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The Fundamental Agreement Between the Holy See and the State of Israel: A Symposium

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THE FUNDAMENTAL AGREEMENT BETWEEN THE HOLY SEE AND THE STATE OF ISRAEL: A SYMPOSIUM

AN INTRODUCTION

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The Vatican-Israel Accord of 1993 was clearly a political document—one undertaken between two sovereign states.[1] At the same time, there can be no doubt that the Accord would not have been possible without significant change in the traditional theological approach of the Catholic Church towards the people of Israel. Any student of modern Christianity will understand immediately the extraordinary changes that have taken place in recent Vatican thinking toward Judaism and the Jewish people. The Catholic Church has made a 180-degree turn in its view of Jews and Judaism since the 1965 Vatican Declaration *Nostra Aetate*.[2] Moving beyond what Jules Isaac termed "the teaching of contempt,"[3] Catholics now claim that "the Jews still remain most dear to God."[4] In a 1985 statement, the Vatican told us that "Judaism is a living religion" and that the Hebrew Bible "retains its own value as revelation."[5]

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1. The question of whether the Vatican should be treated as a sovereign state has been fully reviewed by scholars. The references are well arrayed in Yasmin Abdullah, Note, *The Holy See at United Nations Conferences: State or Church?*, 96 COLUM. L. REV. 1835, 1835 n.3 (1996).

2. The Second Vatican Council, Declaration on the Relationship of the Church to Non-Christian Religions, *Nostra Aetate*, no. 4, Oct. 28, 1965 [hereinafter Declaration], *reprinted in* EUGENE J. FISHER, FAITH WITHOUT PREJUDICE: REBUILDING CHRISTIAN ATTITUDES TOWARD JUDAISM 131 (1993).

3. JULES ISAAC, THE TEACHING OF CONTEMPT: CHRISTIAN ROOTS OF ANTI-SEMITISM 17 (Helen Weaver trans., Holt, Rinehart and Winston 1964) (1962).

4. Declaration, *supra* note 2, at 132.

5. Commission for Religious Relations with the Jews, Guidelines and Suggestions for Implementing the Conciliar Declaration, *Nostra Aetate*, no. 4, Dec. 1, 1974, *reprinted in* FISHER, *supra* note 2, at 133, 134. These themes were further explicated in the Commission's 1985 statement, NOTES ON THE CORRECT WAY TO PRESENT THE JEWS AND JUDIASM IN ROMAN CATHOLIC PREACHING AND CATECHESIS (Vatican City, June 24, 1985).

I. THE VATICAN AND ISRAEL

The Vatican view toward a Jewish state in Palestine has evolved together with its position toward Judaism.[6] In January 1904, Theodore Herzl, the founder of political Zionism, met with Pope Pius X to ask for his support for the Zionist enterprise.[7] The Pope's response was swift and certain:

> We are unable to favor this movement. We cannot prevent the Jews from going to Jerusalem—but we could never sanction it. The ground of Jerusalem, if it were not always sacred, has been sanctified by the life of Jesus Christ. As the head of the Church I cannot answer you otherwise. The Jews have not recognized our Lord, therefore we cannot recognize the Jewish people.[8]

With the collapse of the Ottoman Empire and the entry of the British Army, under Lord Edmund Allenby, into Jerusalem, the Holy See sought a seat at the table deciding Jerusalem's fate. Their goal was to ensure control of Palestine by a Western power—preferably Catholic. Thus, after the First World War, the Vatican sought to have Italy or another Catholic state take the Palestine Mandate.[9] Failing in such efforts the Vatican sought to keep the Mandate in "Christian" hands.[10]

Notwithstanding the Vatican's efforts "to stir up opposition"[11] to Britain—a Protestant country—taking on the Mandate, the League of Na-

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6. The literature on the Vatican-Israel relationship is limited yet growing. *See* Silvio Ferrari, *The Vatican, Israel and the Jerusalem Question (1943-1984)*, 39 MIDDLE EAST J. 316, 316-31 (1985); *see also* GEORGE EMILE IRANI, THE PAPACY AND THE MIDDLE EAST: THE ROLE OF THE HOLY SEE IN THE ARAB-ISRAELI CONFLICT, 1962-1984, at 13-30 (1986); ANDREJ KREUTZ, VATICAN POLICY ON THE PALESTINIAN-ISRAELI CONFLICT: THE STRUGGLE FOR THE HOLY LAND 93-94 (1990). *See generally* SERGIO I. MINERBI, THE VATICAN AND ZIONISM: CONFLICT IN THE HOLY LAND, 1895-1925 (Arnold Schwarz trans., 1990); LIVIA ROKACH, THE CATHOLIC CHURCH AND THE QUESTION OF PALESTINE (1987).

7. *See* THE DIARIES OF THEODOR HERZL 427 (Marvin Lowenthal ed. & trans., 1956).

8. *Id.* at 428. Earlier, Herzl met with the Vatican Secretary of State, Cardinal Merry del Val, who informed him that "in order that we should come out for the Jewish people in the way you desire, they would first have to accept conversion." *Id.* at 421; *see also* ALEX BEIN, THEODORE HERZL: A BIOGRAPHY 490 (Maurice Samuel trans., 1941).

