

Jordan's Custodianship of the Muslim Holy Shrines in Jerusalem

By Victor Kattan

Abstract

The Israel–Jordan peace treaty of 1994 requires that Israel respect Jordan’s special role in the Muslim holy shrines in Jerusalem. But that role was not clearly spelt out, making it a point of contention for the two countries. Victor Kattan argues that Jordan’s role arose from local custom prior to Israel’s occupation of the West Bank, including the Old City of Jerusalem, and involves custodianship, with its attendant duties of maintaining, protecting and regulating access to the holy shrines. He draws on international conventions on war and on the protection of cultural property in the event of armed conflict to argue that Israel has an obligation to respect whatever role Jordan had prior to the occupation.

Twenty-five years have passed since Israel and Jordan concluded the Washington Declaration

(25 July 1994), which paved the path for the historic peace treaty between the two nations. Among the treaty’s provisions is Article 9(2), according to which “Israel respects the present special role of the Hashemite Kingdom of Jordan in Muslim Holy shrines in Jerusalem. When negotiations on the permanent status will take place, Israel will give high priority to the Jordanian historic role in these shrines”.¹

The question is, what was the special role of the Hashemite Kingdom of Jordan in the Muslim holy shrines in Jerusalem that Israel purportedly recognised in the treaty? The answer to this question is important as there is an ongoing dispute between Israel and Jordan over the meaning of Article 9 of the peace treaty. The dispute arose after Israel placed restrictions on Muslim pilgrims and Jordanian personnel, including archaeologists, curators, guards and religious dignitaries, travelling to the sanctuary during the second Palestinian intifada, which began in September 2000. The intifada ended in 2005 but the restrictions remain in place.

Jordan’s special role dates back to the time when the Ottoman sultans took great pride in protecting the pilgrimage to Mecca, defending the holy places on the route of that pilgrimage, which

¹ See “Israel–Jordan: Treaty of Peace done at the Arava/Araba Crossing Point, 26 October 1994”, *International Legal Materials* 34 I.L.M. 43 (1995) (Cambridge University Press, 1995), 43–66.

included Jerusalem,² Hebron and other “holy cities”, and maintaining the shrines.³ While Mecca and Medina are purely Muslim holy places, Jerusalem is a city that is holy to three faiths. Yet, for many centuries, Jerusalem had been under a Muslim suzerain, which also acted as the protector of the Christian and Jewish holy places. Jordan is today fulfilling the role that had once been assumed by the Ottoman sultans in respect of the Muslim holy shrines.

The dispute between Israel and Jordan is not a dispute about sovereignty. Jordan does not recognise Israeli sovereignty over Jerusalem, only its *de facto* control of the city. Nor does Jordan claim sovereignty over Jerusalem.⁴ The dispute concerns Jordan’s special role regarding the access, maintenance and security of the shrines. Jordan maintains that its special role is that of a custodian or guardian of the Muslim holy shrines in Jerusalem on behalf of the Muslim world, a special role which Israel recognised in the peace treaty.

The Israel–Jordan Peace Treaty

Jordan’s special role in the Muslim holy shrines in Jerusalem finds expression in Article 9(2) of the peace treaty, which is sandwiched between Article 9(1) on freedom of access to places of religious and historical significance and Article 9(3) regarding interfaith relations. While both sides have agreed to provide freedom of access to places of religious and historical significance in Article 9(1), arguably Jordan could restrict such access if it interfered with its special role in the Muslim holy shrines. For example, if the entry of extremists were likely to cause a disturbance in al-Haram al-Sharif/Temple Mount, then it would seem prudent to restrict or prevent such access.

This is what happens in practice where the adherents of all faiths have been given access to the sanctuary through Mughrabi Gate during visiting hours agreed to by the Jordanian Awqaf.⁵ Jordan, however, objects to the entry of Christian and Jewish extremist groups that want to pray in the sanctuary. It argues that this practice breaches Article 9(2) of the treaty and the status quo, according to which Muslims pray at the al-Haram al-Sharif/Temple Mount, while non-Muslims visit. Given the threats to the shrines and the history of violent attacks, Jordan’s position would seem to be a reasonable interpretation of Article 9.⁶

² According to Amikam Elad, a historian of the medieval Middle East, the tradition of pilgrims visiting Jerusalem in order to sanctify themselves for the haj or the *umrah* (“minor” pilgrimage) dates to the first quarter of the eighth century. See Amikam Elad, *Medieval Jerusalem and Islamic Worship: Holy Places, Ceremonies, Pilgrimage* (Brill, 1995), 64–68. Johann Büssow explains that, under the Ottomans, Jerusalem attracted pilgrims from all over the Islamic world, including North Africa, Persia, Afghanistan and India, who stopped to visit Palestine’s sacred site before they went to Mecca. See Johann Büssow, *Hamidian Palestine: Politics and Society in the District of Jerusalem 1872–1908* (Brill, 2011), 438–439.

