed a Joint Higher Municipal Council, and an Israeli and Palestinian sub-municipality, responsible for the municipal concerns of their respective citizens and their properties. The Plan also proposed a special regime for the Old City, and the “preservation of the unique character of the Old City” was to be referred to a Joint Parity committee appointed by the two sub-municipalities (38). In this plan Palestinians would have extraterritorial sovereignty over the Haram ash-Sharif. Of significance is that the Palestinian sub-municipal areas did not come up to the 1967 borders, thus detaching the Old City and some of the Palestinian suburbs from the Palestinian sub-municipality and capital.

In 2000, the Camp David summit between Israel and the PLO hosted by US President Clinton did not produce the hoped-for breakthrough. Although there was no formal record of the talks, from media leaks and post-mortems, we can discern a number of proposals and counter-proposals (39). At Camp David, Israel actually offered less than in the Abu Mazen-Beilin plan (See Map 5). Palestinian counter-proposals based upon UNSCR 242 were rejected by the Israelis as politically unfeasible (40). The Israeli proposals comprised two
main elements: first, they would relinquish control over the northern Palestinian-dominated suburbs of the city to the Palestinian Authority and cede administration in the central areas of East Jerusalem to Palestinian bodies. Second, Israel would retain overall sovereignty and security control over East Jerusalem including the Old City. As these came nowhere close to Palestinian aspirations, and did not take into account 242 in any meaningful way, it was not surprising that they were rejected. Indeed, as we can see from the previous section, from a Palestinian perspective, the Israelis were not offering them much more than they already had. However, as the former Israeli Deputy Mayor of Jerusalem, Meron Benvenisti, declared:

“A taboo has been broken and Israel has participated in talks on Jerusalem that were focused on a partition of the city, even if the word "partition" was not explicitly used. These two facts have created an irreversible situation.” (41)

In an attempt to rescue the peace process, President Clinton suggested a framework, known as the “Clinton Parameters”, which would have led to the partition of the city, including the Old City, on demographic criteria. He further recommended Palestinian sovereignty over the Haram ash-Sharif, Israeli sovereignty over the Western Wall, and special arrangements for excavations underneath the Haram (42).

During the subsequent talks at Taba in 2001, built on the Clinton parameters, there was further progress over the question of Jerusalem (43). As at Camp David, no formal agreement was reached, but a record of the meetings at Taba compiled by the EU Envoy Ambassador Miguel Moratinos indicates a number of important developments. Both sides agreed that Jerusalem would be the capital of two states. In addition, Palestinians were willing to discuss Israeli sovereignty over the settlements in East Jerusalem, and to accept Israeli sovereignty over parts of the Old City. For its part, Israel accepted Palestinian sovereignty over Palestinian suburbs up to the Green Line. There was no final agreement on the Holy Places, but an agreement to continue discussions on the concept of a Holy Basin encompassing religious sites, and special arrangements regarding the Haram ash-Sharif/Temple Mount (44). Taken together these were important steps towards an agreement on Jerusalem and actualising UNSCR 242; yet, on the other hand, there was recognition that it could not be the basis of a long-term agreement which met the interests of both sides. More needed to be done.

The most recent public negotiations between the two sides which have taken place on Jerusalem were the Geneva Initiative (sometimes known as the Geneva Accords) whose interim plan was launched in December 2003. Although having no official status they
included many of the leading figures in, or advisors to, the negotiating teams that met in Camp David and Taba. The Initiative illustrated that further progress on a number of key issues was achievable and it mapped out a possible trajectory for future official negotiations. A key element in the Geneva Accords is third party intervention and monitoring. It proposes, significantly, a number of channels for external intervention and involvement. For example, an Implementation and Verification Group and an interfaith council would be established, while a central reference for activities in the Old City would be UNESCO with its protocols on conservation and heritage. This suggests a growing recognition on the Israeli side of the positive role the international community can play.

