The Unfinished State

Territorial Status, State Creation, and United Nations Mismanagement Within the Borders of the Mandate of Palestine

by

David Myers

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Graduate Department of the Faculty of Law

University of Toronto

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Abstract

The international laws and customs that decreed a right for a Jewish state to be created within the former British Mandate of Palestine provided the same in equal measure for an Arab state within the same Mandate. What they did not provide for, however, thanks in no small part to UN mismanagement and recalcitrant warring parties, were borders separating the two states to be.

By chronicling the international legal situation of the territory over the last century, it becomes possible to make determinations about minimum state level territorial rights. While failing to provide instant and obvious border location, the application of international law renders certain positions beyond debate. This narrows the scope of territorial negotiations to a 'simple' determination of which lands are necessary for the creation of a viable Palestinian state, whose citizens' freedom of movement within its peaceable borders is unimpeached by even Israel's most ardent security concerns.
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As a show of gratitude to you all, the author declares that any blame or anger for all views and conclusions, along with any and all errors and poorly chosen pop culture references, expressed within this submission belong to him alone. You know, just in case this is a sensitive topic or something.
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Introduction

International legal analysis of the Israel Palestine conflict leads to conclusions about the territorial rights of the parties involved. This is possible because there exists an objective legal history to the conflict surrounding the former British Mandate of Palestine, and it comes from applying international laws and customs to situations and agreements related to the conflict. The history of events in the conflict need not be dominated by a view to assign blame, which even when considered mostly applies to establishing the legality of an Israeli presence in territory outside of the Mandate borders¹ (without having to analyze the legality of actions taken therein, focusing only on legality of presence) and has little to do with similar analysis inside the Mandate borders.² Then lengthy paper trail left by legal scholars and statement provide further legal framework for this conflict by clarifying legal positions and commitments, thereby providing a foundation to build off of in using international law and legal custom to scrutinize state-level territorial claims.

Using this approach, the conclusions drawn allow for a determination of basic legal status of territory throughout the conflict. Beginning with the fall of the Ottoman Empire, the legal history of the land starts with British promises regarding territorial rights within the British Mandate of Palestine. As further and even contradicting promises are made, and the external borders of Palestine are shrunk so as to exclude what is now Jordan (and parts of Iraq), the general legal claims to territory are curtailed until reaching the status they have held since being crystalized by the United Nations (UN) in 1947; the territory of Palestine, as defined by its internationally recognized borders, is to be divided between two peoples, thereby creating a ‘Jewish state’ and an ‘Arab state’. Claims by external parties beyond their

¹ At this stage in Israel’s overall conflict situation, it only applies to the Golan Heights territories beyond the Mandate borders. That Syria bears the blame for aggression during the wars of 1948-1949, 1967, and 1973 establishes a legal basis for Israel to advance into territories that are a direct and immediate threat to it at the time (as discussed later in this thesis). That Syria has not made peace, thereby failing to end the state of war that exists between the two countries and thus end the threat, Israel has legal cause to remain. Again, this is without comment on the legality or illegality of any actions taken within said territory, speaking only to the legality of occupying it.

² As will also be discussed, blameworthiness inside the Mandate borders only applies in so far as it deprives outside states of a reason for being there, while further strengthening the Israeli case for its movements beyond the unimplemented borders the UN suggested instead of ordering due to their own failings.
own legally recognized borders do not hold, nor do those occasionally referenced as being held by the UN, with those claims having been of dubious legal standing even in the event that they had not been allowed to lapse.

Unfortunately, rather than clarifying where the borders between these two states within Palestine are, the actions of state parties, and the general lack of consistency in action and understanding of the situation by the UN, have instead provided insight only into where the borders are not. Despite the resolutions and rhetoric, it is the odd failure of the UN to transfer the Mandate to Trusteeship, coupled with the even greater failure to impose peace and border divisions even without necessarily having the legal authority to do so, that has resulted in only having general principles to try and guide the creation of new borders. Aggressive war by neighbouring Arab states resulted in legal reasons for Israel to be present in all corners of the Mandate, and the belief in a final military victory by these same states, coupled with a disdain for peace with Israel, would ensure that no legally recognizable borders existed by the time Israel remained the only state in the Mandate territory. These same actions, along with later and increasingly contradictory stances on the subject, would also see a failure to set up an Arab state, even one without clarified borders much in the same way as Israel could exist without clarified borders.

However, despite the UN’s actions that continue to undermine its own goals, the situation is not lost for the realization of an Arab/Palestinian state within the borders of the former Mandate territory. The requirement to create this state is still binding, and has only been bolstered by developments in the law of self-determination. Unfortunately, this does not guarantee equitable conditions in how this new state would be created, and could easily find itself at the mercy of the very real risk of Israeli unilateral action in the wake of disaffection with the situation.
Part I: Untangling the Mess

Contrary to the inane conclusions of the ICJ, in which it found “no need for any enquiry into the precise prior status of those territories,”\(^3\) in order to understand how one thing can transform into another it must first be established what that thing was originally. Or, to quote Malcolm N. Shaw,

“since such fundamental legal concepts as sovereignty and jurisdiction can only be comprehended in relation to territory, it follows that the legal nature of territory becomes a vital part in any study of international law. Indeed, the principle whereby a state is deemed to exercise exclusive power over its territory can be regarded as a fundamental axiom of classical international law. The development of international law upon the basis of the exclusive authority of the state within an accepted territorial framework meant that territory became ‘perhaps the fundamental concept of international law’.\(^4\)

Wilful blindness to international law regarding this conflict reached particularly strange heights in the advisory opinion regarding Israel’s building of a wall in the West Bank, where the ICJ’s decision not to investigate prior status was celebrated by Judge Al-Khasawneh; “The Court followed a wise course in steering away from embarking on an enquiry into the precise prior status of those territories not only because such an enquiry is unnecessary for the purpose of establishing their present status as occupied... but also because the prior status of the territories would make no difference whatsoever to their present status... except in the event that they were *terra nullius*...”\(^5\) This is an odd statement considering status determination would answer fundamental questions regarding where Israel ends and the occupation begins, or help explain how Israel can be outside of its territory without having crossed an international border. One would assume status determination of territory to be of fundamental importance since “laws relating to territory... are basically the foundation upon which international law functions.”\(^6\) Judge Al-Khasawneh even correctly identifies that if the 1949 armistice line is less significant

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\(^3\) International Court of Justice, *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, International Court of Justice (ICJ), 9 July 2004, at para 101, page 177.


than assumed then territorial claims could “work both ways”\(^7\) with Palestinians claiming rights West of the armistice line, exactly as envisioned and explicitly guaranteed (repeatedly) by the Israel-Jordan Armistice Agreement.\(^8\) And yet people are often so caught up in preconceived notions of what the law is that they dismiss the very legal reality they claim to already understand.

With the above in mind, here follows the establishment of the time line and legal issues arising during it that are applicable to the territories in question.

**In the Beginning...**

**The Balfour Declaration, November 2, 1917**

The history of conflict and claims in the regions is as old as it is long. Fortunately, for the purposes of this inquiry, the beginning of the current legal quandary is set at just under 100 years ago towards the closing year of World War I. The area in question was under the control of the Ottoman Empire. Without regard for the morality or legality of this situation, it is enough to say that European states began imposing a new legal order in the area which is the basis from which all current legal arguments and claims stem.

The first document is known as the ‘Balfour Declaration’, due to the declaration having been transmitted by Arthur James Balfour. The short message, which shall be recreated here, is the beginning of this legal saga.

> “His Majesty’s government view with favour the establishment in Palestine of a national home for the Jewish people, and will use their best endeavours to facilitate the achievement of this object, it being clearly understood that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country.”\(^9\)

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\(^7\) *Ibid*, at para 11(2), page 238.


The end text referring to political status of Jews abroad is no concern to this paper. The clear intent of this declaration is to serve as notice that Great Britain has, in 1917, committed itself to the cause of establishing a national home for Jews in Palestine without prejudicing the civil and religious rights of non-Jews already in the area. This sentiment would be reaffirmed and underscored by subsequent documents released by Great Britain and the League of Nations, and would be articulated by others as well. U.S. President Wilson’s Enquiry Commission, established to create a world map reflecting the Fourteen Points, felt that Palestine should be a Jewish state due to it being “‘the cradle and home of their vital race,’ the basis of the Jewish spiritual contribution, and the Jews were the only people whose only home was in Palestine.”

Covenant of the League of Nations

The League of Nations, created in the wake of the carnage of World War I, charged itself and its European members with the development of “colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by people not yet able to stand by themselves under the strenuous conditions of the modern world.” It was felt that this responsibility was best given to European states, being “advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility... and that this tutelage should be exercised by them as Mandatories on behalf of the League.” Regarding the area that would become the British Mandate of Palestine, “...[c]ertain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognized subject to the rendering

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12 Ibid, Article 22(2)
of administrative advice and assistance by a Mandatory until such time as they are able to stand alone.”13

Whatever the modern view of early twentieth century European states vesting in their “advanced”-selves the responsibility for ‘civilizing’ and ‘modernizing’ territories, these words led to the provisions of the British Mandate of Palestine. The change in title over the territory in question, being moved from the Ottoman Empire (now Turkey, which had ruled the area from 1517 to 1917)14 to the local inhabitants themselves. However, this was done with temporary administrative and de facto sovereign power vesting in the assigned Mandatory power, and is fully resolved by “Article 16 of the Treaty of Lausanne of 1923 [in which] Turkey renounced all rights and title over, amongst other areas, that of Palestine.”15 The aforementioned Article 16 does “not indicate any transferee in favour of whom renunciation was made”16 (since it clearly did not transfer said sovereignty to the League of Nations and its assigned Mandatory Powers, instead merely transferring the administrative powers). The fact that this was essentially a decolonization of the Ottoman/Turkish empire and the Mandates was set up to aid in development of independence. The obvious conclusion is that sovereignty vested with the territories and their populations who were being set up to exercise their right of self-determination within said territories. This seems the only reasonable inference to draw as Mandatory powers do not acquire sovereignty over Mandate territories (and, in fact, cannot). The Ottoman/Turkish Empire had surrendered its claims, and there was no other state involved with a possible claim to title. Only states can have title to territory, and “so to discover the process of acquisition of title to territory, one has first to point to an established state.”17 Since a Mandate is a state in waiting, the entire point of the system being to provide independence to these territories, the only reasonable conclusion is that sovereignty

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13 Ibid, Article 22(4).
15 Ibid.
17 Shaw, Israel and Palestine, Page 115.
18 Shaw, International Law, page 494.
vested in the territory itself along with its population, to be exercised at a later date once the 
administration of the Mandate had been concluded. “Stoyanovsky has correctly argued that the people 
of a mandated territory are not deprived of the right of sovereignty but are temporarily deprived of its 
exercise.” It is asserted by many authors that “sovereignty lies in the people of the mandate 
territory.”

*White Paper of 1922*

In June of 1922, in response to “exaggerated interpretations of the meaning of the Balfour 
Declaration,” a British White Paper was released explaining the British position on the matter in 
relation to both the Declaration as well as the British Mandate For Palestine that came out of the San 
Remo Conference of April 24, 1920, which was then confirmed by the Council of the League of Nations 
on July 24, 1922 (coming into operation in September of 1923).