³ On Ottoman practices see Suraiya Faroqhi, *Pilgrims and Sultans: The Hajj under the Ottomans 1517–1683* (IB Tauris, 1994); Selim Deringil, *The Well-Protected Domains: Ideology and Legitimation of Power in the Ottoman Empire, 1876–1909* (IB Tauris 1999); and Kimberly Katz, *Jordanian Jerusalem: Holy Places and National Spaces* (University Press of Florida, 2005), 8–9.

⁴ See the speech by King Hussein, “Address to the Nation, 31 July 1988”, available on Jordanian government tribute website for King Hussein, http://www.english.kinghussein.gov.jo/88_july31.html.

⁵ *Awqaf* is the plural of *waqf* in Arabic and is used to refer to the entire administration of the compound. A *waqf* is an endowment registered in a Shari‘a court created by wealthy benefactors who wish to support a religious facility such as mosques, pilgrims’ hostels, schools, hospitals, hospices and orphanages. Income from such land and property is endowed in perpetuity to support their purposes.

⁶ For example, in 1969, Denis Michael Rohan, an evangelical Christian, set fire to the pulpit of Al-Aqsa Mosque. He believed he was given divine instructions to enable the Jews of Israel to rebuild the temple on Temple Mount in accordance with the Book of Zechariah, thereby hastening the second coming of Jesus Christ.

The Meaning of “Muslim Holy Shrines”

The term “Muslim holy shrines” is not defined in the Washington Declaration nor in the peace treaty. While the two documents both refer to Muslim *holy shrines* rather than to Muslim *holy places*, Israeli jurists Reuven Merhav and Rotem Giladi accept that the wording refers to “al-Haram al-Sharif compound and the sites inside it”.⁷ In support of this interpretation, they quote US President Bill Clinton as having told Jordan’s King Hussein at the signing ceremony of the Washington Declaration that: “...in the declaration you will sign, your role as guardian of Jerusalem’s Muslim holy sites [emphasis added], Al-Aqsa among them, has been preserved. And Israel has agreed to accord a high priority to Jordan’s historic role regarding these holy sites in final status negotiations.”⁸

Evidently, the distinction between a Muslim holy shrine, place or site is a fine one and there is very little to distinguish between them. But as Merhav and Giladi admit, by granting Jordan de facto autonomy in the Haram al-Sharif/Temple Mount following the 1967 war, Israel accepted that *the whole of the compound* is a “holy place” or a “holy shrine”.⁹ And, as President Clinton made clear, while Jordan’s historic role as guardian of Jerusalem’s Muslim holy places includes Al-Aqsa, it is not limited to Al-Aqsa.

The Meaning of “Respect”

According to Article 9(2) of the peace treaty, “Israel respects [emphasis added] the present special role of the Hashemite Kingdom of Jordan in Muslim Holy shrines in Jerusalem”.

The word “respect” in Article 9(2) of the peace treaty must be read with due regard for the circumstances of Israel’s presence in the Old City of Jerusalem, which it captured in June 1967 — that of an “occupying power” under the laws of belligerent occupation.¹⁰ Under Article 43 of the 1907 Hague Regulations on the Law and Customs of War on Land, which reflects customary international law,¹¹ Israel is required to take all the measures in its power “to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country”.¹² The laws in force in Jerusalem prior to 4 June 1967 were the laws of the

⁷ Reuven Merhav and Rotem M. Giladi, “The Role of the Hashemite Kingdom of Jordan in a Future Permanent-Status Settlement in Jerusalem” in *Jerusalem: A City and its Future*, ed Marshall J Breger and Ora Ahimeir (Syracuse University Press, 2002), 191–192.

⁸ Reuven Merhav and Rotem M Giladi, “The Role of the Hashemite Kingdom of Jordan”, 192. See also, “Remarks at the signing ceremony for the Israel–Jordan Washington Declaration” in “Weekly Compilation of Presidential Documents 30 (30)”, US Government Publishing Office, 1 August 1994, 1548, [https://www.govinfo.gov/content/pkg/WCPD-1994-08-01-Pg1548-2.pdf](https://www.govinfo.gov/content/pkg/WCPD-1994-08-01/pdf/WCPD-1994-08-01-Pg1548-2.pdf).

⁹ Reuven Merhav and Rotem M Giladi, “The Role of the Hashemite Kingdom of Jordan”, 192, fn 33.

¹⁰ See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, International Court of Justice (ICJ) Reports 2004, at 136, para 78.

¹¹ *Legal Consequences of the Construction of a Wall*, Advisory Opinion, para 89.

¹² See Art. 43 of Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulation concerning the Laws and Customs of War on Land, 18 October 1907, available on the website of the International Committee of the Red Cross, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/73cb71d18dc4372741256739003e6372/4d47f92df3966a7ec12563cd002d6788>.