9. *See* Silvio Ferrari & Francesco Margiotta Broglio, *The Vatican, the European Community, and the Status of Jerusalem*, *in* 3 STUDI IN MEMORIA DI MARIO CONDORELLI 571, 573-74 (Dott. A. Giuffrè ed., 1988).

10. This desire was not mitigated by the tragedy of World War II. By this time, "[s]uch a solution it well knew, however, was unattainable, and in the actual circumstances it preferred the Arabs to the Jews." *Id.* at 574 (citing the comments of John Victor Perowne, British Plenipotentiary Minister to the Holy See, in the summer of 1949).

11. *See* KREUTZ, *supra* note 6, at 42 & nn.81-82 (attributing the phrase to Lord Arthur James Balfour, British Foreign Secretary).

tions awarded the Palestine Mandate to Britain in 1922.[12] During World War I, Britain had promulgated the Balfour Declaration. At that time, it "view[ed] with favour" the development of a Jewish national home in Palestine.[13] The reality of British governance was quite different during the Mandate period as it sought to navigate between its Balfour Declaration commitments and the interests of the local Arab population. The next twenty-five years of British rule saw continuous Jewish immigration met by continuous Arab resistance. At the end of World War II, the intensity of Jewish commitment to Palestine grew and a war-weary Britain chose to "break camp" as part of its more general imperial retreat.

In November 1947, the United Nations General Assembly voted in favor of partitioning Palestine into independent Arab and Jewish states after much hard lobbying by Zionists, who favored partition, and Arab leaders, who opposed it.[14] The Jerusalem-Bethlehem area (with a corridor to the Mediterranean Sea) was designated a *corpus separatum* to be administered by the United Nations itself.[15] Events on the ground, however, swiftly overwhelmed diplomacy. The United Nations partition recommendation was not acted upon because of the outbreak of war in May 1948 between the newly declared State of Israel and five surrounding Arab nations.

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12. *See* MINERBI, *supra* note 6, at 178-95 (describing in detail the Vatican's objection and opposition to the Mandate).

13. *See* The Balfour Declaration (Nov. 2, 1917), *reprinted in* THE ARAB-ISRAEL CONFLICT AND ITS RESOLUTION: SELECTED DOCUMENTS, at 20 (Ruth Lapidoth & Moshe Hirsch eds., 1992) [hereinafter ARAB-ISRAEL CONFLICT DOCUMENTS].

14. *See* G.A. Res. 181(II), U.N. GAOR, 2d Sess., 1947, at 146-50, U.N. Doc. A/64 (1947), *reprinted in* THE JERUSALEM QUESTION AND ITS RESOLUTION: SELECTED DOCUMENTS, at 6-10 (Ruth Lapidoth & Moshe Hirsch eds., 1994).

15. *See id.* at 131. This tracked the views of the 1937 Royal (Peel) Commission Report which called for the partition of Palestine to allow for the creation of independent Arab and Jewish states. *See* PALESTINE ROYAL COMMISSION REPORT, 1937, Cmd. 5479, at 382-83; *see also* PALESTINE STATEMENT OF POLICY BY HIS MAJESTY'S GOVERNMENT IN THE UNITED KINGDOM, 1937, Cmd. 5513. Concerning Jerusalem and its holy places, the report stated: "The partition of Palestine is subject to the overriding necessity of keeping the sanctity of Jerusalem and Bethlehem inviolate and of ensuring free and safe access to them for all the world." PALESTINE ROYAL COMMISSION REPORT, *supra*, at 381. Safeguarding the holy places was considered, in the words of the Mandate, "a sacred trust of civili[z]ation." LEAGUE OF NATIONS COVENANT art. 22, para. 1, *reprinted in* ARAB-ISRAEL CONFLICT DOCUMENTS, *supra* note 13, at 23-24. Accordingly, the members of the Royal Commission proposed that Jerusalem, Bethlehem, Nazareth, and the Sea of Galilee (Lake Tiberias) be made a *corpus separatum*, and thus be detached from the proposed Arab and Jewish states. With a designated road access to the sea, the Christian Holy Areas would have the status of a separate enclave under international administration. *See* PALESTINE ROYAL COMMISSION REPORT, *supra*, at 381-84, and accompanying Map No. 8.

Both at the time of the 1947 partition plan and afterwards, the Vatican supported the internationalization of the city of Jerusalem.[16] After the Six Day War, however, the Vatican policy on Jerusalem began to move away from its insistence on the creation of a separate legal jurisdiction or *corpus separatum* to accept the notion of international guarantees to safeguard the uniqueness of the city.[17] At this time, the internationalization option is simply not on the political agenda of any of the "stakeholders" in the Jerusalem dispute.