It was made clear that the Declaration did “not contemplate that Palestine as a whole should be 
converted into a Jewish National Home, but that such a Home should be founded in Palestine” which 
means “not the imposition of a Jewish nationality upon the inhabitants of Palestine as a whole, but the 
进一步 development of the existing Jewish community… in order that it may become a centre in which 
the Jewish people as a whole may take, on the grounds of religion and race, an interest and a pride.”

Finding it “necessary that the existence of a Jewish National Home in Palestine should be international

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19 Ibid.
22 *British White Paper of June 1922*.
23 Ibid.
guaranteed, and that it should be formally recognized to rest upon ancient historic connection."\textsuperscript{24} Furthermore, while "it is the intention of His Majesty’s government to foster the establishment of a full measure of self-government in Palestine,"\textsuperscript{25} it was clarified that a pledge made by Sir. Henry McMahon to various Arab states regarding an independent national government within the Mandate area would exclude "the whole of Palestine West of the Jordan."\textsuperscript{26}

In addition to re-emphasizing the goals of Britain in the Mandate, and the protection of local rights to follow, the White Paper of 1922 confirmed an impending separation of the Mandate of Palestine along the Jordan River, splitting the Mandate from what would become Trans-Jordan.

\textbf{British Mandate of Palestine}

On July 24\textsuperscript{rd}, 1922, the League of Nations laid out the provisions of the Mandate of Palestine based on the Balfour Declaration, such that the League was "in favour of the establishment in Palestine of a national home for the Jewish people, it being clearly understood that nothing should be done which might prejudice the civil and religious rights of existing non-Jewish communities in Palestine..."\textsuperscript{27}

Among other things, the Mandate gave the Mandatory legislative and administrative powers,\textsuperscript{28} the responsibility of "[securing] the establishment of the Jewish national home, as laid down in the preamble, and the development of self-governing institutions, and also for safeguarding the civil and religious rights of all the inhabitants of Palestine, irrespective of race and religion."\textsuperscript{29} "An appropriate Jewish agency [would] be recognized as a public body... to assist and take part in the development of the country."\textsuperscript{30} While "the Mandatory [would] be responsible for seeing that no Palestine territory shall be

\begin{itemize}
\item \textsuperscript{24} Ibid.
\item \textsuperscript{25} Ibid.
\item \textsuperscript{26} Ibid.
\item \textsuperscript{27} League of Nations, \textit{Mandate for Palestine}, see preamble.
\item \textsuperscript{28} Ibid, Article 1.
\item \textsuperscript{29} Ibid, Article 2.
\item \textsuperscript{30} Ibid, Article 4.
\end{itemize}
ceded or leased to, or in any way placed under the control of, the government of any foreign Power,”

“the administration of Palestine... shall facilitate Jewish immigration under suitable conditions and shall encourage... close settlement by Jews on the land, including State lands and waste lands not required for public purposes” and “facilitate the acquisition of Palestinian citizenship by Jews who take up their permanent residence in Palestine.” As the Mandatory, England would be “entrusted with the control of the foreign relations of Palestine,” ensuring the religious rights and the preservation of and access to “Holy Places and religious buildings or sites in Palestine,” and that “there shall be freedom of transit under equitable conditions across the mandated area.” Finally, in contemplation of separating the lands that would eventually become Jordan, “the territories lying between the Jordan and the eastern boundary of Palestine as ultimately determined” could be excluded from the provisions of the Mandate document, meanwhile “the consent of the Council of the League of Nations is required for any modification of the terms of this mandate.”

The final provision of the Mandate terms stipulate that “in the event of the termination of the mandate... the Council of the League of Nations shall make such arrangements as may be deemed necessary for safeguarding in perpetuity, under guarantee of the League, the rights secured by Articles 13 and 14...” These two Articles deal with the responsibilities of “the Holy Places and religious buildings or sites in Palestine,” especially regarding preservations of existing rights and securing free access. It is important to note that these provisions extend to all Holy Places in Palestine, and not merely Jerusalem. Indeed, Jerusalem goes unmentioned. Taken in connection, this indicates that in the event of the

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31 Ibid, Article 5.
32 Ibid, Article 6.
33 Ibid, Article 7.
34 Ibid, Article 12.
35 Ibid, Articles 13 and 14. Though Article 15 does advise that while “no discrimination of any kind shall be made between the inhabitants of Palestine on the ground of race, religion or language,” the “complete freedom of conscience and the free exercise of all forms of worship... ensure to all” could be subject “to the maintenance of public order and morals.”
36 Ibid, Article 18.
37 Ibid, Article 25.
38 Ibid, Article 27.
39 Ibid, end provisions of Article 27.
40 Ibid, Article 13.
Mandate coming to an end, the League is to automatically take action as necessary to safeguard and enact the rights guaranteed in the relevant Articles. Interestingly, this stakes out an identifiable, separate, and general interest by the international community in the Holy Places of the Mandate territory, and a sense of responsibility to take action to protect free access rights in the event it becomes “necessary” to do so. It is unlikely, however, that these provisions transfer automatically to the UN in light of the fact that responsibility for Mandates do not automatically transfer to Trusteeship (this is discussed below). However it is worth noting these provisions as they create an early declaration as to the existence and scope (both general to Holy Places in the territory, but also limited in being just to the Holy Places themselves and not the territory, thereby failing to express any understood territorial interest).

**Peel Commission of 1937**

The Palestine Royal Commission, often referred to as the Peel Commission, was tasked with evaluating the causes behind the instability in the Mandate of Palestine and making recommendations. The Commission determined that “the underlying causes of the disturbances... are, first, the desire of Arabs for national independence; secondly, their antagonism to the establishment of the Jewish National Homeland in Palestine, quickened by their fear of Jewish domination.”

Also blamed were the ambiguities in the Mandate document; “this uncertainty has aggravated all the difficulties of the situation.”

None of which was soothed by economic opportunities as it was “found that, though the Arabs have benefited by the development of the country owing to Jewish immigration, this has had no conciliatory effect. On the contrary, improvement in the economic situation in Palestine has meant the

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42 Ibid.
deterioration of the political situation." In the end, the Peel Commission would recommend revisiting issues of land acquisition and settlement by Jews, reducing Jewish immigration to Palestine, Opening up Trans-Jordan for compulsory Jewish immigration (though it is noted that under Mandate conditions the acquiescence and approval of Jordan would be needed as such an act could not be done “against the will of its Government and people”), and suggest that a type of partition should be implemented.

The Commission’s report had no more binding an effect than any other recommendation. It was, however, taken into account by British authorities and led to the issuance of the 1939 White Paper discussed below. While the topic of Jewish immigration was revisited and the position of the Mandatory clarified (at least somewhat), the partitioning of the Mandate was not adopted, and the intention clearly remained for a united territory of Palestine that would have within it the national homeland of the Jews (see below).

**British White Paper of 1939**

This second White Paper would declare a halt to Jewish immigration to the Mandate of Palestine, while attempting to balance certain contradictory ideas. England identified its Mandate responsibilities as being fourfold, and articulated by Articles 2, 6, and 13 of the Mandate:

“To place the country under such political, administrative and economic conditions as will secure the establishment in Palestine of a national home for the Jewish People. To facilitate Jewish immigration under suitable conditions, and to encourage, in cooperation with the Jewish Agency, close settlement by Jews on the Land. To safeguard the civil and religious rights of all inhabitants of Palestine irrespective of race and religion, and, whilst facilitating Jewish immigration and settlement, to ensure that the rights and position of other sections

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A list of 7 “Arab Grievances” are found on page 365 of the report, at para 8, and include Jewish immigration, acquisition of land by Jews, and the use of Hebrew and English as official languages.
of the population are not prejudiced. To place the country under such political, administrative and economic conditions as will secure the development of self governing institutions.”

The British sentiment was that “Mandate in which the Balfour Declaration was embodied could not have intended that Palestine should be converted into a Jewish State against the will of the Arab population of the country.” Apparently the British hope was that “in time the Arab population, recognizing the advantages to be derived from Jewish settlement and development in Palestine, would become reconciled to the further growth of the Jewish National Home,” and that “Arabs and Jews share government in such a way as to ensure that the essential interests of each community are safeguarded.” The British recognized that “this hope has not been fulfilled,” and went on to freeze and restrict Jewish immigration to the area beginning in 1939 in order to slow down the process (possibly to allow for a greater and more gradual adjustment period, but likely just to try and ease tensions with regard to the Arab population). Clearly, the intention at this point remained for a single state entity to emerge from the Mandate.

**STATUS UPDATE 1: TERRITORIES OF PALESTINE BEFORE UNITED NATIONS INVOLVEMENT**

Up to this point, the legal status of the lands of Palestine are relatively easy to determine from an international perspective. As discussed above, there was a legally easy to follow transition in power over the region from the Ottoman Empire to the League of Nations, with the latter delegating such powers to the United Kingdom in its role as Mandatory. Sovereignty itself was relinquished by the Ottoman Empire, now Turkey, via treaty. Palestine sovereignty did not transfer to the league or the Mandatory, but rather vested with the people of the Mandate itself. Given the UK’s role as Mandatory,

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49 Ibid, Section I. “The Constitution.”
50 Ibid, Section II. Immigration.
51 Ibid, Section I. “The Constitution.”
52 Ibid, Section II. Immigration.
53 Ibid.
sovereignty was in suspension until statehood status replaced Mandate status and the people of Palestine were deemed to be self-governing.

**The United Nations and Mandates/Trusteeships**

With the conclusion of World War II, the United Nations came into its own and inherited a great many responsibilities, including the Mandate system. The UN put in place the International Trusteeship System, elaborated upon in Chapter XII of the UN Charter, which would include “territories now held under mandate.”

“The trusteeship system [would] not apply to territories which have become Members of the United Nations,” and nothing laid down in the system concerning trusteeships would be “construed in or of itself to alter in any manner the rights whatsoever of any states or any peoples or the terms of existing international instruments to which Members of the United Nations may respectively be parties.”

Most importantly for the purposes of this analysis, it is worth noting that the primary “international instrument” in existence in relation to the Mandate of Palestine is the Mandate document discussed above, thereby indicating that the document concerning the Mandate of Palestine and UN member United Kingdom is still valid until changed or nullified by its fulfillment. Similarly, it should be noted that this provision refers to existing international instruments without qualification as to time period, notably excluding those instruments that may come into effect after the UN Charter comes into force. This indicates that treaties concerning to the Mandate and member states in connection with the Mandate are not and will not be prejudiced should they develop in the future, thereby indicating that future documents may be binding (noting especially the 1949 Armistice Agreements that are discussed below).