Hashemite Kingdom of Jordan, which included the Law for the Restoration of Al-Aqsa Mosque and the Dome of the Rock.¹³

When it comes to the law that applies to cultural property, the word “respect” has a specific meaning that imposes an obligation on state parties to protect cultural property. For instance, Article 4(1) of the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954 Hague Convention),¹⁴ to which Israel and Jordan are contracting parties,¹⁵ requires that they “undertake to *respect* [emphasis added] cultural property situated within their own territory as well as within the territory of other High Contracting Parties by refraining from any use of the property and its immediate surroundings or of the appliances in use for its protection for purposes which are likely to expose it to destruction or damage in the event of armed conflict; and by refraining from any act of hostility, directed against such property”.¹⁶

Significantly, the obligation to protect cultural property under the 1954 Hague Convention also includes the obligation to take *positive* steps to ensure that cultural property is fully protected in situations of belligerent occupation. This is derived from Article 5(1) of the Convention, which provides: “Any High Contracting Party in occupation of the whole or part of the territory of another High Contracting Party shall as far as possible *support* [emphasis added] the competent national authorities of the occupied country in safeguarding and preserving its cultural property.” The competent national authority in al-Haram ash-Sharif/Temple Mount is the Jordanian Awqaf.

Accordingly, it may be concluded that Israel, by agreeing to “respect the present special role of the Hashemite Kingdom of Jordan in Muslim Holy shrines in Jerusalem”, is under a legal obligation to respect, and to continue to respect, whatever that special role was when the treaty was concluded in 1994. It is also argued that the obligation to respect, when read in light of the obligations imposed on Israel by the 1954 Hague Convention, includes a positive obligation to support the Jordanian Awqaf in safeguarding and protecting the Muslim holy shrines in Jerusalem. This would include an obligation to undertake a cultural impact assessment prior to undertaking any work on or around the Muslim holy shrines, which would involve notifying and closely coordinating such work with Jordan beforehand.¹⁷

Conclusion

It should be emphasised that the special role of Jordan as custodian of the Muslim holy shrines in Jerusalem is not predicated on the existence of the peace treaty. It is a right that Israel had recognised before the conclusion of the peace treaty and that exists independently of it. Jordan’s

¹³ The Hashemite Kingdom of Jordan, Law no. 32 of 1954, 2 December 1954. For the text of the law (in Arabic), see website of East Laws network, accessed 5 December 2019, <https://site.eastlaws.com/GeneralSearch/Home/ArticlesTDetails?MasterID=74666&related>.

¹⁴ Convention for the Protection of Cultural Property in the Event of Armed Conflict [Hague Convention], 14 May 1954, *United Nations Treaty Series* 249: 215, <https://treaties.un.org/doc/Publication/UNTS/Volume%20249/volume-249-I-3511-English.pdf>.

¹⁵ Israel ratified the 1954 Hague Convention on 3 October 1957; Jordan ratified it on 2 October 1957.

¹⁶ Art. 4(1) 1954 Hague Convention (emphasis added).

¹⁷ One can infer the existence of such an obligation from the law of environmental protection and the duty to carry out an environmental impact assessment over the common management of resources prior to undertaking a measure that might cause transboundary harm to another state. See, for example, *Pulp Mills on the River Uruguay* (Argentina v Uruguay), Judgment, ICJ Reports 2010, at 14, para. 204.

special role arose from a local custom that was codified in Article 9(2) of the peace treaty.¹⁸ Ultimately, Jordan's special role aims to protect the inviolability of the holy shrines in Jerusalem on behalf of the Muslim world. This role has since been defined in Article 2 of the agreement concluded between Jordan and Palestine in 2013 to "Jointly Defend al-Masjid al-Aqsa", which was based on the "eternal association of the Holy Sites with Muslims of all lands and all ages; and bearing in mind the significance of Jerusalem to those of other faiths."¹⁹

About the Author

Dr Victor Kattan is a senior research fellow at the Middle East Institute at the National University of Singapore and an associate fellow at the university's Faculty of Law. Victor has a PhD from the School of Law at SOAS, University of London and an LLM from Leiden University's Europa Institute. He is the inaugural winner of the Asian Society of International Law's Young Scholar Prize, and is the author and editor of three books, including: *From Coexistence to Conquest: International Law and the Origins of the Arab-Israeli Conflict 1891–1949* (London: Pluto, 2009) and, with the late Peter Sluglett, *Violent Radical Movements in the Arab World: The Ideology and Politics of Non-State Actors* (London: Bloomsbury, 2019). He has written and spoken widely about various aspects of the Israel-Palestine dispute, the laws of war, human rights, and the history of international law. He is an occasional contributing writer for the English language edition of *Ha'aretz*.

¹⁸ In the *Right of Passage through India* case, the ICJ held that a local custom could be established between two states. "The Court sees no reason why long continued practice between two States accepted by them as regulating their relations should not form the basis of mutual rights and obligations between the two States". See *Case Concerning Right of Passage over Indian Territory (Merits)*, Judgment of 12 April 1960: ICJ Reports 1960, 39.

¹⁹ See Jordanian-Palestinian Agreement to Jointly Defend al-Masjid al-Aqsa a, 31 March 2013, available online on website of Jordanian embassy in Washington DC, <http://jordanembassyus.org/news/jordanian-palestinian-agreement-jointly-defend-al-masjid-al-aqsa>.