II. THE VATICAN-ISRAEL ACCORD AND THE *LAW REVIEW* SYMPOSIUM

In December 1993, the Vatican signed an Accord with Israel that led to recognition and the exchange of Ambassadors.[18] The bilateral agreement dealt with a variety of political issues including taxation of churches and pilgrimage rights. The agreement committed both parties to promote religious freedom and ensure access to the holy places. As the Accord stated, "[t]he State of Israel affirms its continuing commitment to maintain and respect the 'Status quo' in the Christian Holy Places to which it applies and the respective rights of the Christian communities thereunder."[19]

The 1993 Accord called for the creation of a number of working groups to produce follow up in areas such as the taxation and the legal personality of the Catholic Church during a three year period. Consistent with the Vatican's new approach toward the Jewish people, the Agreement also stated that "[t]he Holy See and the State of Israel are committed to appropriate cooperation in combating all forms of antisemitism."[20]

The Church expected the 1993 Accord to begin a new day in Vatican-Israel relations. During the period of 1993 to 1997, the hopes that the Fundamental Agreement would lead to a flowering of Vatican-Israeli relations were never consummated. Working group meetings on outstanding issues began auspiciously on July 4, 1994. Despite this initial ef-

16. *See* Ferrari & Broglio, *supra* note 9, at 579-80. For a useful presentment of the past Vatican discussion on Jerusalem (internationalization of the whole city) and present position ("special status" and "international guarantees") see generally Silvio Ferrari, *The Religious Significance of Jerusalem in the Middle East Peace Process: Some Legal Implications*, 45 CATH. U. L. REV. 733 (1996); Silvio Ferrari, *The Struggle for Jerusalem*, 11 EUR. J. INT'L AFF. 22-39 (1991); Ferrari, *supra* note 6, at 316-31.

17. *See* Ferrari & Broglio, *supra* note 9, at 583.

18. *See* Fundamental Agreement Between the Holy See and the State of Israel, Dec. 30, 1993, Vatican-Isr., 33 I.L.M. 153 (1994) [hereinafter Fundamental Agreement].

19. *Id.* art. 4, para. 1, at 155.

20. *Id.* art. 2, para. 1, at 155.

fort, nothing was done to undertake the joint activity on antisemitism, and the taxation working group meetings petered out by early 1996. Most important, the agreement on legal personality, which had been assiduously negotiated by technical working groups throughout 1994 and 1995 and initialed by representatives of the negotiating team in May 1996, seemed to hit a deep freeze.

At first, delay was understandable. The election that May of Benjamin Netanyahu as Prime Minister was naturally going to create an interregnum until a new foreign policy team took over. The delay, however, had more deep-seated roots. Unlike the Peres government, which had an interest in matters European, the Netanyahu government expressed little interest in the Vatican "file." Indeed, Netanyahu visited Italy in February 1997 to meet with the Pope at the Vatican, and he conferred afterward with Cardinal Sodano, the Vatican Secretary of State and was asked by Vatican Foreign Minister Jean-Louis Tauran about the agreement. He was then asked by Tauran about the legal personality agreement and, to the Vatican's dismay, responded that this was the first he had heard of it. It took a symposium at The Catholic University of America's Columbus School of Law and a meeting called by William Cardinal Keeler with American Jewish leaders to spur the Israeli government forward.[21]

One technical reason for the delay was the need for positive legislation by the Israeli Knesset to implement the legal personality agreement. This required significant analysis by the Attorney-General and the drafting of implementing legislation by his staff. At the same time, however, there was concern at the political level that an agreement with the Catholic Church might, in some way, offend the orthodox religious elements in Netanyahu's jostling governing coalition. The Foreign Minister, to some extent, was left to rely on the approval of the Attorney General, a highly respected orthodox former jurist, not only for legal sufficiency, but for religious propriety as well.

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21. The symposium, which took place April 8-9, 1997, was entitled "Continuing the Dialogue: The Fundamental Agreement Between the Holy See and the State of Israel: A Third Anniversary Perspective," and was co-sponsored with the Embassy of Israel. Professor William Wagner of the Columbus School of Law and I organized the symposium. The success of the conference was due, in large measure, to Professor Wagner's creative spirit and deep spiritual commitment.

At the conference, Israel's ambassador to the United States, Eliahu Ben-Elissar, announced that "[t]he legal agreement, already initialed by the two sides, will be brought before the government for ratification in the very, very near future." Larry Witham, *Catholic Church Frustrated with Israel: Diplomacy Stalled Despite Recognition*, WASH. TIMES, Apr. 9, 1997, at A12.

The delay in signing the legal personality agreement was extremely frustrating for the Holy See. As one Vatican diplomat noted at the Columbus School of Law conference, it is necessary to bring "an awareness of the need to go forward with what the journey demands, otherwise there is the risk that everything that has already been done will be rendered void."[22]

From the Vatican perspective, recognition of the Church as a legal entity was very important. For approximately 500 years, the Church maintained an undefined legal status under the Ottoman Empire, the British Mandate, and Israeli rule. The Church and its institutions in Israel were recognized de facto under the Ottoman "status quo" agreements. Now, the Vatican had given away in the 1993 Accord what it deemed to be its own best bargaining chip—recognition of the state of Israel. Some in the Roman Curia, who had urged caution in opening relations with Israel, were now suggesting "I told you so." The Church felt strongly the need to institutionalize its legal status.

The agreement on the legal personality of the Catholic Church was approved by the Israeli cabinet on September 7, 1997 and signed by Israeli Foreign Minister David Levy and the Apostolic Nuncio Archbishop Montezemolo in Jerusalem on November 10, 1997.[23] The purpose of the agreement was to normalize the status and legal personality of the Catholic Church and its institutions. The agreement determined that the Catholic Church and many of its institutions would be accorded legal status (such as association or corporate status) under Israeli law. The institutions also would be included in an official state registry (such as the Registrar of Associations or the Registrar of Religious Trusts), and their interaction with non-Church bodies in Israeli would be subject to Israeli law, including litigation in Israeli law courts.