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The trusteeships would essentially fall under the authority of the United Nations General Assembly (UNGA), inheriting the responsibility from the League of Nations, and the UNGA would exercise all functions of the UN in relation to trusteeship agreements (with exception to those concerning areas designated as strategic that would fall under the purview of the United Nations Security Council (UNSC)) with the assistance of the Trusteeship Council (covered in UN Charter Chapter XIII), which would operate under the UNGA’s authority.57

Problematically, however, there is no automatic vesting of responsibility in the United Nations for former Mandate territories. The International Court of Justice (ICJ) stated in its 1950 Advisory Opinion on the *International Status of South West Africa* that there was “no legal obligation imposed by the United Nations Charter to transfer a mandated territory into a trust territory,”58 though the Mandatory would still be bound by the terms of the mandate agreement it had assumed.59 This same case confirmed that UNGA power relating to mandate territories would come from the delegation of such authority from the Mandatory itself or else due to a valid revocation from a material breach.60 This was reaffirmed in the ICJ’s 1971 *Legal Consequences for States of the Continued Presence of South Africa in Namibia* Advisory Opinion,61 which also concluded that actions taken by South Africa in Namibia regarding territory were illegal and led to UNSC Resolution 301 recognition of the above, and reaffirmation of Namibia’s “national unity and territorial integrity.”62 This is all in keeping with one of the final resolutions passed by the League of Nations Assembly, which noted “the expressed intention of the Members of the League when administering territories under Mandate to continue to administer them for the well-being and development of the people concerned “until other arrangements have been agreed between the United Nations and the respective mandatory Powers.”63 The Mandatory and the

57 Ibid, Article 85.
59 Ibid.
60 Crawford, *The Creation of States in International Law*, page 430 and 431.
61 Ibid, page 430.
UNGA had to work together, since “the status of a Mandated territory could be altered only with the consent of the United Nations,”⁶⁴ and the Mandatory could not “by its own unilateral act resile from its responsibilities.”⁶⁵ Furthermore, if the Mandate is to be moved into Trusteeship, the UN Charter requires a Trusteeship agreement,⁶⁶ the terms of which, “including any alteration or amendment, shall be agreed upon by the states directly concerned, including the mandatory power”⁶⁷ when still exercising its powers. Without such an agreement, “nothing in this Chapter shall be construed in or of itself to alter in any manner the rights whatsoever of any states or any peoples or the terms of existing international instruments to which members of the United Nations may respectively be parties.”⁶⁸ Therefore,

“it is to be a ‘matter for subsequent agreement’ which territories in the categories are brought under the trusteeship system and upon what terms. It seems very doubtful whether any trusts will, in fact, be created in the third category. Chapter XI makes trust principles applicable to non-self-governing territories, and any change of status ought presumably to have the consent of the dependent people. They might be expected to object.”⁶⁹ “The terms of trusteeship for each territory are to be agreed upon by ‘the states directly concerned’, including the mandatory Power in cases where the Mandate is held by a member of the United Nations (Article 79), but the agreements have to be approved by the General Assembly (Article 85), except in the case of strategic areas, where approval is reserved to the Security Council (Article 83).”⁷⁰ “The United Nations have yet to find the answers to some vital practical questions concerning non-self-governing and trust territories. … What are to be the individual terms of each trust agreement? Who is to identify the ‘states directly concerned,’ under Article 79? And lastly, how will discord be avoided in deciding the crucial problem whether a given ‘trust territory’ shall be a ‘strategic area’ or not?’ Upon the answers to these questions depends the success or failure of the whole system.”⁷¹

This all indicates that changes to the terms of the existing Mandate require a great deal of consensus, and that even the transfer of Mandatory Powers is not to be assumed.

“… the International Court of Justice in 1950 in its Advisory Opinion on the International Status of South West Africa stated that, while there was no legal obligation imposed by the United Nations Charter to transfer a mandated territory into a trust territory, South Africa was still bound by the terms of the mandate agreement and the

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⁶⁴ Ibid, 15 and 38.
⁶⁵ Crawford, The Creation of States in International Law, Page 430.
⁶⁶ Charter of the United Nations, Article 81.
⁶⁷ Ibid, Article 79.
⁶⁸ Ibid, Article 80(1).
⁷⁰ Ibid.
⁷¹ Ibid, page 129.
Covenant of the League of Nations, and the obligations that it had assumed at that time. The Court emphasised that South Africa alone did not have the capacity to modify the international status of the territory. This competence rested with South Africa acting with the consent of the United Nations, as successor to the League of Nations. Logically flowing from this decision was the ability of the United Nations to hear petitioners from the territory in consequence of South Africa's refusal to heed United Nations decisions and in pursuance of League of Nations practices.\textsuperscript{72} ... The General Assembly resolved in October 1966 that since South Africa had failed to fulfil its obligations, the mandate was therefore terminated. South West Africa (or Namibia as it was to be called) was to come under the direct responsibility of the United Nations.\textsuperscript{73}

UNSC resolution 301 of 1971 “reaffirmed the national unity and territorial integrity of Namibia.”\textsuperscript{74} This incident demonstrates that while Mandates are not automatically transferred to the Trusteeship system to be administered by the UN (but rather by the still empowered Mandatories), the UNGA can take such powers when the Mandatory ignores its responsibilities. As summarized by James Crawford, “if the Mandatory and the Assembly had together determined upon the future disposition of the territory, that determination would have been legally effective (at least if it did not manifestly violate the essential conditions of the Mandate). Alternatively, the Assembly might have acquired sole dispositive authority over the Mandate, for example in the event of a valid revocation for material breach”\textsuperscript{75} “as was held to be the case with the Mandate for South West Africa: Namibia Opinion.”\textsuperscript{76}

As the United Kingdom was not held in breach, it is worth further noting from the above that the peoples of the Mandate territory, even if not transferred to Trusteeship, have the right to petition the United Nations. There appears to be a lack of rules as to what to do in the event a Mandate is legally abandoned, but the League of Nations does not exist to automatically reclaim administrative powers, and the United Nations neither receives such powers automatically nor appears able to seize them without said powers being handed over by the Mandatory. There appears to be no reason why a Mandatory-less Mandate would not be able to submit petitions to the United Nations. However, since

\begin{footnotes}
\item\textsuperscript{72} Shaw, \textit{International Law}, page 225.
\item\textsuperscript{73} Ibid, 226.
\item\textsuperscript{74} Ibid, 227.
\item\textsuperscript{75} Crawford, \textit{The Creation of States in International Law}, page 431.
\item\textsuperscript{76} Crawford, \textit{The Creation of States in International Law}, page 431, footnote 221.
\end{footnotes}
the UN is incapable of issuing binding resolutions regarding Mandates it has not effected transfer of into Trusteeship, then subsequent resolutions taken by the UN in acting upon the petitions would be of no consequence unless the resolution was to remove the Mandatory from authority. In the case before us, that the UN might pass resolutions or try to exert pressure on a state based on petitions of the people of a Mandate would appear to be more a function of general international support for said people, as a reflection of general state opinion, rather than the establishment of new practice and the creation of new binding rules (which it could not do without proper transfer of powers anyway). Based on this, it seems reasonable to believe that petitions from peoples within the Mandate of Palestine (or the territory of the Mandate of Palestine) could submit petitions to and speak with the United Nations (as the pre-Israel bodies did in the course of discussions with the international body leading up to and after Resolution 181) regardless of the organization’s actual ability to exercise authority over the Mandate. After all, if the UN could accept petitions while the Mandatory power was in control but the UN did not have authority within the Mandate then it stands to reason such petitions could still be accepted under the same conditions of non-UN authority, but in absence of a Mandatory.

United Nations General Assembly Resolution 181

The UNGA issued Resolution 181 on November 29, 1947, which approved a plan to partition Palestine into a Jewish state, an Arab state, and an internationally separate city of Jerusalem to be administered by the United Nations (corpus separatum), while providing for an economic union. The same resolution also empowered the UNSC to take all measures to aid in the implementation of the plan, and to determine as a threat to the peace, breach of the peace or act of aggression, in accordance with article 39 of the charter, any attempt to alter by force the settlement envisaged by this resolution.  

77 UNGA, Resolution 181, November 29, 1947.
78 Ibid, A(c).
The intention was to have the United Nations Commission on Palestine “carry out measures for
the establishment of the frontiers of the Arab and Jewish States and the City of Jerusalem in accordance
with... the partition of Palestine”79 (the location of said frontiers are explained in Part II and Part III(B) of
the Partition Plan document) and then administer the Provisional Council of Government for each State
during “the period between the termination of the Mandate and the establishment of the State’s
independence.”80 At the moment of independence, the population residing in each state will become
citizens of that state,81 and the “State shall be bound by all the international agreements and
conventions, both general and special, to which Palestine has become a party.”82 Jerusalem would exist
as a corpus separatum, and become a separate international city to be administered by the United
Nations, and though the local inhabitants would have power over legislation and taxation, no law or
legislative measure would be allowed to affect, interfere with, or overrule the UN’s Statute of the City,
and the Governor of the city would be selected by the Trusteeship Council and would represent the
UN.83 The City’s population could have citizenship of either the City or a neighbouring state,84 and all
would have freedom of access to Holy Places with “free exercise of worship... mourned in conformity with
existing rights and subject to the requirements of public order and decorum.”85

Problematically for future interpretations, despite having apparent authority to make binding
resolutions regarding matters of trusteeship, the UNGA relies on language reflecting its usual ability to
only make recommendations in resolutions; “recommends to the United Kingdom, as the mandatory
Power for Palestine... the adoption and implementation,”86 and “requests that (a) the Security Council
take the necessary measures as provided for in the plan for its implementation.”87 That the Partition
Plan of Resolution 181 may have no more than the force of recommendation has been explored at

83 Ibid, Plan of Partition with Economic Union: Part 1(C)(2) and (5)
85 Ibid, Plan of Partition with Economic Union: Part 3(C)(13)(a) and (b).
86 UNGA, Resolution 181, A, preamble.
87 Ibid, A(a).
length, and includes the fact that “there was no concurrence between the Mandatory and the Assembly as to the future disposition of the territory, nor was there any agreed intent to adopt the partition plan as anything else than a recommendation to the parties concerned.”

This would be in keeping with the UN’s own documentation on the subject; “The Assembly recommendations were for the establishment in Palestine of an independent Arab state, an independent Jewish state, and an autonomous territory, the City of Jerusalem, under the authority of the United Nations.”

The Palestine Commission noted their intent for the establishment of “independent Arab and Jewish States and the Special International Regime for the City of Jerusalem” was October 1, 1948, and that implementation of the Assembly’s recommendations required negotiations with the Mandatory Power and the arrival of the Commission in Palestine in advance of the transfer of authority from the Mandatory Power to the Commission. This state of affairs led to U.S. Ambassador to the UN, Warren Austin, commenting on March 19th, 1948, that “the United Nations would have ‘no administrative and governmental responsibilities for Palestine’ on May 15, 1948, unless further action was taken by the General Assembly.” No such action was ever taken.

Britain attained a discharge of its Mandatory powers, responsibilities, and duties from the UNGA as part of Resolution 181, which, among other things, sought the termination of the Mandate for Palestine “not later than 1 August 1948,” authorized the withdrawal of “the armed forces of the

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88 Crawford, The Creation of States in International Law, page 431, see also footnote 222 of same page.
91 Ibid, Section 14(a) and (b).
mandatory Power... not later than 1 August 1948,“ and for the “administration of Palestine... [to] be progressively turned over to the Commission.”

This handing over of administrative duties and powers never occurred, and the administrative duties and powers never transferred to the UN without a handover as would be the case due to material breach of the Mandate by the Mandatory."

“Although Britain’s unilateral abandonment of the Mandate might, in other circumstances, have constituted a material breach, it was necessary also that the Assembly act upon that breach by revoking the Mandate. This it did not do; on the contrary it affirmed the British decision to withdraw. But there was no concurrence between the Mandatory and the Assembly as to the future disposition of the territory, nor was there any agreed intent to adopt the partition plan as anything else than a recommendation to the parties concerned. The conclusion must be that the partition plan, though valid, was intended as no more than a recommendation.”

