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THE IMPORTANCE OF TERMINOLOGY FOR A SOLUTION TO THE JERUSALEM QUESTION

Enrico Molinaro

"Sovereignty" in International Law as "Independence" or "Jurisdiction" / Territorial, Functional, and Personal Jurisdiction / The Relationship between Sovereignty and Human Rights / The Question of Jerusalem and the Holy Places / Other Anomalies to Exclusive Israeli Jurisdiction / The Concept of a "Political Capital" in International Law and the Idea of a Capital Abroad

"Sovereignty" in International Law as "Independence" or "Jurisdiction"

The question of Jerusalem, though not formally being discussed in the Israeli-Palestinian peace talks, is likely to be a burning item on the agenda in the permanent status negotiations. It is an issue of extraordinary sensitivity. While the media, when referring to discussions of the future status of the city, often adopt terms like "sovereignty" (religious as well as territorial), "political capital," and "sovereign rights," the proper meaning of these terms is a subject of intensive debate even among scholars of international law. Consequently, journalists and politicians are not always clear when they employ these or similar words in their everyday language, particularly if one takes into account their strong symbolic and emotional value.

Considering the issue of Jerusalem and the possible outcomes of the negotiations from the specific perspective of international law, is the issue of "sovereignty" really at stake? What is the proper meaning of this term in international law?

Jean Bodin introduced the term "sovereignty" in legal (and philosophical) discourse in the sixteenth century, defining it as "*la puissance absolue et perpétuelle d'une République*" (the absolute and permanent power of a state).

The term was first employed in order to give a moral and philosophical legitimization to the supreme authority in a country, during a period when the ancient sources of power — the emperor and the pope — had begun to lose part of their traditional influence. In other words, "sovereignty" acquired a (legal) meaning in municipal (or, if one prefers, national or constitutional) law, a field completely different, though related, to the international system of law. The term also began to be employed in the language of international law, to the extent that it has today become popular both in scholarly literature and in diplomatic docu-

Daniel J. Elazar, Editor and Publisher; Zvi R. Marom, Associate Editor; Mark Ami-El, Managing Editor. 13 Tel-Hai St., Jerusalem, Israel; Tel. 02-5619281, Fax. 02-5619112, Internet: elazar@vms.huji.ac.il. In U.S.A.: 1616 Walnut St., Suite 507, Philadelphia, PA 19103; Tel. (215) 204-1459, Fax. (215) 204-7784. ISSN: 0792-7304.

ments, including treaties.

Scholars as well as diplomats tend to use "sovereignty" in order to express two different meanings: either "independence" as a qualification of power, or "jurisdiction" as the content of power, namely the competence attributed to a territorial subject of international law.

This latter meaning requires a further qualification. The materials of international law employ the term "sovereignty" to describe both the concept of title and the legal competence which flows from it. In the former sense, the term "sovereignty" explains first why the competence exists and what its fullest possible extent may be, and second, whether claims may be enforced with respect to interference with the territorial aspects of that competence against a particular subject of international law. Therefore, "sovereignty" was the term used to describe the right of a territorial subject of international law to freely exercise its power under customary international law without the permission of any other subject in relation to persons, things, and relationships within its territory.

When referring to sovereignty in terms of "independence", one refers to the main prerequisite for characterizing a subject of international law. A subject of the law is an entity capable of possessing international rights and duties and having the capacity to maintain its rights by bringing international claims. Thus, a subject must be independent of other legal orders (namely foreign governments), and any interference by such legal orders, or by an international agency, must be based on a title of international law.

In fact, sovereignty defined as independence can only be applied concretely in the light of the legal purpose with which the inquiry is made and the particular facts. In general, though, we cannot consider an entity as an independent subject of international law in case of foreign control over its decision-making on a wide range of matters of high policy, exercised systematically and on a permanent basis.

In a different context, sovereignty may also mean "jurisdiction," that is to say, power or legal competence (*imperium*) which the subjects of international law are entitled to exercise, within the limits established by general customary law.

Usually, sovereignty refers to a particular type of subject, the "state," whose main characteristic, compared with other subjects of international law, is to control a certain area of the globe in a sufficiently established manner. "Sovereign" territorial entities, then, tend to exercise most of their powers (jurisdiction/sovereignty) within the limits of the area legitimately controlled by them, even though there have been several instances in international practice which went against this trend, or at least required a further qualification: a state has enforcement jurisdiction abroad only to the extent necessary to enforce its legislative jurisdiction.

In modern times, the term "sovereignty" was almost exclusively used in connection with states. While the term "state" may generate various difficulties and be the source of some confusion and misunderstanding, it nevertheless must be taken into consideration, given the fact that it appears in the provisions of several important multilateral treaties, such as the Charter of the United Nations and the Statute of the International Court of Justice.