On the other hand, Church institutions would maintain full internal autonomy in the administration of its institutions and assets in Israel. Adjudication of these matters would be left to the Church in accordance with Canon Law. Thus, Israel committed itself "not only to the de jure confirmation of those rights pertaining to the Catholic Church's educational and philanthropic institutions, but also to enshrine the authorita-

22. *Id.* (quoting the remarks of Archbishop Claudio Maria Celli).

23. *See Legal Personality Agreement with the Holy See* (Dep't of Comm. & Pub. Aff., Consulate General of Israel, New York, N.Y.), Nov. 11, 1997, at 1 [hereinafter *Legal Personality Agreement*]. As of April 15, 1998, the exchange of the instruments of ratification had not yet taken place.

tive structure of the Catholic Church's hierarchy and religious orders in Israeli law."[24]

The agreement also consists of directives, principles for implementation, and appendices. The appendices include the list of Church institutions that have been recognized as legal personalities and are to be included in the state registry. Names of institutions may be added or removed from the list in the future.

It is important to note that the agreement concerns areas where Israeli legislation is in effect—a formula which includes East Jerusalem.[25] This has resulted in the Palestinian calling the agreement "a stab in the back."[26] In early December 1997, the Palestinian legislature sent an "urgent message" to the Islamic summit in Teheran calling on Yasser Arafat to send a delegation to "inform the Pope of the dangerous consequences of this agreement."[27]

Notwithstanding this progress in Vatican-Israel relations, an agreement regarding tax exempt status between the two parties still remains to be negotiated. Such an agreement, once it materializes, would revolve around the tax privileges of clergy and tax exemption for religious property. The agreement could be drawn from a 1948 understanding Israel reached with France, as then interlocutor for the Catholic community.[28]

III. FUTURE ISSUES

Despite the progress that has been made in Vatican-Israel relations, significant issues remain. The following are some of the most pressing issues.

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24. David Rosen, *New Agreement Between Vatican and Israel Yet Another Step on the Journey of Reconciliation*, IRISH TIMES, Nov. 18, 1997, at 14, *available in* 1997 WL 12035986.

25. *See Legal Personality Agreement*, *supra* note 23, at 1.

26. *Palestinians Call Vatican-Israeli Accord a "Stab in the Back,"* AGENCE FRANCE-PRESSE, Nov. 11, 1997, *available in* 1997 WL 13431992.

27. *Palestinians Ask Islamic Summit to Counter Vatican-Israel Agreement*, AGENCE FRANCE-PRESSE, Dec. 9, 1997, *available in* 1997 WL 13450716.

28. A 1948 exchange of letters between the representative of the Jewish Agency in Paris and the Director-General of the French Foreign Ministry led to a continuing dispute as to whether the exchange constituted an agreement by Israel to continue the privileges and exemptions for French Catholic institutions as enumerated in the Ottoman status quo. Israeli authorities viewed the exchange as an agreement to conduct negotiations as to whether the historical arrangements were to continue to have effect. *See* Eitan Margalit, *Comments on the Fundamental Agreement Between the Holy See and the State of Israel*, JUSTICE, June 1994, at 24, 25.

A. Christians Living in the Holy Land

Christians face three practical problems which affect their relations with Israel. First, they are fractured and each group is concerned that another church might secure advantages that it does not have. Thus, they insist on the Ottoman "status quo" at all times even if doing so might hurt their individual interests. For example, the different denominations who claim possessory interests in the Church of the Holy Sepulcher jealously guard every inch of "title" and every presumption of customary privilege that they can. For example, the Copts, an Egyptian Christian Church, and the Ethiopian Christians have disputed for centuries over the monastery of *Deir al Sultan* east of the Church of the Holy Sepulcher. The Copts were in possession until 1970, when on Easter night the Ethiopians entered and changed the locks while the Copts were at Church. In protest, the Copts camped out for years in an encampment of "huts" by their old home. Efforts to remedy this reversal of fortune remain mired in the Israeli legal process.[29]

Even today, the Christian communities remain at odds over control of Christian holy places. It has taken more than thirty years to create a consensus among the different denominations present at the Church of the Holy Sepulcher as to how to proceed with vital building repairs.[30] A consensus was only reached after Israeli officials, fearing a cave in, threatened to make the repairs to the ceiling themselves. A dispute over the painting of the dome of the rotunda took more than twelve years to resolve.[31]

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29. In *The Coptic Patriarchate v. The Minister of Police* (1971), 25(1), P.D., 225, the Copts secured an order of eviction. Enforcement was postponed to allow the government to make determinations as to substantive rights under the 1924 Order in Council. *See Palestine (Holy Places) Order in Council, in* LIONEL G.A. CUST, THE STATUS QUO IN THE HOLY PLACES OF CHRISTENDOM 65 (1971). The committee has met once since 1971, but a second petition in 1977 based on grounds that the court was waiting for the government to act failed. *See The Coptic Patriarchate v. The Government of Israel* (1979), 33(1), P.D., 225. At different times, both the Egyptian and the Ethiopian governments have intervened on behalf of their "charges." *See generally* Walter Zander, *Jurisdiction and Holiness: Reflections on the Coptic-Ethiopian Case*, 17 ISRAEL L. REV. 245 (1982).