The situation is worsened by the fact that after the passing resolution 181, “both the Security Council and the United Kingdom refused to enforce the partition plan,” and “it is clear that the majority of the then assembled states believed that the Resolution could have legally binding as well as practical effect only after a Security Council decision to implement the Partition Resolution.”

“On 10 June 1948 the Under-Secretary of State (Mayhew) stated that the argument that Resolution 181 was binding could not ‘possibly be maintained’, which emphasized the December 12, 1947, British statement that “HMG are not going to oppose the UN decision. The decision has been taken... We have no intention of opposing that decision, but we cannot ourselves undertake, either individually or collectively in association with others, to impose that decision by force.” Since neither the Security Council nor the United Kingdom would take action to implement the partition plan, and the Commission never received the administrative powers that would allow it to implement the resolution, and Britain’s

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98 Crawford, The Creation of States in International Law, page 431.
99 Ibid.
100 Ibid.
101 Gerson, Israel the West Bank and International Law, pages 48 – 49.
102 Crawford, The Creation of States in International Law, page 431, footnote 222.
103 Ibid, footnote 226.
discharge from Mandatory status prevented it from being able to transfer powers (that it no longer had) after the date of its discharge, it is arguable that Resolution 181 is no more than a recommendation that was not followed up on.\textsuperscript{104} The status of recommendation is highlighted by the ICJ in its Advisory Opinion concerning the construction of a wall in the West Bank 56 years later, "the General Assembly had on 29 November 1947 adopted resolution 181 (II) on the future government of Palestine, which ‘\textit{Recommends} to the United Kingdom... and to all other Members of the United Nations the adoption and implementation... of the Plan of Partition’ of the territory, as set forth in this resolution... as well the creation of a special international regime for the City of Jerusalem."\textsuperscript{105} The argument in favour of the resolution, especially regarding the internationalization of Jerusalem, is further strengthened by the position of the United Nations Conciliation Commission for Palestine, which would be created by UNGA Resolution 194; during negotiations in 1951, the Commission’s ‘aim continues to be to exhaust all the means at its disposal with a view to submitting to the Commission proposals for an international regime for Jerusalem which will be both in conformity with the Assembly’s resolution of 11 December 1948 and acceptable to the Arab States and to the State of Israel.’\textsuperscript{106} The resolution of 11 December 1948 being UNGA resolution 194 (to be discussed later), which while omitting, if not abandoning, any calls for the partition divisions does still call for the internationalization of Jerusalem. Even though the Commission had made attempts to use Resolution 181 as the basis for territorial negotiations, it was “understood that any necessary adjustments of these boundaries could be proposed.”\textsuperscript{107} The offer of such boundaries had been rejected by local and regional Arabs before and during the war, and changes in attitude towards said boundaries could still not produce an agreement on them as the Israeli positioned had changed so that Israel would be the party to reject\textsuperscript{108}, and therefore stymie, the proposed partition plan

\textsuperscript{104} \textit{Ibid,} page 431, see also foot note 226 of same page.

\textsuperscript{105} \textit{ICJ, Advisory Opinion, Legal Consequences of the Construction of a Wall, at para 71.}

\textsuperscript{106} Conciliation Commission for Palestine, \textit{Third Progress Report,} 21 June, 1949, at \textit{para 35,} retrieved from UNISPAL: \url{http://unispal.un.org/UNISPAL.NSF/9a798adbf322aff38525617b006d88d7/4a5ef29a5e977e2e852561010079e43c?OpenDocument}

\textsuperscript{107} \textit{Ibid,} at \textit{para 10.}

\textsuperscript{108} \textit{Ibid,} at \textit{para 33.}
after the war. Clearly the feeling was that even taking the partition boundaries as the starting point of negotiations did not make said boundaries beyond change and thus appears to make them non-binding and unenforceable. Furthermore, that agreement of both sides was required regarding where the boundaries would be implies that the finalization of a two state solution required agreement on territorial disposition, thereby making the UN resolution an apparent recommendation (at least practice accepted by the UN via its negotiating agents) that went unaccepted. That the UN Commission decided that the acceptance of the parties involved was required with regards to the internationalization of Jerusalem undermines arguments in favour of the internationalization provision being binding just as much as the purposeful inaction of relevant parties to pursue implementation of, and exercise authority based on, the internationalization of Jerusalem provisions.

Furthermore, moving a Mandate into Trusteeship requires even more than just action on the part of the UN and the Mandatory partner. Referring back to UN Charter Articles 79, 80(1), and 81, the transfer of powers, alterations or amendments to those powers (ostensibly presented in pre-existing international instruments), and any kind of alteration of the rights of states or peoples or “the terms of existing international instruments to which Members of the United Nations may respectively be parties.”

A slight interpretive problem may exist with Article 79 as the consultation requirement lists the Mandatory power (if applicable) and “states directly concerned.”

Mandate territories are not states (which is the entire point of the Mandate and Trusteeship system), and it is unclear how states could have sufficient legal rights of concern in territories outside of their own borders (Mandate territories are distinct international territorial units) so as to justify the need for the inclusion and agreement of those states to matters of the terms of Trusteeship in a Mandate territory. The possible interpretations of this are that either the UN Charter is breaking with its terminology of referring to the “trust territories” and is including the Mandate territory as a state, or, more likely, states can have

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109 Charter of the United Nations, Article 80(1).
110 Ibid, Article 79.
111 Ibid, Article 75.
“direct concerns.” This raises the question of how to determine which states have such direct concerns, and it can only be surmised that this must include states with pre-existing legally recognized interests in the territory, and likely also neighbouring states (the creation of a new state that will border your own being without a doubt a matter of direct concern). Though this seems like an illogical assumption, due to the fact that malicious neighbouring states might refuse agreement in order to deliberately frustrate progression of a Mandate territory into Trusteeship, Article 80(2) states that such provisions “shall not be interpreted as giving grounds for delay or postponement of the negotiation and conclusion of agreements for placing mandated and other territories under the trusteeship system as provided for in Article 77.”

The Arabs of the Mandate rejected the proposed changes to the existing Mandate instrument, as presented in the form of Resolution 181, as did the surrounding and likely “directly concerned” Arab states. Unless there was no need for any agreement from those mentioned parties, which seems unlikely, the UNGA’s resolution failed to be enforceable by its own rules regarding Trusteeship. This confusion over the phrase “directly concerned” was noted earlier (page 18) and was a source of confusion amongst observes of the time, though trust-agreements certainly appeared to require “the consent of the dependent people.”

Even if the resolution had been binding or had been followed up on, given the rules of Trusteeship already discussed, it is unlikely the law provides for the UN to create the corpus separatum and exercise de facto sovereign control on a permanent basis over Mandate/Trust territory (even just a part of it). This would constitute either a formal annexation or else a permanent infringement on sovereignty of the state-to-be. Furthermore, such action deviates from the established interest of the international community as exemplified in the previously mentioned Article 27 of the Mandate of Palestine (which is still in force until properly altered or amended as part of the creation of terms of Trusteeship, as mentioned above). The international interest is indicated to be in connection with rights

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112 Ibid, Article 80(2).
of access to the Holy Places of the territory of Palestine in general, but includes no expression of interest in territory itself. The notion of a corpus separatum is a sharp departure from an interest in the access of Holy Places and moves into the realm of interest in territorial disposition, which is an affront to the previously mentioned Article 5 of the Mandate of Palestine, which demands that “the Mandatory shall be responsible for seeing that no Palestine territory shall be ceded or lease to, or in any way placed under the control of, the Government of any foreign Power.” \(^\text{115}\) Whether or not the UN can be considered a government of a foreign power (more accurately, it is a quasi-governmental legislative and administrative body representing many foreign powers) is uncertain, but the fact that the League of Nations couched its ability to interfere in access to places of international interest rather than in terms of rights over territory may be a reasonable indicator that an international organization representing various states may be construed as a “foreign Power.” Its only possible salvation may lay in Article 76 in Chapter XII of the Charter, which states:

“employs the guarded phrase ‘progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned, and as may be provided by the terms of each trusteeship agreement.’ The decision to eliminate or qualify the use of the word ‘independence’ in Chapters XI – XIII is probably irreversible. It represents a defeat for the extreme pressure groups who are convinced that all peoples should have ‘freedom to be free,’ by which they seem to mean untrammelled political independence, manhood suffrage under a democratic constitution, and absolute civil and religious liberties.” \(^\text{116}\)

That a Mandatory is banned from annexing the land of a Mandate is clear. The alteration of such a term would undoubtedly require the agreement of all concerned. However the phrase “self-government or independence” implies that independence need not be a final result, but rather that self-government may be appropriate taking into account the “freely expressed wishes of the peoples concerned.” This provides the only fig leaf for the UN in regards to the corpus separatum proposal; since Mandatories are capable of dividing up the territories of their Mandates as required (as was the case

\(^{115}\) Mandate of Palestine, Article 5.  
with Palestine-Jordan and Syria-Lebanon) It follows that the UN proposal is for the separating out of two states from the Mandate and the retention of the remaining Mandate (as occurred when Trans-Jordan was separated off from Palestine but the Mandate continued). To that end, establishing self-government in the remaining, city sized, Mandate of Palestine (renamed Jerusalem, at such a point) could be legally feasible in light of the provision for expression of the public will through voting (obviously a consideration of resolution 181, but arguably curtailed too far in resolution 194, discussed later).

The actions and inactions of the UNGA leading up to and during the (non-) execution of Resolution 181 represents the first two significant failures of the UN regarding Palestine. Failure to properly exert and transfer the powers of the Mandatory to the UNGA created a vacuum for proper and legitimate exercise of sovereign like power in the Mandate of Palestine, thereby creating the impression that Resolution 181 is non-binding despite the binding authority the UNGA was supposed to accept and have. Even if we accept that the discharge of an existing Mandatory automatically vests Mandatory powers in the UNGA (which we have no reason to assume is the case), the wording of the resolution casts doubt on the binding intention of the Partition Plan and is only exasperated by the refusal to of the UNSC and the United Kingdom to implement the resolution, especially when taken in hand with the UK’s stated position on the issue (the UK being an ostensible authority on the subject of the power and implementation abilities of various bodies regarding Palestine during its tenure as the Mandatory Power of Palestine).

In either case, the UNGA causes a break in the chain of certainty of legal title and privileges over the Mandate of Palestine, and also appears to give Resolution 181 the binding power of a mere recommendation. Since recommendations must be accepted by the concerned parties, it is worth noting that the proposed Partition Plan of Resolution 181 was not agreed to. “The parties were free to accept or reject it. The Jews accepted it. The Arabs rejected it. The U.N.-as will be seen-eventually also
acquiesced in the idea that its proposal was not to be implemented.”\textsuperscript{117} Though Israel would later reject the provisions as well, the fact of the matter is that at no point was mutual acceptance of the partition achieved by the parties concerned.