Like Taba, the Geneva Initiative proposes two capitals for two states with two municipalities responsible for their respective areas. A coordination committee appointed by the municipalities would oversee the economic development of the city as a whole. In contrast to the Holy Basin idea that was discussed in Taba, there would be a special regime for the Old City, and Israeli sovereignty over the cemetery on the Mount of Olives and the Wailing Wall. Palestinian sovereignty over the Haram would be phased in according to an agreed timetable. On the central issue of the areas of sovereignty, the Accords are not clear, as they refer to a map which has not been published (45). With respect to the settlements in and around Jerusalem the Initiative proposes their evacuation according to an agreed timetable and to territory exchanges (46). The Geneva Accords was greeted by some caution by the Palestinian leadership and outraged scepticism by their Israeli counterparts, but most of the ire on both sides were directed at the clauses concerning the refugee issue, and not the Jerusalem issue.

The trends in the negotiations from the Camp David summit, to the Taba talks to the Geneva Initiative, reveal a gradual movement away from the maximalist Israeli positions prior to the peace process. They also reflect a move towards the UNSCR 242 formula of an Israeli withdrawal and Palestinian sovereignty over large areas of East Jerusalem, and a tacit parallel acquiescence on the part of Palestinians to the new realities in Jerusalem. The fact that this movement is limited and incremental cannot disguise the fact that from being “non-negotiable” in the eighties (pre-Oslo), Jerusalem became “negotiable-at-some-deferred-stage” in the nineties (Oslo) to “negotiable-in-detail”, including territorial exchanges, in the 21st century (post Camp David and Taba).

The current alteration to the landscape and physical use of the city by the construction of the separation Wall and the unilateralist policies of the current Israeli government does not, for the time being, alter this trend. These ‘facts on the ground’ can be cast in a different light when examined from the perspective taken in this paper—that is, what elements are
required for a peace agreement that has some chance of being durable rather than an imposed political settlement kept in place through coercion. Israel's physical control over East Jerusalem on the basis of the lines drawn by the separation Wall will not be acceptable as the basis of future negotiations. Indeed, in line with Lustick's argument, discussed above, that Israel has failed to attain hegemonic status over Jerusalem, one should note recent developments in Israeli political discourse that indicate the previous Israeli position is being reversed. A new consensus is building on a much less maximalist position. While Israeli Prime Minister Ehud Olmert declared he,

"Will never, never agree to a compromise on the complete control over the Temple Mount. And not only the Temple Mount but also the Old city, Mount of Olives and every place that is an inseparable part of Jewish history",

he went on to add,

"We don't pray facing Bir Nabala or Issawiyya, or any of the other Palestinian neighbourhoods that have been added to Jerusalem by someone who drew a map one day." (47)

Here we have a nationalist politician from the right of the Israeli political spectrum associated with the maximalist view conceding that some Palestinian areas of Jerusalem need not be incorporated into the final borders of the Israeli state. Further illustration of this shift to a more flexible position can be seen in the proposals by Knesset member Otniel Schneller, advisor to Olmert but also, more significantly, a former leading figure in the settler movement. He suggested that while Israel would retain the Old City and immediate environs, it would not seek to hold onto some of the Palestinian suburbs (48). Thus while construction of the Separation Wall is clearly an impediment to the resumption of peace negotiations, it should not obscure the fact that there has been an unravelling of the Israeli consensus on Jerusalem since 1993, and that a return to the 1967 border (UNSCR 242) subject to some critical territorial exchanges, is far more palatable than it was 10 years ago.

**Towards an agreement on Jerusalem**

The context and facts presented above bring us to the conclusion that the solution to the Jerusalem issue is less prescribed by international law and the dominant political discourse than is often perceived. The Palestinian acceptance of UNSCR 242 as a basis for negotiation for Jerusalem is already a major concession by the Palestinian leadership, in that it implies that Palestinians will accept the loss of Palestinian land in West Jerusalem.
Indeed, it is a concession that has not been fully reciprocated by the Israeli side, but the
grounds for refusing such a reciprocation are much weaker than asserted. The Israeli claim
to title over East Jerusalem has not been accepted by the international community, and its
de facto authority there, despite nearly 40 years of occupation and colonisation, has actually
diminished. In this broad context, setting aside the current unpropitious and unstable
conditions, the scope for a negotiated solution is still very much a possibility.