30. *See* Lisa Pevtzow, *Holy Squabbles*, JERUSALEM POST MAG., Apr. 1, 1994, at 6 (describing the territorial battles among the six religious denominations housed in the Church).

31. *See* Mary Curtius, *Holy Sepulcher Church Paint Job an Act of Faiths*, L.A. TIMES, Apr. 15, 1995, at A1; *see also* Michael Krikorian, *A Simple Cross Ends Decades of Division*, L.A. TIMES, Dec. 30, 1995, at B4. A Roman Catholic investment banker from Rye, New York, George Doty, who provided the funding, "stressed that all the work had taken place within the framework of the status quo." Haim Shapiro, *Holy Sepulcher Cupola Unveiled After 68 Years Under Wraps*, JERUSALEM POST, Jan. 3, 1997, at 20. Only after seeking the assistance of the Pontifical Mission for Palestine, a social services organization,

The Greek Orthodox have often indicated that maintenance of Israeli control of Christian holy places was preferable to revision of the Ottoman status quo.[32] The Greek Orthodox fear that, in any revision, they would lose out to the larger and more powerful Roman Catholic Church.[33] In speaking of the holy places, Metropolitan Timothy, Secretary of the Greek Orthodox Patriarch of Jerusalem, underscored that "[t]he Vatican does not represent us."[34] In late 1995, the Patriarch Diodorues I issued a call for a legally binding agreement with Israel that would not compromise the existing status quo.[35] Similar intramural tension might be expected among Muslim interests if they were to be handed the Muslim Holy Places to "govern."

Second, most of the lay Christians in the Jerusalem area are Palestinians and do not wish, out of either solidarity or fear, to isolate themselves from general Palestinian concerns. Many of the clergy, including the senior clergy, are from European countries and have interests that are not necessarily identical with the Palestinian laity.[36]

Third, there is a real concern with maintaining a sufficient Christian community in Jerusalem to serve as "witness" to Christian needs and concerns. This demographic problem may not be the fault of any specific party, but it is real. Since 1948, the Christian community of Jerusalem has dropped in size from 30,000 to between 10,000 and 12,000. Bethlehem, where Church tradition places Jesus' birth, no longer has a Christian majority.[37] Reverend Peter Vasko, a Franciscan priest and leader of

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Doty was able to secure the agreement of all the religious "stakeholders" to begin the restoration. *See* Graziano Motta, *Jerusalem Basilica's Dome is Restored*, L'OSSERVATORE ROMANO, weekly ed., Feb. 8-19, 1997, at 8.

32. *See* Haim Shapiro, *Greek Orthodox: Consult us on Status of Holy Places*, JERUSALEM POST, July 20, 1994, at 1.

33. Thus, the Greek Orthodox Church, together with 11 other Church leaders, signed a memorandum calling for the maintenance of the status quo in regards to Christian holy places. *See generally* Memorandum, *The Significance of Jerusalem for Christians* (Nov. 14, 1994) (on file with author). But note that the Catholic Church already adopted this position in its 1993 Accord with Israel. *See* Fundamental Agreement, *supra* note 18, art. 4, para. 1, at 155.

34. Shapiro, *supra* note 32, at 1.

35. *See* Haim Shapiro, *Patriarch Wants Agreement Between Non-Catholic Church and Israel*, JERUSALEM POST, Dec. 29, 1995, at 24.

36. One exception, of course, is the Latin Patriarchate, His Excellency, Michel Sabbah, the first Palestinian Christian to hold that office. *See* Michel Sabbah, *The Church of Jerusalem: Living with Conflict, Working for Peace*, COMMONWEAL, Jan. 12, 1996, at 14 (presenting the views of Michel Sabbah).

37. It is unclear what, if anything, can be done to resolve this problem. It may be necessary for the municipality to consider providing housing assistance for Christians in the Old City, where most of them live in the same way that the government of Israel provides incentives for building new areas for Jewish settlement. While this may cause prob-

the Holy Land Foundation, has suggested, "If we don't do something now, within 60 to 70 years, there will be no Christian Churches in the Holy Land. . . . Christian holy sites will be empty monuments."[38]

The Christian community should not assume that they need only be concerned with their relations with the Israeli government. The Palestinian Ministry of Religion recently appointed Ibrahim Kandallaf, a Greek Orthodox resident of East Jerusalem, to be Advisor on Christian Affairs. While Kandallaf's authority, so to speak, extends only to areas within the control of the Palestinian Authority, where there are presently few Christian holy sites, he in fact operates de facto in Jerusalem, joining Israeli officials on the dais at East Jerusalem Christian events.[39] Moreover, the Christian Community cannot be certain that Kandallaf's authority will not be enlarged. Indeed, it is reported that the so-called Abu-Mazen-Beilin "non-paper" on final status issues, including Jerusalem, called for the Church of the Holy Sepulcher to be placed under extraterritorial Palestinian jurisdiction.[40] And recently, while denied by the Palestinians, Israeli officials raised concerns over the fate of a Christian holy site, Jesus' cradle, which is located on the Temple Mount, suggesting that the Muslim authorities might be planning to tear down that Christian site.[41] Further, in July, the Palestinian Authority evicted a "White" Russian contingent from a Church in Hebron (which it controls under the Oslo Agreement) and presented it to representatives of the Russian Patriarch in Moscow.[42] Thus, the Christian communities may have no choice but to negotiate with the Palestinians.