On May 14\textsuperscript{th}, 1948, Israel declared its independence, and in its declaration made reference to the UNGA resolution 181.\textsuperscript{118} These references declared that “the General Assembly required the inhabitants of Eretz-Israel to take such steps as were necessary on their part for the implementation of that resolution. This recognition...is irrevocable... The State of Israel is prepared to cooperate with the agencies and representatives of the United Nations in implementing the resolution of the General Assembly...”\textsuperscript{119}

These references indicate three important things. The first is that the resolution had obviously not been implemented, or else there would be no need to cooperate in order to achieve said implementation. The second is that the understanding clearly existed that implementation required the cooperation and action of the parties involved.\textsuperscript{120} Finally, while the previous two implications rely on the mutual acceptance of the resolution, the final point of importance is that which Israel deems to be “irrevocable.” This word is not applied to the provisions of the resolution that were to partition and lay out the new states within the Mandate, these being provisions that require mutual acceptance and implementation and are therefore conditional. Instead this word is reserved for the overarching idea or principle of the resolution, namely that new states be created. From Israel’s point of view, this meant the resolution indicated an international commitment to allow (even if not to facilitate it as planned) a Jewish state to emerge from the Mandate was taken as a binding declaration of international customary

\textsuperscript{119} Ibid.
\textsuperscript{120} Despite the fact that the Arab invasion had already begun and said states were now involved, that the surrounding Arab states rejected the resolution seems less important as they were not parties whose acquiescence and cooperative action was absolutely necessary to make the implementation of Resolution 181 possible. However, the fact that local Arab inhabitants of the Mandate of Palestine did themselves also reject the provisions indicates the recommendation/offer was not accepted.
understanding on the issue. But a door may swing both ways, and if the declaration so enshrined the right of a Jewish state to emerge (even if the conditions for that emergence were non-binding and questionable) then it must by extension enshrine a similar right for an Arab/Palestinian state to emerge in the Mandate as well.

Perhaps ironically to many, at a time when the UN and international community were failing to set up an Arab state in Palestine, and at a time when the entire 181 resolution could have been dismissed due to total rejection by one side, Israel’s specific and unequivocal reliance on this provision saved some measure of relevance for the Partition Plan. It is the one thing from the resolution that Israel has undeniably clung to as being a consequence of said resolution, and it essentially indicates an acceptance of a legal understanding of resolution 181 that the principles of state/entity creation within the resolution are sacrosanct. This is the first true saving grace that protects an Arab/Palestinian right to a state somewhere in the Mandate of Palestine territory. That this is possible based on the mere principle of partition rather than on the provisions of the resolution is exemplified by the view of the Soviet bloc on the matter; “This State ([Palestine]) had not been established, as provided for in the 1947 resolution. On the other hand, the State of Israel had been set up within the territorial limits established by the General Assembly.”

Coupled with the earlier issues of non-implementation of the resolution, along with its dubious phrasing that raised questions about the resolution being a mere recommendation subject to the acceptance of parties involved (acceptance that was not acquired), it becomes apparent that Israel achieved statehood not from the resolution but from its factual existence as recognized by states without regard to the provisions of the resolution (seeing as how Israel was clearly recognized despite not being in adherence with the Partition Plan’s suggested borders) and UNSC members determined that Israel was taking actions to achieve the status of state on its own and

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that its borders were evolving, all based on “[emphasizing] the *de facto* considerations”\(^\text{123}\) rather than anything to do with Resolution 181.

**STATUS UPDATE 2: TERRITORIES OF PALESTINE BEFORE DECLARED ISRAELI INDEPENDENCE**

As determined above, the legal chain of events properly transfers the territories in question out of Ottoman/Turkish sovereignty and places it in the Mandate system so as to vest the territories themselves with sovereignty to be exercised as an independent state, one that will be developed by the administration of the Mandatory. To that end, the sovereignty of the Mandate of Palestine can be said to belong to its people but to be in a type of dormancy pending independence.

The Mandate did not transfer automatically to the UNGA, and while the United Kingdom was discharged of its Mandatory status it decided against implementing changes to the terms of the Mandate (the changes being the Partition Plan of Resolution 181). That the proposed terms of Trusteeship (represented by resolution 181) were rejected by local Arabs, neighbouring Arab states, and were not implemented by the UK, UN Charter provisions regarding changes to existing international instruments and the terms of a Mandate would indicate that the proposed terms of Trusteeship failed.

Therefore, it appears doubtful that the Mandate of Palestine was transferred to the Trusteeship system, and the proposed partitioning of the Mandate would appear to be an unaccepted and unimplemented recommendation or proposal with no force or effect save for its overarching principle of a two state solution. That the plan for creation of two states within the Mandate achieved widespread approval is augmented by the fact that Israel relied on this principle to raise its guarantee of being able to establish a Jewish homeland in the Mandate of Palestine to the level of a guarantee of the right to have a state within the Mandate of Palestine (and since the resolution equally identifies a Jewish state and an Arab state, it cannot be said that this principle only applied to a Jewish state).

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\(^{123}\) Crawford, *The Creation of States in International Law*, page 433. See especially footnote 234 of same page for multiple examples and quotations from state representatives expressing the viewpoints of their countries regarding Israel’s development of statehood.
As such, this thesis submits that the status of the Mandate of Palestine territories the moment before the Israeli Declaration of Independence, the subsequent international recognition of said independence, and the invasion of Arab states, is that a single territorial unit existed with its only recognizable international boundaries being those set out in the Mandate of Palestine provisions and there is the intent if not outright internationally recognized requirement that an Arab state and a Jewish state emerge from said territorial unit. This is without regard to territorial allotment or internal divisions due to the rejection of the proposed Partition Plan.

“At the moment when the Resolution failed to be implemented, its description of specific boundaries ceased to be fully relevant... As a description of a particular boundaries they became worthless; but as the reflection of the idea that there should be a boundary between a Jewish and an Arab state somewhere in Palestine the proposal still retained some value-albeit a historical rather than a legal one.”\textsuperscript{124}

**Brief Interlude on Legal Concepts Regarding Time**

*Intertemporal Law*

Intertemporal law refers to the practice of judging actions based on the international law and legal understandings in place at the time the acts occurred, as noted in the *Island of Palmas* case.\textsuperscript{125} That said, while a right or proper claim may be established to already be in existence in a given situation based on the legality of the actions that gave rise to said right or claim at the time, the extent of the right may be determined on different grounds than determining its existence. Simply put, since rights evolve and change it makes sense to apply the modern understanding of the extent of that right today after having established the existence of that right some time back.\textsuperscript{126} This occurred in the *Aegean Sea Continental Shelf* case, where establishing the existence of a Greek right relied on the law as applied at


\textsuperscript{125} Shaw, *International Law*, page 508.

\textsuperscript{126} Ibid, page 508 – 509.
the time, but the extent of the right based on the continental shelf, which was unknown at the time the right came into being, is based on modern standards.\textsuperscript{127}

Often determining when a right came into existence requires the determination of a “critical date” that indicates the moment a right has crystallised.\textsuperscript{128} Determining the critical date can be imprecise and difficult. In cases of determining territorial rights, the critical date may be the date of independence, or it may be a later date evidenced by sovereign activities, or it may be an even later or undetermined date dependent on other factors stipulated to in treaties.\textsuperscript{129}

\textit{Contemporaneity}

Closely tied with the notion of intertemporal law, the practice of contemporaneity refers to the practice of analyzing treaties in light of the circumstances surrounding their negotiation, signing, and execution, while also taking note of the actions of parties in adherence of said agreements.\textsuperscript{130}

“In the \textit{Eritrea/Ethiopia} case, the Boundary Commission referred to the principle of contemporaneity, by which it meant that a treaty should be interpreted by reference to the circumstances prevailing when the treaty was concluded. ... However, in seeking to understand what that was, reference to subsequent practice and to the objects of the treaty was often required. In interpreting a boundary treaty, in particular in seeking to resolve ambiguities, the subsequent practice of the parties will be relevant. Even where such subsequent practice cannot in the circumstances constitute an authoritative interpretation of the treaty, it may be deemed to ‘be useful’ in the process of specifying the frontier in question. However, where the boundary line as specified in the pertinent instrument is clear, it cannot be changed by a court in the process of interpreting delimitation provisions. ... It is also possible that boundary allocation decisions that do not constitute international judicial or arbitral awards may be binding, providing that it can be shown that the parties consented to the initial decisions.”\textsuperscript{131}

This re-affirmed as international practice in the \textit{Vienna Convention on the Law of Treaties} (of 23 May, 1969), which in Article 31 provides that treaties will be interpreted in their “context and in the light

\textsuperscript{127} Ibid, page 509.
\textsuperscript{128} Ibid.
\textsuperscript{129} Ibid, 510-511.
\textsuperscript{130} Shaw, \textit{International Law}, page 497 – 498.
\textsuperscript{131} Ibid.
of ...[their] object[s] and purpose[s].”¹³² This will be determined by taking into account any subsequent agreements, subsequent practices, or rules of international law of relevance,¹³³ while “special meaning shall be given to a term if it is established that the parties so intended.”¹³⁴ Work produced relating to negotiations may be used to make such determinations.¹³⁵ Treaties may later be deemed terminated or suspended based on conclusions of later treaties or material breaches, and so the context of what a treaty required and what the expectations were at the time of breach is important.¹³⁶ Furthermore, treaties are void if they conflict “with a peremptory norm of general international law.”¹³⁷ A peremptory norm of general international law is “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only be a subsequent norm of general international law having the same character.”¹³⁸

**International Custom Regarding Recognition, Acquiescence, and Estoppel**

The conduct of states, as evidenced by their statements and historically observed and repeated actions, sheds light on what can constitute an accepted international custom.

“The Eritrea/Ethiopia Boundary Commission explained the general principle that ‘the effect of subsequent conduct may be so clear in relation to matters that appear to be the subject of a given treaty that the application of an otherwise pertinent treaty provisions may be varied, or may even cease to control the situation, regardless of its original meaning’. The various manifestations of the subsequent conduct of relevant parties... reflect expressly or impliedly the presumed will of a state, which in turn may in some situations prove of great importance in the acquisition of title to territory.”¹³⁹

In general, the actions or non-actions of states may have an overriding effect, in whole or in partial variation, on existing treaties.

¹³³ ibid, Section 3, Article 31 (3).
¹³⁴ ibid, Section 3, Article 31 (4).
¹³⁵ ibid, Section 3, Article 32, especially (a) for the later purposes of this research.
¹³⁶ ibid, Article 59 and Article 60.
¹³⁷ ibid, Article 53.
¹³⁸ ibid.
¹³⁹ Shaw, International Law, page 515.
“Recognition is a positive act by a state accepting a particular situation... even if that accepted situation is inconsistent with the terms in a treaty. Acquiescence... occurs in circumstances where a protest is called for and does not happen or does not happen in time in the circumstances. In other words, a situation arises which would not seem to require a response denoting disagreement and, since this does not transpire, the state making no objection is understood to have accepted the new situations. The idea of estoppel in general is that a party which has made or consented to a particular statement upon which another party relies in subsequent activity to its detriment or the other’s benefit cannot thereupon change its position. This rests also upon the notion of preclusion.”

Unfortunately, state practice is not always clear, and so “in situations of uncertainty and ambiguity, the doctrines of acquiescence and estoppel come into their own,”

even though they may not take on the authority of substantive law.

Clauses including the term “without prejudice” may be used to avoid questions of silence giving rise to estoppel; “The ‘without prejudice’ formula (so popular among lawyers) was introduced to forestall future claims of estoppel in the course of peace negotiations.”

“The extent to which silence as such may create an estoppel is unclear and much will depend upon the surrounding circumstances, in particular the notoriety of the situation, the length of silence maintained in the light of that notoriety and the type of conduct that would have been seen as reasonable in the international community in order to safeguard a legal interest.”