In this section I first consider what the principles are which will help frame a solution to the
question over the future status of the city. I then consider how Israeli and Palestinian
interests will have an impact upon that framework and how they may be accommodated. I
conclude by arguing that while the separation Wall dramatically alters the current
configurations on the ground, it also brings into sharp relief many unresolved questions over
the status of East Jerusalem as part of Israel, and that ultimately it offers no solutions to
Israel and that a negotiated agreement as opposed to an imposed settlement needs to take
into account the principles enunciated below.

A solution for Jerusalem will need to be based upon a framework encompassing four
overarching principles: compatibility, reciprocity and both a retrospective and a prospective
perspective. By compatibility, I refer to the overall negotiating context. Whatever is agreed
on Jerusalem should be both consistent and compatible with agreements in the other Final Status
negotiations such as borders and security, refugees, and settlements. Border
permeability, employment and residency rights, economic and fiscal arrangements, security
and policing cooperation should all be compatible with other arrangements negotiated. For
example, it would be unworkable to agree to “hard” or impermeable borders between most
of the West Bank and Israel, but have “soft” or permeable borders for the areas between
East Jerusalem and West Jerusalem. Militants opposed to the agreement on both sides
could make use of this disjunction to enter each other’s territory via Jerusalem.
Permeability of the borders would have to be consistent in one way or another. However, the
principle of compatibility need not be absolute. For example, as a result of the unique status
of the city as the site of Holy Places for three religions and of two national capitals, the
requirement for compatibility should not exclude some special arrangements for Jerusalem.
The agreement would need to address questions over access to holy places, taxation on
religious property and the operations of embassies in a way which reflects this special
status. Issues such as the settlements and refugee property restitution or compensation
would need to have this same mix of compatibility with the broader agreement and some
special arrangements for the Jerusalem case.
The second principle of reciprocity may appear implausible, particularly in the current balance of power between the two parties. In reality, reciprocity provides a considerable amount of flexibility. Here, issues such as the ceding of title to land, the recognition of restitution claims, of access and the transfer of legal jurisdiction from one side to the other side would all be in exchange for other “goods”. In this way, each metre shift in the border, each municipal service transferred and each legal jurisdiction obtained by the Israeli side, would be accompanied by a *quid pro quo* for Palestinians, and *vice versa*. However, it is not often understood that there is a degree of flexibility in the principle of reciprocity. To put it simply, the “goods” exchanged need not be the same goods. Clearly territorial exchanges will play an important role if negotiators seek to avoid further excessive political and social disruption from the evacuation of settlements. But land can be exchanged for other goods, such as international monitoring of security procedures, guarantees of access, economic development, and environmental cooperation. In addition, goods can be disaggregated both physically and temporally so that particularly contentious exchanges of goods can be phased in over an extended period. Some settlements, for example, can be parcelled up and evacuated over an agreed-upon period. Clearly, this principle can only be implemented if premised on Resolution 242 and a Palestinian acceptance of Israeli sovereignty over West Jerusalem that is met by a reciprocal Israeli recognition of East Jerusalem as the Palestinian capital by Israel. Despite the weakness of their overall position, the Palestinians are stronger than Israel in one area that is vital for Israel: it is only through an agreement with the Palestinians on Jerusalem that Israel can obtain international legitimacy of their presence in the city and recognition of West Jerusalem as Israel’s capital. Similarly, the Israeli aspiration for an “end of conflict” clause in a peace agreement with Palestinians offers the Palestinians another form of “goods” which can be exchanged (49).