Territorial, Functional, and Personal Jurisdiction

When referring in general to the powers legitimately exercised by such "territorial" subjects of international law, a useful distinction may be drawn between "territorial," "functional," and "personal" jurisdiction. Indeed, such a distinction helps to explain and to clarify the various cases and instances of limitations to jurisdiction which occurred in past and contemporary international practice.

By "functional" jurisdiction we refer to the contents of powers of government attributed to the entity under consideration. The tasks undertaken by the government may range from so-called "full" jurisdiction (sovereignty), referring to the wide powers which, though limited by international customary law, are generally attributed to states as the "ordinary" territorial subjects of international law, to a more limited scope of powers which the state has to share or to coordinate with different international entities. In this respect, when dealing with state powers, further distinctions may be drawn, the most common one being the distinction between legislative, executive, or judicial jurisdiction, depending mainly on the way the particular state organizes its own constitutional powers.

The "territorial" and "personal" dimensions refer here to the object of jurisdiction/sovereignty. In other words, to what or whom do the powers authoritatively apply? International norms define the object (territory or peoples) to which functional powers should apply.

The international arrangements stipulated in the framework of the Israeli-Palestinian peace negotiations in progress (the Declaration of Principles initialed in Oslo and signed in Washington on September 13, 1993, as well as the Interim Agreement signed in Washington

on September 28, 1995) adopt the same threefold distinction.

Moreover, both the Camp David Agreement (signed by Egypt and Israel in September 1978) and the aforementioned Oslo Agreement, as well as other international arrangements stipulated in the framework of the Palestinian-Israeli peace negotiations in progress, always refer to "jurisdiction" and never to "sovereignty," since the latter term would raise intricate questions of interpretation.

The Relationship between Sovereignty and Human Rights

The term "sovereignty" may also generate confusion vis-à-vis the subject of human rights in international law. This set of norms relates to some obligations binding the subjects of international law to respect some interests of the individuals or groups in (legal or material) connection with the said subject. The most common instances are the norms protecting individuals or groups living in a specified area against discrimination or ill-treatment on the part of the territorial entity (state) exercising jurisdiction over the area.

In this respect, some could argue that to a certain extent these obligations may represent an infringement or a threat to the "sovereign" rights of the state. In fact, if the term "sovereignty" is used according to its meaning of "independence," it is generally agreed that some limitations upon a state's freedom of action to treat the population residing in the area under its territorial jurisdiction do not endanger the state's standing as an independent subject of international law (unless such limitations are so wide and detailed that the freedom of the territorial entity under consideration is deprived of any content or actual meaning). This applies, for example, to general customary international norms on human rights, which, by definition, encompass broad principles relating mainly to non-discrimination.

On the other hand, self-imposed limitations that have their legal source in treaties previously accepted by the states in question cannot endanger its independence under international law, even if the treaty provisions include the acceptance of some form of binding verification procedures.

Only in a paradoxical scenario, indeed, can we imagine a situation in which a state, by accepting far-reaching limitations on its freedom of action imposed by human rights treaties, would completely lose its ability to continue its existence as an independent subject of international law.

When we consider the term "sovereignty" in its meaning of "jurisdiction," the question to be asked is mainly a political one: do the burdens assumed by the state in this respect correspond to the benefits received? These are sometimes intangible, in the sense that the benefits derived from a commitment to observance of human rights, though politically real and significant, are not generally measurable in economic terms.

The extent to which states are parties to human rights conventions determines the range of limitations which states have accepted upon national freedom of action, but in any case this kind of self-limitation does not affect the state as an independent subject of international law. On the contrary, the state's ability to limit the scope of its own jurisdiction through the various legal means available in international law practice (treaties, unilateral binding declarations, etc.) is one of the main prerogatives of states.

The Question of Jerusalem and the Holy Places

In considering the question of "sovereignty" as applied to the question of Jerusalem, we see where misunderstandings about this term lead to. If sovereignty is intended to mean "independence," the classification of Israel as an independent subject of international law is by no means in question, even if this country, as a result of the peace negotiations in progress, should give up all kinds of powers in areas of the city. The same, of course, would apply to the PLO, if one considers this entity, too, as a subject of international law.

If, on the contrary, in the debate on the status of Jerusalem one employs the word "sovereignty" to mean "jurisdiction," its use might be explained in terms of political considerations, given its emotional and symbolic value.

Without necessarily referring to the many proposals which envisage for Jerusalem all kinds of exceptional arrangements involving such creative solutions as "mixed," "shared," or even "scattered" sovereignty/jurisdiction, let us limit ourselves to an analysis of the present situation in the city. In general, the model of full, absolute, exclusive exercise of sovereignty/jurisdiction is idealistic rather than realistic, and one which often contains several interesting anomalies.