As such, it is seen that an important aspect of international legal interpretation over extended periods of time may require analysis of how other states are interpreting the situation or what about the situation they are ignoring and acquiescing to. These are delicate tools to use in analyzing a situation as complex and confused as the one undertaken here, but there are certain instances where such principles can at least help narrow the scope of an argument or remove it from the equation even without supplementing a new argument or possible solution in its place. That said, it can still require a nuanced use.

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140 Ibid, page 516.
141 Ibid, page 518.
142 Ibid.
Prescription

Stability is much desired in the international system, and arguments over territory can be a source of extreme volatility and, therefore, instability. In order to preserve the status quo, an illegal act that would still be illegal may simply be ignored in favour of legitimizing the status quo and avoiding changes. To this end,

“Prescription... is the legitimisation of a doubtful title by the passage of time and the presumed acquiescence of the former sovereign, and it reflects the need for stability felt within the international system by recognizing that territory in the possession of a state for a long period of time and uncontested cannot be taken away from that state without serious consequences for the international order. It is the legitimisation of fact. If it were not for some such doctrine, the title of many states to their territory would be jeopardised. The International Court in the Botswana/Namibia case, while making no determination of its own, noted that the two parties were agreed that acquisitive prescription was recognized in international law and further agreed on the criteria to be satisfied for the establishment of such a title, viz. the possession must be à titre de souverain, peaceful and uninterrupted, public and endure for a certain length of time. The Court did not contradict this position.”\(^{145}\)

The timeline for establishing this resolution has not been defined, but the parties of the British Guiana and Venezuela Boundary case “agreed to adopt a fifty-year adverse holding rule.”\(^{146}\)

The Legal Confusion Truly Begins

The above mentioned first failures of the United Nations cloud the legal situation of the opening of formal and full hostilities in the Israel-Arab/Palestinian conflict (1948 being the chosen starting year due to Israel only being formed and recognized at that time). The UNGA’s ability to formally bind the Mandate and its population through resolutions and administrative provisions is in doubt. Its only possible salvation rests in an assumption of automatic transfer of Mandatory powers to the UNGA via the Trusteeship system. However, as already established, Mandates do not automatically transfer to the Trusteeship system unless some material breach occurs on the part of the Mandatory. The transfer of power requires cooperation with the Mandate. As seen, the United Kingdom was not accused of

\(^{145}\) Ibid, page 504.
\(^{146}\) Ibid, page 506.
material breach nor did its declared surrendering of Mandatory status or power constitute such a breach as it was deemed acceptable and lawful (if not desirable) by the UNGA. So with a lawful discharge, no material breach, no handing over of powers, and no assumption of powers and duties by the UNGA, the UN’s right to administer the Mandate territory falls into question.\footnote{Referring to the Mandate of Palestine, James Crawford summarizes the situations thusly: “In force 29 September 1923. Not transferred to Trusteeship. UN partition plan (Nov 1947) failed. UK withdrew unilaterally, 14 May 1948, thereby terminating mandate.” Crawford, The Creation of States in International Law, Appendix 2, page 471.}

This vacuum of authority gives rise to the very real possibility that the ‘dormant sovereignty’ of the territory and people of Palestine revived and vested in the population of the Mandate lands. In this case, the fighting that broke out between Jews and Palestinians may be viewed in the context of civil war with outside state interference (not unlike the wars in Korea and Vietnam). If, for some unexplained reason, Mandatory powers did somehow transfer automatically to the UNGA, the question of the binding nature of Resolution 181 still stands due to the wording and subsequent statements regarding its binding nature by states in the international system, as well as the lack of fulfillment of provisions to create the terms of trusteeship for the territory that are necessary in order to abrogate existing international instruments regarding the Mandate territory. This issue was not helped by the 1948 war.

\textit{Israeli Declaration of Independence}

Having already spoken about the Israeli Declaration of Independence of May 14\textsuperscript{th}, 1948, with regard to Resolution 181, it is sufficient here to simply reiterate the essential points. The Declaration referred to the right of the Jewish people to their national homeland on the lands with which they have historic ties, as having been recognized by the international community through the Balfour Declaration, the Mandate of the League of Nations, and the United Nations through Resolution 181.\footnote{\textit{The Declaration of the Establishment of the State of Israel}, May 14\textsuperscript{th}, 1948.} The recognition of a right of the Jewish people to establish the state was deemed “irrevocable” in the context of the passage of Resolution 181, but with regards to the rest of the resolution the Declaration
merely said that “Israel is prepared to cooperate… and will take steps to bring about the economic union of the whole of Eretz-Israel.”\textsuperscript{149} Aside from the fact that the economic union was to be for the whole of the Mandate Territory,\textsuperscript{150} Israel’s understanding of the applicability of the actual provisions of Resolution 181 (having relied on the general principle as making its declared right to a Jewish state ‘irrevocable’) was that the parties had to cooperate and, by extension, agree on the implementation. This obviously did not happen due to the invasion by Arab states, and the violent situation ongoing in the Mandate territory is acknowledged by Israel as part of the declaration.\textsuperscript{151} According to David Ben-Gurion, anticipation of this violence actually influenced the wording of the declaration so as to imply cooperation was needed for implementation, especially after considerations regarding territory.

“We accepted the UN Resolution, but the Arabs did not. They are preparing to make war on us. If we defeat them and capture Western Galilee or territory on both sides of the road to Jerusalem, these areas will become part of the state. Why should we oblige ourselves to accept boundaries that in any case the Arabs don’t accept?”\textsuperscript{152}

1948 – 1949 War

After the passing of Resolution 181, violence escalated and was followed with incursions by Arab States into the Mandate of Palestine territory began in January 1948.\textsuperscript{153} Implementation of the Partition Plan was felt to require armed forces, but neither the U.S. nor the Britain were amenable to this.\textsuperscript{154} Attempts at frustration and abandonment of the Partition Plan by the Britain were later followed by an American proposal to suspend attempts at implementation of the Partition Plan and instead place Palestine under United Nations trusteeship.\textsuperscript{155} The Soviet Union vetoed this proposal, and Britain would

\textsuperscript{149} Ibid.
\textsuperscript{150} This author is prepared to assume that this is what was meant, lest the phrasing be without legal significance since an economic union within Israel itself should be a given, and the provision that required cooperation was the economic union of the entire former Mandate territory.
\textsuperscript{151} The Declaration of the Establishment of the State of Israel.
\textsuperscript{153} Gerson, Israel the West Bank and International Law, page 49.
\textsuperscript{154} Ibid, page 50.
\textsuperscript{155} Ibid.
go on to frustrate any UN ability to implement Resolution 181. With the withdrawal of Britain from its Mandatory role, followed immediately by Israel’s declaration of independence, the loud Arab rejection of the Partition Plan was reinforced by invasion on the ground by all bordering states plus Iraq.

Battle raged, and the first ceasefire of the war came on June 11th, 1948 “pursuant to the [UNSC] Resolution of May 29, 1948.” The cease fire was “without prejudice to the rights, claims and position of either Arabs or Jews,” and was to last for four weeks. Calls to extend the ceasefire did not materialize, and UNSC Resolution 54 placed the blame for this with the Arab states that had “rejected successive appeals of the United Nations Mediator, and of the Security Council... for the prolongation of the truce” while Israel had “indicated its acceptance in principles of a prolongation of the truce in Palestine.” The resolution also called for a new ceasefire, and the UNSC ‘decided’ to extended the truce indefinitely.

A second ceasefire came into effect on July 18th, 1948, which allowed the United Nations Mediator, Count Bernadotte, to recommend a series of proposals, which Britain favoured, that would have seen Trans-Jordan gain “nearly all of Palestine exclusive of Western Galilee, including parts which, by the terms of the Partition Plan, were to be under Jewish control,” with the Jewish state of Israel being formed in the remainder. This was not agreed to, and states varied in response to the proposal (Britain for it, the Soviet Union against it, and the United States first being for it and then being against it in favour of returning to the Partition Plan).

The third ceasefire was agreed to on October 22, 1948, following a dramatic escalation in violence and coming directly on the heels of a massive Israeli strike that saw major territorial shifts as a
result;\(^{165}\) “In seven days Israel destroyed most of the Egyptian army in the south, took control of the whole Galilee in the north, and penetrated two to six miles inside of Lebanon.”\(^{166}\) Calls went up for Israel to withdraw to the previous ceasefire lines, which Israel argued would be a reward to the Arab states by selectively applying the law in this case while ignoring “the initial Arab entry into Palestine in violation of United Nations resolutions and subsequent Arab refusal to accede to ceasefire attempts.”\(^{167}\) However a change in attitude was to take place during the subsequent sessions of the Security Council, namely that the emphasis soon changed from automatic withdrawal to ‘permanent truce lines’ to one of holding positions, followed by withdrawal after “successful conclusion of a final peace settlement.”\(^{168}\) This would carry with it the basis for the tone of the later UNSC Resolution 242.\(^{169}\)

Violence signaled the death of the ceasefire period on December 22, 1948.\(^{170}\) Before this time, much work was being conducted to aid in moving the parties towards signing Armistice Agreements.\(^{171}\)

The fourth ceasefire, which came into effect on January 7, 1949, was to be the final ceasefire, called for in UNSC Resolution 66 and based on resolutions 61 and 62.\(^{172}\) The resolution was ignored by Israel for a time as it worked to consolidate its positions until “an Anglo – American ultimatum threatening intervention halted the Israeli offensive.”\(^{173}\)

This brought about the end of the 1948 – 1949 War period, which marked its conclusion with the signing of The Armistice Agreements by Israel on an individual basis with Egypt, Lebanon, Trans-Jordan, and Syria. These Armistice Agreements are discussed below, but at this moment it is worth noting that in the sole instance of respect for international frontiers, Israel would withdraw its forces from Lebanon and return to the Lebanon – Mandate of Palestine border.\(^{174}\) Also worth noting is that the

\(^{165}\) Ibid, pages 55 to 56.  
\(^{166}\) Ibid, page 56.  
\(^{167}\) Ibid, page 57.  
\(^{168}\) Ibid, page 58.  
\(^{169}\) Ibid.  
\(^{170}\) Ibid, page 61.  
\(^{171}\) Ibid, page 58 to 59.  
\(^{172}\) Ibid, pages 61 to 62.  
\(^{173}\) Ibid, page 62.  
\(^{174}\) See discussion below.
Armistice Agreements acted more as permanent ceasefire agreements, with all issues outstanding between the parties to be discussed later, including if not especially the issue of territory. No territorial decisions are made in the Agreements, and the territorial decisions of Resolution 181 are of dubious standing (both legally and in the eyes of the concerned parties).

**UNGA Resolution 194**

Amid the death and destruction of a war where a territorial entity is invaded by all its surrounding neighbours (plus some of their allies), it can be easy to forget that there were parties of concern to issues within the Mandate of Palestine borders who had no skin in the game. Though their Partition Plan, as envisioned by Resolution 181, had, for all intents and purposes, been stymied by the parties concerned, the UNGA remained undeterred about the prize they sought; Jerusalem.

On the 11th of December, 1948, before the first Armistice Resolution had even been put forward, the UNGA passed Resolution 194. The resolution would be known for two things. The most straightforward item from this resolution, the specific provision of which would go on to be mentioned in future UN resolutions, was paragraph 11 which “resolved that the refugees wishing to return to their homes and live at peace with their neighbours should be permitted to do so at the earliest practicable date,” with compensation paid to those who choose not to return. The larger and territorially significant provisions of the resolution span paragraphs 7 and 8, and ‘resolve’ that the Conciliation Commission should present to the UNGA “its detailed proposals for a permanent international regime for the territory of Jerusalem” that “should be accorded special and separate treatment from the rest of Palestine and should be placed under effective United Nations control.”