The third principle is that of retrospective-ness. By this I mean that most agreements comprise an element of making good what was wrong in the past. This can encompass a range of issues from the withdrawal of armed forces, the recognition of a grievance hitherto unaddressed through to reparations for the harm done during the course of the conflict. To a large extent Resolution 242, and subsequent Security Council resolutions on Jerusalem, provide the basis for some of this, but not all. Both sides have concerns that predate 1967 and Resolution 242. For the Israeli side, there are concerns about the Jewish Holy Places, including the cemetery on the Mount of Olives, and concerns for the property in the Jewish quarter of the Old City, in Silwan and the surrounding area. There are similar concerns on the Palestinian side. These issues need addressing in either the broader negotiations concerning property restitution and compensation, or as part of the Jerusalem ones.
The final principle is that of prospective-ness. Here we are looking forward to see what is required from the agreement to allow the city to prosper for both sides. What is required is an agreement which provides some economic viability to the city and that allows its urban fabric and infrastructure to develop to meet the needs of the residents on both sides, as well as to the thousands of visitors which will surely come to Jerusalem after a peace agreement is implemented (50). It will need to sensitively accommodate cross-border cultural and religious attachments. In addition, the agreement will need to take into account the highly charged nature of a politically shared city with such huge religious symbolism contained within it with some extra security cooperation and guarantees. Thus, it appears that an agreement which is intended to establish a stable basis for the city in the future will require a significant degree of joint activity, high level consultation across a range of issues and a degree of third party involvement, at least for the early stages. With these four principles in mind, we can now discuss ways in which a right-based approach can accommodate both Israeli and Palestinian interests in the city.

Four major Israeli interests can be identified in their claims to Jerusalem. The first would be the international recognition of Jerusalem as its capital and the legitimacy of national institutions in the city from the President’s Residence, the Knesset, the Supreme Court of Justice and the Israeli municipality and the application of its laws in an agreed territory. Whatever agreement is reached, a *sine qua non* of Israeli acceptance would be the acknowledgement of its place in Jerusalem by the international community, including by countries of the Arab and Islamic world. If Palestinians were satisfied with other aspects of an agreement, this would be forthcoming.

A second important interest is that of access to, and control over, the Jewish Holy Places. Specifically, this would include Israeli sovereignty over the Western Wall and the cemetery on the Mount of Olives under an extraterritorial arrangement. Special arrangements could also be negotiated over an Israeli enclave in the Jewish quarter of Old City stopping short of full sovereignty, but according Israeli residents there great latitude, depending upon the kind of administrative framework established for the Old City and the Holy Places. Connected to the question of the Holy Places is recognition that excavated sites will be accorded respect and be conducted with transparency in line with international standards, such as those set out by UNESCO.

The third major interest is the right to pursue good governance in terms of cooperation with Palestinians in service provision, regional and urban planning and the safeguarding of security of Israeli residents. This would require a strategic administrative cooperative structure, such as a metropolitan council, close cooperation on legislation and extradition,
and a partnership with Palestinian security forces involving some Israeli presence outside its sovereign territory, such as the monitoring of access points to Jerusalem in an interim phase.

Finally, in view of the length of time elapsed since the construction of settlements, the position of Israeli residents in East Jerusalem should be considered. Their status as citizens can be addressed either through territorial exchanges, which will allow some of the settlements to remain under Israeli sovereignty, or by a phasing in of Palestinian sovereignty to provide them with time to evacuate in an orderly way. An offer of Palestinian citizenship and compensation for relocation should also be offered under the terms of the agreement.

On the Palestinian side the rights are identical to those of the Israelis with respect to the first three: international recognition of the city as the Palestinian capital, access and control over Holy Places and good governance and security. The Palestinian side, in addition, can legitimately claim some additional rights with regard to refugee property in West Jerusalem. The way to address these concerns would be to de-couple the issue of sovereignty from that of ownership to allow for either restitution or compensation. This was the approach followed by the signatories of the Dayton Peace Agreement which included far-reaching provisions to deal with the refugee issue (51). Although it was not adopted, this approach also informed the Annan Plan for Cyprus and has set a benchmark for international norms on reparations (52). Both these approaches allowed for a significant degree of redress, but in a manner which is framed by the overall political structures. It is also important to recognise that for the Palestinian side, any territorial exchanges and cooperation over security and economic activities envisaged in both East and West Jerusalem would need to be supplemented by two further rights: the right to reverse the planning decisions and land expropriations of the past 40 years and the right to establish contiguity between East Jerusalem and the West Bank.