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lems for Israel, which historically has not distinguished between Palestinian Christians and Muslims, some focus on this issue may be needed to preserve Christian life in the Holy Land.

38. David Gibson, *Holy Land's Christians in Need of Miracle*, THE RECORD (Bergen County, NJ), Dec. 26, 1996, at A1, *available in* 1996 WL 6124127.

39. *See* Bill Hutman, *Olmert: PA Official Liaising with Churches*, JERUSALEM POST, Nov. 28, 1996, at 2.

40. The Abu Mazen-Beilin non-paper was concluded and initialed in November 1996, but was never accepted by either Yasser Arafat or then-Prime Minister Shimon Peres. *See* Ze'ev Schiff, *Beilin and Abu Mazen Drafted a Document on Final Status; Agreed to Establish a Palestinian State*, HA'ARETZ, Feb. 22, 1996, at 1; *see also* David Makovsky, *Time for Beilin to Disclose Agreement in Full*, JERUSALEM POST, Feb. 25, 1996, at 2; *The Past, Present and Future of the Oslo Process: View from the Labor Party*, PEACEWATCH No. 112 (Wash. Inst. for Near East Pol'y, Washington, D.C.), Dec. 11, 1996, at 1 (summarizing a speech of Yossi Beilin).

41. *See* Karin Laub, *Foreign Minister Asks Police to Monitor Christian Holy Site*, ASSOC. PRESS, Dec. 3, 1996, *available in* 1996 WL 4452274.

42. *See* Serge Schmemann, *Arafat Enters Into a New Fray, Over a Russian Church*, N.Y. TIMES, July 11, 1997, at A3.

It should have been no surprise then that shortly after signing the 1993 Vatican-Israel Accord the Vatican moved toward establishing official links with the Palestinian Liberation Organization (PLO). In October 1994, following several months of negotiations, the Vatican and the PLO announced the establishment of official links. The PLO opened an office at the Vatican and the papal nuncio in Tunis became responsible for the Vatican's contacts with PLO leaders. In a joint statement issued by the Vatican, the parties announced that the official links would "open channels for communication" to "jointly . . . search for peace and justice . . . in the Middle East" with a view toward "preserving the religious and cultural values which mark the Peoples of the region, and which properly belong to the Holy Land and especially to the Holy City of Jerusalem."[43]

B. The Status of the Holy Places

Having recognized both the state of Israel and the PLO, the Vatican now hopes to have a "seat" at the table when final status issues are discussed.[44] The Vatican has asserted its position in the Jerusalem question as not only a matter of right but "a right which it exercises—to express a moral judgment on the situation."[45] However described, this right does not extend to such "technical aspects" as the territorial boundaries of the city or its form of governance.[46] Rather, Vatican concerns center around three objectives. First, the Vatican consistently has promoted the adoption of an "internationally guaranteed special statute" to resolve the issue of Jerusalem.[47] The goals of such a statute would be to: (1) safeguard the global character of Jerusalem as a sacred heritage common to the three monotheistic religions; (2) preserve religious freedom in all aspects;

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43. *PLO Vatican Establish Links, but not Full Diplomatic Recognition*, DEUTSCHE PRESSE-AGENTUR, Oct. 25, 1994, *available in* LEXIS, Nexis Library, Allnews File.

44. The Vatican Secretary of State for Foreign Affairs, Archbishop Jean-Louis Tauran, has pointed out that "[t]he religious aspect of Jerusalem must be discussed in a multilateral forum, and we want to be involved in it." *Vatican Official: Nobody Can Claim Exclusive Rights to Holy Places*, JERUSALEM POST, Dec. 19, 1995, at 1.

45. *Vatican Note: Jerusalem: Considerations of the Secretariat of State*, 26 ORIGINS 250, 250 (1996) [hereinafter *Vatican Note*]. Indeed, this right is contained in Article 11 of the Fundamental Agreement between the Holy See and the State of Israel, which provides that the Holy See maintains the right, in every case, to exercise its moral and spiritual teaching office. *See* Fundamental Agreement, *supra* note 18, art. 11, para. 2, at 157.

46. *See Vatican Note*, *supra* note 45, at 253. The Holy See "is not concerned with the question of how many square meters or kilometers constitute the disputed territory." *Id.* at 251. Still, it is important to underscore its view that "a political solution will not be valid unless it takes into account in a profound and just manner the religious needs present in the city." *Id.* at 253.

47. *See* Angelo Macchi & Giovanni Rulli, *The Future of Jerusalem*, LA CIVILTA CATTOLICA (Rome) June 15, 1996, *reprinted in* 26 ORIGINS 254, 256 (1996).