UNGA Resolution 194 does not make mention of UNGA Resolution 181. Resolution 194 is essentially a fresh start, and it deals only with the division of Jerusalem. No mention is made of

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175 UNGA, Resolution 194, December 11th, 1948.
176 Ibid, Article 11.
177 Ibid, Article 7.
178 Ibid, Article 8.
partitioning the rest of the Mandate of Palestine area, nor is any mention made of new boundaries within the territory. The UNGA simply “instructs the Conciliation Commission to take steps to assist the Governments and authorities concerned to achieve a final settlement of all questions outstanding between them.”

Changes on the ground having clearly laid waste to the Partition Plan, the UNGA does not call for adherence to Resolution 181 or even recall that resolution expressed the planning of the international community or, perhaps, the Trustee Power, but rather leaves it to the parties themselves to figure out final status of all issues (thereby including territory). This would be fine, and arguably in keeping with the notion of respecting the wishes of the local inhabitants, especially as would be required before moving a Mandate territory into Trusteeship (assuming such a position even remained possible without the express agreement of the population possible after the legal withdrawal of Britain as the Mandatory), but for the fact that the UNGA still seeks to exact its will upon Jerusalem alone. It does not claim to do so as the Trustee or acting Mandatory, but rather directs the Commission to submit proposals on the grounds that the city is too important to too many people.

Ignoring the principle of non-annexation of Mandate territories for a moment, being able to do this would require the UNGA to be in the position of the Mandatory or the Trustee. If not, then it has no power to act inside of the Mandate of Palestine in any official capacity. But if the UNGA does have this authority, then it also has the authority to do more regarding the peace settlement in the region. Such authority would allow the UNGA to impose the 1947 Partition Plan, or put forward new boundary lines and seek consensus, and move the parties towards an agreement by leading them there since they have the authority to do so. If the UNGA did not do this because they did not have the power to do so, then that is one thing and it simply makes their moves on Jerusalem seem callous in the face of issues of great

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179 Ibid, Article 6.
180 Ibid, Article 8. “Resolves that, in view of its association with three world religions, the Jerusalem area... should be accorded special and separate treatment from the rest of Palestine and should be placed under effective United Nations control.” The request for submissions of the internationalization proposal are made in the rest of the same Article. See also Article 7.
suffering. But if the UNGA actually had the authority to step in with regards to Jerusalem then it would have had the authority to do far more than it did, and this demonstrates near unfathomable irresponsibility on the part of the UNGA.

With UNGA Resolution 303, the General Assembly would ‘Decide’ to restate its intention for Jerusalem to be a separate international city, with regards to Resolutions 194 and 181, and would appoint the Trusteeship Council to administer the City after preparing, approving, and implementing “the Statute of Jerusalem.” Though the ‘Decision’ is deemed to be “in relation to Jerusalem,” it is significant in that it refers to Resolution 181, but not its partition boundaries, which would have also been used to set up Jerusalem and the corridor connecting Jerusalem to one of the Jewish partition area. Of further interest is that this resolution comes after both the signing of the 1949 Armistice Agreements as well as after Israel’s admission to the United Nations in May of 1949. In pushing forward the issue, there may be some reason to conclude that the United Nations did not recognize the Armistice Lines as an impediment to different divisions within the territory, and that Israel’s admission to the UN had done nothing to consummate those lines into borders.

1949 Armistice Demarcation Lines Issue

The 1949 Armistice Lines may well be the most misunderstood area of the entire Israel – Palestine issue. In public discourse, they are often incorrectly referred to as ‘borders’, usually identified as the ‘pre-1967 borders’. Using the term ‘pre-1967 borders’ not only conveys a seeming lack of knowledge as to when these lines became borders by not using that reference date instead, but it also implies that the borders changed in 1967. This is a confusing interpretation of an international legal norm. If the 1949 Armistice Lines are borders that Israel is in longstanding breach of, then those borders

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181 At worst. Best case scenario, the UNGA is expressing the foresight to know that an issue as big as Jerusalem should be taken off the table and simply preserved for free access, and the inclusion of the provisions, at considerable length, while awarding far less space and consideration to the plight of real human suffering in the form of refugees, is simply a case of poor timing and lack of forethought on this issue.

182 UNGA, Resolution 303, December 9th, 1949, Section I, Article 2, for the quote. For all information see Section I of the resolution generally.
still exist. If the borders changed in 1967 then that implies legal legitimacy to the change, since unlawful changes are not recognized and so no change is referred to, and therefore Israel is not in breach of borders and the call to change the borders back is more a request than a charge of illegality. That the reference is clearly to the 1949 Armistice Lines at least clarifies what the term refers to, even if the term offers no clarity in and of itself.

By understanding the implications of armistice lines in general, in conjunction with understanding the text and intentions of the armistice agreements themselves, it is possible to analyze the legal standing of the 1949 Armistice Lines and their non-impact on border creation.

Armistices and Armistice Lines in General

An armistice is a convention of warfare that has long been “interchangeable in substance with a truce or a cease-fire.” Arguably, “in the current practice of States, an armistice chiefly denotes a termination of hostilities, completely divesting the parties of the right to renew military operations under any circumstances whatever.”

In referring to the armistice that marked the termination of hostilities in WWI, Yoram Dinstein notes that the agreement’s far reaching provisions, eventually extended indefinitely, “barred the possibility of resumption of hostilities by the vanquished side. Only the victorious Allies reserved to themselves the option of resorting to force again in case of breach of the Armistice’s conditions by Germany.” Even though it is clearly an instrument governing war, there is a clear push to move armistice agreements into the category of governing peace instead of allowing for the creation of peace;

“...[w]hen it brings war to a close, an armistice is like the first category of preliminaries of peace.... Whereas a treaty of peace is multi-dimensional (both negating war and providing for amicable relations), an armistice agreement is restricted to the negative aspect of the demise of war. To the extent that a distinction is drawn between associative and

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183 Dinstein, War, Aggression and Self-defence, page 42.
184 Ibid.
185 Ibid.
dissociative peace (the latter amounting to ‘the absence of war, a peace defined negatively’), an armistice has to be marked as a dissociative peace.”

To equate armistice agreements with peace agreements is to confuse scheduling a meeting with having one. Deciding to make room for negotiations to achieve peace is not the same as achieving peace, even if choosing to define that peace as being the mere absence of violence.

That a state of war continues to exist, even if acting upon it is illegal, is further borne out by other examples from the conflict of 1948 – 1949. Dinstein argues that...

“there is also recourse to the past tense in the Israeli practice of ending war. This occurred in the abortive Treaty of Peace between Israel and Lebanon, which was signed in May 1983... but never entered into force since Lebanon declined to ratify it. The instrument is significant only because it sets forth in Article 1(2): ‘The Parties confirm that the state of war between Israel and Lebanon has been terminated and no longer exists.’ It is clear that... Lebanon and Israel did not terminate the war between them at the moment of signature (using the present tense) or undertook to end it upon ratification (in the future): they confirmed that the state of war had already ended at some indeterminate stage (in the past), and that it therefore no longer existed.”

A look at the full text of the actual treaty, however, reveals issues with this analysis. Firstly, the preamble of the document declares that Israel and Lebanon “having agreed to declare the termination of the state of war between them,” then proceeds to agree to the provisions, including Article 1(2) mentioned by Dinstein. Article 5 states that “consistent with the termination of the state of war... the Parties will abstain from any form of hostile propaganda against each other.” While Article 8(2) provides that “...[d]uring the six-month period after the withdrawal of all Israeli forces from Lebanon in accordance with Article I of the present agreement..., and in light of the termination of the state of war, the Parties shall initiate... bona fide negotiations in order to conclude agreements....” Lastly, Article 10(1) states that the Agreement “shall be ratified by both parties” and “shall enter into force on the

186 Ibid.
187 Dinstein, War, Aggression and Self-defence, page 37.
189 Ibid, Article 5.
190 Ibid, Article 8(2).
exchange of the instruments of ratification.” The agreement clearly relies on the fact that the parties have “agreed to declare the termination of the state of war between them,” rather than on the notion of having agreed that the state of war between them has already terminated. Article 1(2) is enacted in order to confirm the declaration of the termination of hostilities that the parties have agreed to.

Further examining the unacted agreement, Article 5 refers to taking action now that will be consistent with the termination of the state of war, while Article 8(2) makes the termination of the state of war sound very recent given that it provides for action to now be undertaken “in light of the termination of the state of war.” They could have opted for language suggesting that the existing lack of a state of war allows for such peaceful conduct (though if they’d already recognized the non-existence of such a state it begs the question why it needed repeating regarding action that could only happen in absence of a state of war), but instead made the provision something that happens because of the end of a state of war provided for earlier in the agreement. As for when this will take place, Article 10(1) indicates that this understanding of the termination of their state of war comes into effect along with the rest of the provisions of the document upon ratification.

The exception to this last understanding would be if the fact that the agreement to declare a termination of the state of war is part of the preamble, rather than the provisions of the document would indicate that the agreement had already been made, and the declarations already effected by virtue of that agreement independent of ratification of the peace treaty. This might eliminate the incongruity of analysis and sustain Dinstein’s argument that Article 1(2) is recognizing an already existing termination of the state of war, but it is tempered by the tone of other provisions that imply the termination of the state of war is recent; likely the agreement of which was part of the negotiations regarding the unratified peace treaty. In either case, clearly the state of war did not cease to exist because of the 1949 Armistice Agreements, but instead occurred at a later date.

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191 Ibid, Article 10(1).
It is clear, however, that the end of this state of war was a direct result of the negotiations, and more likely the result of the agreement. Dr. Kimche, the Director General of the Israel Foreign Ministry gave an address at each of the two signing locations for the unratified peace treaty. At the first occasion, in Khalde, he said “The goal of peace in place of war, the goal of friendship in place of hostility... these are the directives that have guided us during these protracted talks in Khalde.”\footnote{Ibid, at para 1 of ‘2. Kiryat Shmona’} At the second signing in Kiryat Shmona, he said “It is fitting that here... we should be signing this document which brings to an end the state of war between us and lays the foundation for a new era of peace....”\footnote{Statements by Director General Kimche Regarding the Israel – Lebanon Peace Agreement (May 17, 1983), Jewish Virtual Library, para 1 of ‘1. In Khalde’, Retrieved from: Jewish Virtual Library, ‘Statements by Director General Kimche Regarding the Israel – Lebanon Peace Agreement (May 17, 1983)’, Israel, Jewish Virtual Library: jewishvirtuallibrary.org, https://www.jewishvirtuallibrary.org/jsource/Peace/kimche.html.}

This author offers the point of view that an armistice agreement is like all other instruments associated with international humanitarian law, namely that it is another device for the regulation of armed conflict. Much as a white flag of surrender requires a cessation of hostilities towards the target, unless they breach the provisions of this cessation of hostilities and thus allow for defensive actions, an armistice agreement can be seen as another form, if not an extension of, this type of policy. That an armistice agreement is a tool governing warfare rather than peace making is further evidenced by the fact that the terms of peace need not be included in the armistice at all.

Are the 1949 Armistice Lines borders?