Under current conditions of political instability, in which short-term security considerations override longer term perspectives on the future of the city, the feasibility of the framework discussed here seems very remote. The fragmentation of the PLO and Palestinian Authority and the unilateralism of the Israeli government suggest that serious negotiations are unlikely to take place in the coming few years. In this event, the “hard” border in the form of the Separation Wall being constructed by the Israeli government will impinge harshly on Jerusalem. In essence, the harder the border between Israel and Palestine, the further east of Jerusalem it will likely to be.
In this sense, the Separation Wall runs absolutely counter to the settlement policy of the past (See Map 5). That policy was designed to pre-empt an Israeli withdrawal by making the separation between the two communities impossible, and in order and to isolate East Jerusalem from the West Bank hinterland. That objective has now been abandoned by the unilateralist policies of Israel. The Separation Wall now encircles Palestinian suburbs but not Israeli settlements, so that it twists and turns around the hills of East Jerusalem and has to go further east to incorporate the settlements.

(Map 5. Jerusalem: camp David proposals, 2000)
If this is to be the new permanent border between Israel and the putative Palestinian states then it will pose several dilemmas to the new Israeli government. It will have to deal with the multiple borders issue and the changing Zionist discourse on Jerusalem, which recognise that not all of Jerusalem is Jewish Jerusalem. For example, if it decides to impose citizenship on the Palestinian East Jerusalemites on the Israeli side of the border, this would alter the demography of Israel, and have electoral consequences that would enhance the influence of Palestinian Arab parties. In addition, it will raise the dormant issue of their rights to property in West Jerusalem. If it decides to leave them in the current state of legal limbo, this would undermine its authority and its claim to sovereignty in the eyes of the international community, and delay once again its objective of international recognition. Furthermore, the separation Wall will re-ignite the struggle over the education curriculum in the Palestinian sector which took place in the 1980s with its accompanying strikes and rioting students (53). It may oblige the Israeli government to try again to co-opt the religious leadership in an international political climate where there are increased sensitivities to religious interference, and where there is a much greater degree of pan-Islamic and pan-Christian organising that will be able to resist these attempts. Finally, the separation Wall will oblige the municipality to re-establish it role as the primary service provider in East Jerusalem with the huge costs that entails. In sum, the separation Wall and the current policy of unilateralism will create a range of problems for Israel with regard to Jerusalem than was possibly foreseen by its planners.

These dilemmas confronting Israeli policy-makers make the discussion of a more flexible approach relevant and urgent. They also strongly confirm that a solution can only be based along the lines outlined in this paper: that international law remains a central guiding principle under which changes on the ground and the wider negotiation context can be taken into account. This paper has illustrated that while international law provides the overarching framework for a solution to the Jerusalem question, it lacks a clear prescription over the necessary details but which, in turn, allows a degree of ambiguity necessary for negotiation. It has also sought to demonstrate that the political discourse on Jerusalem, despite the polarity that exists in policy and practice, is much less entrenched than in the pre-Oslo period. Combining these two observations this paper has also shown that a resolution can be arrived at. By recognising the interests of both sides of the conflict in the context of some legal flexibility and changing elite aspirations, it is possible to delineate the basic prerequisites of an agreement.
Notes

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14. A modest Canadian-backed proposal for third party role in the administration of the Old City has received some interest by negotiators. See Jerusalem Old City Initiative at http://web2.uwindsor.ca/wsgcms/Projects/JerusalemInitiative


16. It is important to state at the outset of this discussion that by focusing on Jewish and Israeli religious symbols and changing attitudes towards them, I am not entering into a debate over which religious community has greater rights to the city. Instead, my argument emphasizes the fluidity of positions about these religious symbols. A similar observation can be made about the changing perspectives in Muslim, Christian, Palestinian and Arab discourse. The focus in this paper, however, is on the Jewish, Zionist and Israeli discourse, since by virtue of the political and military superiority of Israel; it is this discourse that matters in trying to identify room for negotiations.


34. Ibid., p. 405. Indeed, the disproportion of investment is possibly even greater than these figures suggest when one realises that funds for Route One, one of the city’s major road projects and for the Jerusalem football stadium in west Jerusalem were taken from funds targeted for the Palestinian Arab sector. Ibid. 410-411.


36. See Lustick’s discussion on this theme in supra note, p. 50.


39. See note 1 supra.


44. Ibid.


46. Ibid., Article 4.5.


49. Shamir, supra note 1.

50. See my discussion on this in Dumper, supra note 37 at 147-168.


References


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