Looking at the actual case of Jerusalem, for instance, an important anomaly is represented by the special limitations on jurisdiction regarding freedom of religion and the special regime applied in the Holy Places. The general considerations referred to above with regard to human rights protected by international law apply also, of course, to freedom of religion and

worship. As yet, no single specific international treaty regulates this set of norms, though freedom of religion is recognized today as a basic principle by the overwhelming majority of states.

This phenomenon can perhaps be explained by the same kind of problems that affect, in a more specific perspective, the subject of the Holy Places of Jerusalem. Because of the extreme sensitivity of the matter, even consolidated principles may not be expressed in a written text. This refers to broad regulations about the ways of worship, access, and pilgrimage to the main places of worship, within Jerusalem or in its immediate proximity, of significant importance for the followers of the three monotheistic religions, defined as the so-called status quo, in its wider sense.

For this reason, the various entities which, since the Ottoman period, have held territorial jurisdiction in Jerusalem have limited their exclusive powers through international legal instruments sometimes differing from multilateral treaties. These obligations find their basis in international law sources that are usually neglected, such as the binding legal effects of unilateral declarations, or a sort of "objective regime" (or "local custom"), and consist of limitations as to the content of the "functional" jurisdiction exercised by the entity responsible for the territory in question.

As to the separate question of settlement of disputes "in connection with the Holy Places or religious buildings or sites in Palestine, or the rights or claims relating to the different religious communities in Palestine" (Palestine Order-in-Council, 15 September 1924, paragraph 2), some broad principles seem to be consolidated in an international law framework with regard to this question as well. Indeed, the principle that the disputes discussed in the aforementioned Order-in-Council should not be referred to the ordinary courts is widely accepted in Israeli case law, even if there seems to be some misunderstanding as to which body should have jurisdiction over the said disputes.

In this writer's opinion, the third paragraph of the Order-in-Council gives a clear answer to this question: the territorial government (today Israel, once Great Britain) shall decide only the question whether "any cause or matter comes within the terms of the preceding Article hereof." In other words, the territorial government may, and has to, decide only the question as to whether this or that particular dispute should be referred to the ordinary courts or not, and not the question of the substance of the dispute under examination

Nevertheless, these narrowly defined limitations on the (functional) jurisdiction of the territorial power clearly do not imply any infringement of the independent quality of the said entity as a subject of international law nor on its power vis-à-vis the territory under its control (territorial jurisdiction).

Other Anomalies to Exclusive Israeli Jurisdiction

Another important anomaly which may question the model of full, absolute, exclusive exercise of sovereignty/jurisdiction over Jerusalem was the decision taken by the Education Ministry of Israel not to enforce Israeli curricula on Arab schools in the areas of Jerusalem formerly under Jordanian control (eastern Jerusalem) and to permit them instead to continue to use Jordanian curricula and testing arrangements.

Moreover, special arrangements have been laid down for eastern Jerusalemites. These arrangements apply to several spheres, as embodied in the Legal and Administrative Matters (Regulation) Law (Consolidated Version), 5730-1970. By this act, for example, Israeli law recognized Jordanian permits and licenses as valid without requiring Arab businessmen and professionals to make application to Israeli authorities.

These provisions, together with the important special arrangements related to the Holy Places and the traditional rights of the religious communities in the city considered above, refer to areas of "functional" sovereignty/jurisdiction not exercised by the entity which controls the area ("territorial" sovereignty/jurisdiction).

Other provisions should be put into the context of "personal" sovereignty/jurisdiction such as the decision not to impose Israeli nationality on residents of eastern Jerusalem. This differs from the procedure applied earlier in Israeli history which turned virtually all Arabs in the territories made part of Israel in 1948-1950 into Israeli citizens.

Nevertheless, the media and some political authorities continue to label activities currently carried out by Palestinian Authority agencies in Jerusalem as intended to undermine Israel's "sovereignty" in Jerusalem. Examples include the hosting of foreign delegations and official guests by Mr. Hassan Tahboub, the Palestinian Authority representative for religious affairs, and the diplomatic activity in Orient House (Feisal Husseini's office) with receptions, ceremonies and meetings with foreign diplomats, or the opening of the Al-Quds University without the requisite certification from the Israeli Council on Higher Education to operate and grant degrees, as required by Israeli law. Do these acts in fact "subvert Israel's sovereignty"? Is Israel's "sovereignty" in Jerusalem so weak and so easily undermined?