(3) protect the "status quo"; (4) assure permanence and the development of religious, educational, and social activities proper to each community; (5) ensure equality of treatment to all three religions; and (6) establish an appropriate juridical safeguard that does not reflect the will of only one of the interested parties involved.[48]

As a matter of principle, the Vatican adheres to the view that the issues surrounding Jerusalem are of concern to more than the two parties involved, and that there is a unique international interest in what happens to the Holy City. As one authoritative Vatican source has noted, "[w]hen it comes to Jerusalem, the voice of others (besides Israelis and Palestinians), the presence of additional subjects legitimized by international law, and the appropriate contribution of religious and cultural institutions . . . cannot be considered purely superfluous, or worse, unsuitable."[49]

Second, the Vatican cares about more than the "simple extraterritoriality" of the holy places. Its focus is on what we moderns might call the environmental and cultural character of the Jerusalem it cares about most—the Old City. It wants the surrounds of the holy places to reflect their august majesty (no McDonalds perhaps) and it needs a living community of the faithful to breathe life into what would otherwise be holy relics. More than anything, it is this demographic concern that keeps the Vatican from limiting its concerns to the holy places themselves.

Finally, the Vatican believes that religious rights of freedom of religion and conscience must be preserved and protected. Optimally, the Vatican is insistent on an international statutory instrument to achieve this goal. Yet to a nuanced observer, it appears that the specific modalities of "bilateral-plus" are open to discussion. We must remember that most of this work has already been resolved in the Fundamental Agreement.[50] In this area at least, there is little untethered ground for a new international agreement to cover. Some have suggested, however, that were Israel to affirm existing international instruments (many of which it already has committed itself to), the required bow to the notion of international guarantees might well be met. Several of these instruments include the United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief,[51] the 1972

48. *See* GERUSALEMME NEI DOCUMENTI PONTIFICI A CURA DI EDMOND FARHAT, CITTA DEL VATICANO, LIBRERIA EDITRICE 215-16 (Vatican City 1987).

49. Macchi & Rulli, *supra* note 47, at 254.

50. Freedom of religion and conscience are protected in Article 1, sections 1 and 2. *See* Fundamental Agreement, *supra* note 18, art. 1, para. 1-2, at 154-55.

51. *See* Nov. 25, 1981, G.A. Res. 36/55, U.N. GAOR, 36th Sess., Supp. No. 51, U.N.

UNESCO Convention on the Protection of World Cultural and Natural Heritage,[52] and, the 1976 Recommendation Concerning the Safeguarding and Contemporary Role of Historic Areas.[53]

The exact modalities of such an arrangement to protect religious rights, if any, will likely depend in large measure on the general state of the Vatican-Israel relations at the time. To the extent that the Vatican's concerns regarding Jerusalem and the holy places are accomplished through the Fundamental Agreement, the Vatican's need to "internationalize" these issues likely will lessen.

C. The Jubilee Year

The Christian world is preparing for the 2000th anniversary of the birth of Christ and the beginning of Christianity. Catholics have designated the millennium the Jubilee Year. Large numbers of Christians are expected to visit the Holy Land.[54] The Pope himself has been invited by the Israeli government[55] and there is some sense that if the peace process advances he may well visit. The Jubilee Year provides an extralegal, and indeed extrapolitical, rationale for the Vatican and Israel to resolve outstanding issues.

At the same time, we will likely soon move into a new phase of negotiation in the Palestinian-Israel Peace talks. Whether or not that phase is styled final status negotiations or some form of "Oslo-plus," it is likely to encompass issues surrounding Jerusalem, with which the Vatican has expressed clear and stated concerns. There can be little doubt that the experience of the Vatican-Israel Accord will serve the parties in good stead as they move into this new phase of difficult negotiations.

IV. CONCLUSION: RELIGION AND THE STATE

Both the Vatican and the State of Israel present unique vantage points from which to examine how religion and religious identity interact with the state and, in particular, the democratic state. The Church, of course,

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Doc. A/36/51 (1982).

52. *See* UNESCO Convention concerning the protection of the World Cultural and Natural Heritage, Nov. 16, 1972, 6 UNESCO Doc. 17/C/106 (1972), *reprinted in* 11 I.L.M. 1358 (1973).

53. The Convention and the Recommendation are *reprinted in* CONVENTIONS & RECOMMENDATIONS OF UNESCO CONCERNING THE PROTECTION OF THE CULTURAL HERITAGE (Paris, UNESCO 1985).

54. *See* Larry Witham, *Holy Land Visits Seen Ballooning Next 3 Years*, WASH. TIMES, Oct. 12, 1997, at A5.

55. *See* Haim Shapiro, *Katsav to Meet with Pope Today*, JERUSALEM POST, Jan. 15, 1998, at 4.

historically viewed, and indeed still views itself as in possession of unalloyed universal truth. Historically, Catholic countries were never responsive to theories of toleration and religious pluralism. The 1492 expulsion adverred to in Rafael Palomino's essay on the Concordat in Spain stands as mute testimony to this religious exclusivity.[56] Only after Vatican II have countries who view themselves as Catholic in national identity had to wrestle seriously with issues of religious freedom and pluralism.