Of course, some Israeli professors of international law use a different language to describe these and other similar Palestinian activities. According to Prof. Yehuda Blum (former Israeli Ambassador to the United Nations), "The period since the signing of the Declaration of Principles has been marked in Jerusalem by constant Palestinian attempts to change the existing *status quo*, by creating *faits accomplis* on the ground to enhance the PLO's bargaining posture in the projected permanent status negotiations concerning the future of the city."

Unfortunately, though, the law passed by the Knesset on 26 December 1994 barring any activity in Israel of the PLO or the Palestinian Authority, *of a political or governmental nature...which is inconsistent with respect for Israel's sovereignty*, without Israeli government permission, does not clarify whether the term "sovereignty" has been adopted here in its municipal or international law meaning (and, in the latter, whether as a synonym for "independence" or "jurisdiction").

In light of these considerations, one cannot but hope that the scholar as well the diplomat, when dealing with the question of Jerusalem, will refrain from using such all-encompassing terms as "sovereignty," or "sovereign rights." Especially if one aims at finding a possible solution for the long-standing conflict over the city, these words have clearly proven to be misleading, too often generating confusion and useless controversies.

The Concept of a "Political Capital" in International Law and the Idea of a Capital Abroad

In general, the term "capital" means the city or town where the government of a country, state, or province is officially located. Washington, D.C., for instance, is the capital of the United States, while each state of that country has its own capital.

The question arises as to the meaning of this term in international law. More precisely, does international law attach any importance to this classification of areas of the globe? In other words, how is this concept relevant for the application of any international norm?

There appears to be no specific international legal consequence of establishing or declaring a particular area the "capital" of a (territorial) subject of international law aside from symbolic acts, such as periodic tributes given by visiting foreign diplomats to the national flag of a country on special occasions, and formal celebrations alike, which currently constitute non-binding practices.

True, foreign embassies tend to establish their sites in the "capital" of the said territorial entity, but this phenomenon occurs because of the mutual consent of the two parties involved. If the foreign entity decides to establish its diplomatic representation elsewhere, it is up to the host country whether it accepts this shift in practice or not, without needing to change international law in the positive case.

From another perspective, no international norm forbids any subject of law to establish its "capital" (i.e., its main offices) "abroad," that is to say, on the area under the territorial jurisdiction of another subject, provided the latter gives its consent.

To a certain extent, this seems to have been the case of the Holy See (a recognized subject of international law), which between 1870 and 1929 until the Lateran Treaty had its governmental offices in Italy. A clearer instance might be the case of several governments-in-exile during World War II, which were located in areas under the territorial jurisdiction of friendly countries.

Without necessarily referring to these as well as other so-called "special" cases occurring in international law practice, one may wonder which international norm forbids, and for what purpose, one entity from establishing some of its governmental buildings in territory belonging to another country. This is probably a case in which the considerations referred to previously about the meaning of the term "sovereignty" in international law may be useful.

If indeed one uses "sovereignty" as a synonym for "independence," one should conclude that a country's independence is not necessarily threatened or in danger under international law if a foreign entity is allowed to exercise some governmental functions on the former's territory, and, conversely, if part of the said functions are exercised (either permanently or temporarily) abroad.

If, on the other hand, one defines "sovereignty" as "jurisdiction," then *a fortiori* no violation of, or derogation from, any international norm occurs. As noted above, on the contrary, jurisdiction, by definition, can be divided. Hence, in this case we would have (for instance in the territory currently included within the borders of the municipality of Jerusalem or in a broader, surrounding area) a distinction between the territorial jurisdiction of one entity, on one side, and the (partial) functional jurisdiction of another entity, on the other side, and, possibly, vice versa. This distinction makes clear that when a country allows the exercise of (part of) a foreign entity's jurisdiction on its own

territory, there is no implication for the sovereignty/title under international law.

The above considerations may give an answer to the universal concern about the future of Jerusalem, which is considered by millions of believers in the world as a kind of religious city. Thus, quoting Prof. Sari Nusseibeh, President of the Al-Quds University, the people of Jerusalem should be regarded as custodians rather than as rulers of the city, an idea which seems to be shared by the several religious denominations present in the city.

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Enrico Molinaro is a Ph.D. student in International Law and a Fellow of the Truman Research Institute for Peace at the Hebrew University of Jerusalem. His research has been funded by the Center for Human Rights at Hebrew University and the Tami Steinmetz Center for Peace Research at Tel Aviv University. His most recent publications in English include "Israel's Position on Jerusalem and International Norms for the Holy Places," *JL* #342 (16 September 1996), and "The Jerusalem Question," *Jerusalem Times* (8 November 1996). The ideas presented in this *Jerusalem Letter/Viewpoints* were discussed by the author at several international conferences on the topic of Jerusalem and the Holy Places.