Issues of religious toleration and pluralism in Judaism were of theoretical interest only until the creation of the State of Israel in 1948. While an effort was made by some religious parties to institutionalize Jewish (religious) law in the new Jewish state,[57] it did not succeed. The Knesset, in 1980, did ordain that any lacunae in legal interpretation should be answered by recourse to the principles of "Israel's Heritage," a more elusive—and perhaps more flexible—reed than *halacha* or Jewish law.[58]

While Israel today, with a fifteen percent Arab minority, is an explicitly democratic state; it is one which seeks, at least in the eyes of most citizens, to maintain a specifically Jewish character. During the last Labor government the issue arose both in matters small—should the national anthem Hatikva speak exclusively of a homeland for Jews—and large—should a majority of specifically Jewish voters be required to elect a government that agrees to give up national territory.

The signing of the Vatican-Israel Accord opened a new chapter in both the bilateral relations between Israel and the Holy See and the relations between the Catholic Church and the Jewish people. It also offered a unique opportunity to explore principles of religious freedom and toleration in a state that maintains a particular religious character. As such, developments which flow from the Accord are of interest not only to students of Israel and the Vatican, but also to comparativists in the theory of church and state in the modern age.

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56. *See* Rafael Palomino, The Fundamental Agreement Between the Holy See and the State of Israel: A Third Anniversary Perspective—Church-State Agreements in Spain, 47 CATH. U. L. REV. 477 (1998).

57. *See* EMANUEL RACKMAN, ISRAEL'S EMERGING CONSTITUTION 1948-1951, at 31-32, 45-49 (1954). The argument for institutionalizing religious law in the Israel legal system is developed in K. KAHANA, THE CASE FOR JEWISH CIVIL LAW IN THE JEWISH STATE 109-13 (1960).

58. *See* The Foundation of Law Act, 1980, 34 L.S.I. 5740, (1980). A criticism of the effectiveness of the Act can be found in Ya'akov Meron, *Practical Application of the Foundations of Law Act*, *in* 8 THE JEWISH LAW ANNUAL 159 (1989).

The essays in this issue offer unique insight into how domestic issues of church and state can play out over a transnational and international context. Father David Jaeger, a scholar intimately involved in the negotiations leading up to the Accord, offers an exhaustive study of its legal context from a Vatican perspective.[59] The international implications of some of these issues are well-developed by Moshe Hirsch in his study of the right of conversion in international law,[60] and by Geoffrey Watson in his paper on the international legal issues associated with the religious duty of pilgrimage.[61] In contrast, Ruth Lapidoth discusses church-state relations in the domestic law of Israel, the country where the Accord must be effectuated and where the promise of freedom of religious expression must be fulfilled.[62]

Because the Accord is only one of many bilateral Vatican agreements which address the position of the Holy See and the Catholic Church as to respective States, the decision was made to include the comparative studies of Silvio Ferrari,[63] Rafael Palomino,[64] and Msgr. Roland Minnerath[65] on Concordats—those official agreements which govern the Roman Catholic church in its relations with specific nation-states. While the Accord is in specific terms not a Concordat, but rather an agreement regulating a political relationship that has been integrated into a document of political recognition, the comparative study of Concordats provides useful background against which to better understand the Accord.

The unique contribution of this symposium is its treatment of a bilateral treaty on religious issues from domestic, comparative, and international law perspectives. It allows, I believe, for a deeper contextual understanding of the issues involved. One can hope that future studies of

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59. *See* Fr. David-Maria A. Jaeger, *The Fundamental Agreement Between the Holy See and the State of Israel: A New Legal Régime of Church-State Relations*, 47 CATH. U. L. REV. 427 (1998).

60. *See* Moshe Hirsch, *The Freedom of Proselytism Under the Fundamental Agreement and International Law*, 47 CATH. U. L. REV. 407 (1998).

61. *See* Geoffrey R. Watson, *Progress for Pilgrims? An Analysis of the Holy See-Israel Fundamental Agreement*, 47 CATH. U. L. REV. 497 (1998).

62. *See* Ruth Lapidoth, *Freedom of Religion and of Conscience in Israel*, 47 CATH. U. L. REV. 441 (1998).

63. *See* Silvio Ferrari, *The Fundamental Agreement Between the Holy See and Israel and the Conventions Between States and the Church Since the Vatican II Council*, 47 CATH. U. L. REV. 385 (1998).

64. *See* Palomino, *supra* note 56, at 477.

65. *See* Msgr. Prof. Roland Minnerath, *The Position of the Catholic Church Regarding Concordats from a Doctrinal and Pragmatic Perspective*, 47 CATH. U. L. REV. 467 (1998).

religious liberty abroad take advantage of this approach which is far more suited to the study of law and religion than purely doctoral analysis.

More specifically, one can hope that this symposium will encourage further comparative study of Vatican concordats in their political and cultural context, such as those in France and Poland; as well as the study of religious liberty abroad in areas including Asia, Africa, China, and the Muslim world. This said, the Vatican-Jerusalem Agreement remains *sui generis*, as must any agreement that deals with religion in what so many view as the Holy Land. Future agreements with the Greek Orthodox and other Christian groups will surely come, as well as agreements, formal and informal, with both Palestinian and Muslim authorities regarding the Muslim holy sites. From now on, all such efforts will have to begin with and reflect on the experience of Israel and the Holy See in drafting the Fundamental Agreement.