That the 1949 Armistice Lines are not borders, and have no international legal standing as such, is made clear by applying the above argued principles of what an armistice agreement is for, while also noting the provisions of the specific 1949 Armistice Agreements themselves.
As already discussed, the 1949 Armistice Agreements Israel signed with Egypt, Jordan, Lebanon, and Syria brought the end of hostilities during the war of 1948 – 1949. In general, these agreements sought to bar breaches of the peace and set forth boundaries (the 1949 Armistice Demarcation Lines) across which neither side was to venture, with these lines being strictly “without prejudice” to the territorial claims or rights of the parties concerned.\(^{194}\) Though, after the war, only Egypt and Jordan retained control of lands inside the Mandate that would come to make up the current claim of Palestinian territory based on the ‘1967 borders’, Israel’s 1949 Armistice Agreements with Lebanon and Syria are also noteworthy for consideration in the impact of these lines. Important provisions of these agreements will be listed in turn, and then discussed in aggregate.

**Hashemite Jordan Kingdom – Israel: General Armistice Agreement\(^{195}\)**

**Article II**

With a specific view to the implementation of the resolution of the Security Council of 16 November 1948, the following principles and purposes are affirmed:

1. The principle that no military or political advantage should be gained under the truce ordered by the Security Council is recognized;

2. It is also recognized that no provision of this Agreement shall in any way prejudice the rights, claims and positions of either Party hereto in the ultimate peaceful settlement of the Palestine question, the provisions of this Agreement being dictated exclusively by military considerations.

**Article III**

3. No warlike act or act of hostility shall be conducted from territory controlled by one of the Parties to this Agreement against the other Party.

**Article IV**

2. The basic purpose of the Armistice Demarcation Lines is to delineate the lines beyond which the armed forces of the respective Parties shall not move.

**Article VI**

8. The provisions of this article shall not be interpreted as prejudicing, in any sense, an ultimate political settlement between the Parties to this Agreement.

\(^{194}\) *Ibid*, page 44.

9. The Armistice Demarcation Lines defined in articles V and VI of this Agreement are agreed upon by the Parties without prejudice to future territorial settlements or boundary lines or to claims of either Party relating thereto.

Article XII
2. This Agreement, having been negotiated and concluded in pursuance of the resolution of the Security Council of 16 November 1948 calling for the establishment of an armistice in order to eliminate the threat to the peace in Palestine and to facilitate the transition from the present truce to permanent peace in Palestine, shall remain in force until a peaceful settlement between the Parties is achieved, except as provided in paragraph 3 of this article.

Egyptian – Israeli General Armistice Agreement

Article IV
With specific reference to the implementation of the resolutions of the Security Council of 4 and 16 November 1948, the following principles and purposes are affirmed:

1. The principle that no military or political advantage should be gained under the truce ordered by the Security Council is recognized.

3. It is further recognized that rights, claims or interests of a non-military character in the area of Palestine covered by this Agreement may be asserted by either Party, and that these, by mutual agreement being excluded from the Armistice negotiations, shall be, at the discretion of the Parties, the subject of later settlement. It is emphasised that it is not the purpose of this Agreement to establish, to recognise, to strengthen, or to weaken or nullify, in any way, any territorial, custodial or other rights, claims or interests which may be asserted by either Party in the area of Palestine or any part or locality thereof covered by this Agreement, whether such asserted rights, claims or interests derive from Security Council resolutions, including the resolution of 4 November 1948 and the Memorandum of 13 November 1948 for its implementation, or from any other source. The provisions of this Agreement are dictated exclusively by military considerations and are valid only for the period of the Armistice.

Article V
2. The Armistice Demarcation Line is not to be construed in any sense as a political or territorial boundary, and is delineated without prejudice to rights, claims and positions of either Party to the Armistice as regards ultimate settlement of the Palestine question.

3. The basic purpose of the Armistice Demarcation Line is to delineate the line beyond which the armed forces of the respective Parties shall not move except as provided in Article III of this Agreement.

Article XI
No provision of this Agreement shall in any way prejudice the rights, claims and positions of either Party hereto in the ultimate peaceful settlement of the Palestine question.

Lebanese – Israeli General Armistice Agreement

Article II
With a specific view to the implementation of the resolution of the Security Council of 16 November 1948, the following principles and purposes are affirmed:

1. The principle that no military or political advantage should be gained under the truce ordered by the Security Council is recognized.

2. It is also recognized that no provision of this Agreement shall in any way prejudice the rights, claims and positions of either Party hereto in the ultimate peaceful settlement of the Palestine question, the provisions of this agreement being dictated exclusively by military considerations.

Article IV
1. The line described in Article V of this Agreement shall be designated as the Armistice Demarcation Line and is delineated in pursuance of the purpose and intent of the resolutions of the Security Council of 16 November 1948.

2. The basic purpose of the Armistice Demarcation Line is to delineate the line beyond which the armed forces of the respective Parties shall not move.

Article V
1. The Armistice Demarcation Line shall follow the international boundary between the Lebanon and Palestine.

Syrian – Israeli General Armistice Agreement 1949

Article II
With a specific view to the implementation of the resolution of the Security Council of 16 November 1948, the following principles and purposes are affirmed:

1. The principle that no military or political advantage should be gained under the truce ordered by the Security Council is recognized.

2. It is also recognized that no provision of this Agreement shall in any way prejudice the rights, claims and positions of either Party hereto in the ultimate peaceful settlement of the Palestine question, the provisions of this Agreement being dictated exclusively by military, and not by political, considerations.

Article IV
2. The basic purpose of the Armistice Demarcation Line is to delineate the line beyond which the armed forces of the respective Parties shall not move.

Article V
1. It is emphasised that the following arrangements for the Armistice Demarcation Line between the Israeli and Syrian armed forces and for the Demilitarised Zone are not to be interpreted as having any relation whatsoever to ultimate territorial arrangements affecting the two Parties to this Agreement.

2. In pursuance of the spirit of the Security Council resolution of 16 November 1948, the Armistice Demarcation Line and the Demilitarised Zone have been defined with a view toward separating the armed forces of the two Parties in such manner as to minimise the possibility of friction and incident, while providing for the gradual restoration of normal civilian life in the area of the Demilitarised Zone, without prejudice to the ultimate settlement.

As the above shows, the 1949 Armistice Agreements were designed for the express purpose of halting hostilities. No final sweeping solutions are brought forward by the Agreements, and the main and often repeated point of concurrence is that this agreement to cease hostilities will have no bearing on the claims or positions of the parties involved. Moreover, there are additional provisions that expressly forbid the interpretation of anything in the agreement from being construed as influencing border determination, despite the fact that it has already been spelled out that the Demarcation Lines have a limited scope and no influence on borders. Even in the case of Lebanon’s 1949 Armistice Agreement, as seen above, makes it clear that the 1949 Armistice Demarcation Line is only for indicating a limitation on troop movements. This distinction is maintained despite the fact that Article 5(1) of that same agreement stipulates that the Armistice Demarcation Line will overlay the international border between Lebanon and the Mandate of Palestine. This perfectly underscores not only that the 1949 Armistice Demarcation Lines do not take on the same functions as borders, but also that they cannot be interchanged or conflated as the same thing. They serve completely different purposes, are of completely different character, and each have a standing in international law so particular that they are both listed when in reality only one would be necessary for the same effect. The Agreement could have either required Israel to pull back to its borders or else described the path of the Armistice Demarcation Line as is done for lines that do not follow borders, but instead it chose to list them separately in order to not conflate the two or imply any sort of interchangeability.

Ralph Bunche, Acting Mediator for the Israeli – Syrian armistice negotiations in June of 1949, emphasized the non-finality of these Armistice Demarcation Lines.

"I call attention to the fact that in the Israeli-Transjordan Armistice Agreement, in Article V, paragraph c, and in Article VI, paragraph 2, the armistice demarcation lines agreed upon involved changes in the then existing truce lines, and that this was done in both cases
without any question being raised as to the sovereignty over or the final disposition of the territory involved. It was taken for granted by all concerned that this was a matter for final peace settlement. The same applies to the provision for the al-'Auja zone in the Egyptian-Israeli Agreement. From the beginning of these negotiations our greatest difficulty has been to meet Israel’s unqualified demand that the Syrian forces be withdrawn from Palestine. We have now, with very great effort, persuaded the Syrians to agree to this. I trust that this will ‘not be undone by legalistic demands about broad principles of sovereignty and administration which in any case would be worked out in the practical operation of the scheme.’  

In his analysis of the 1949 Armistice Agreements, regarding the non-prejudicial nature of the agreements on territorial determinations, Yoram Dinstein notes that...

“The ‘without prejudice’ formula (so popular among lawyers) was introduced to forestall future claims of estoppel in the course of peace negotiations. The formula must not obscure the salient point that the parties reserve only their right to reopen all outstanding issues when they eventually get to negotiate an amicable settlement of the conflict. During the intervening time, the conflict continues, but it is no longer an armed conflict. ... The Agreements can be considered transitional, inasmuch as they were intended to be ultimately replaced by definitive peace treaties; yet, there is nothing temporary about them.”

“Once more, the disclaimer may be taken as lip service. ... ‘the armistice demarcation lines can be regarded as equivalent to international frontiers, with all the consequences which that entails’. When a line of demarcation between States is sanctioned in such a way that it can be revised only by mutual consent (and not by force), it becomes a political or territorial border. The line may not be deemed ‘final’, but the frontiers of no country in the world are impressed with a stamp of finality. All international frontiers can be altered by mutual consent, and history shows that many of them undergo kaleidoscopic modifications through agreements.”

“A distinction between armistice demarcation lines and other international boundaries made in the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. ... It is submitted that this distinction is no longer valid in most cases.”

It is correct that these Agreements govern the cessation of hostilities until a peaceful settlement is reached, and certainly appear to act as international frontiers in that they mark a boundary that

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200 Dinstein, War, Aggression and Self-defence, page 44 – 45.
201 Ibid, page 45.
prevents the movement of all sides across them. But it is wrong to consider them as having created legally recognizable borders of a permanent nature simply because there exists a de facto peace that outlaws future violence, as has been argued. International understanding of the situation as it was expressed at the time clearly distinguished between the two concepts, including byway of the Tripartite Declaration Regarding the Armistice Borders, which differentiates the two concepts when explaining measures should any state or states seek “to violate frontiers or armistice lines.”

Furthermore, that the 1949 Armistice Agreement and its Demarcation Lines are to be permanent until replaced by treaty does not speak to the survival of the Agreement once hostilities have broken out again. This, above all else, is what prevents an interpretation of the 1949 Armistice Demarcation Lines as borders. When states at peace go to war, international law still recognizes the borders regardless of where the troops are. But when an armistice is breached it can be replaced by another armistice agreement with different lines, or no agreements at all. The lines set out by the decidedly temporary agreement (it is designed to be replaced by a proper peace agreement) cease to govern when the agreement ceases to govern. The chance of resuscitating these lines in such an instance could be if one of the parties is felt to have unnecessarily violated the agreement and may therefore be demanded to return to them. This is not unlike the distinction between belligerent occupations of a legal or illegal nature, with the latter being an instance of legitimate response to a threat and therefore is permissible as an act of self-defence. Such a concept could be used to explain the different reactions between the wars of 1956 and 1967, where Israel was made to return to the 1949 Armistice Demarcation Lines in the former but not the latter. Furthermore, the aforementioned understanding would also allow for a conclusion of general inviolability without permanence for these lines, which would otherwise clearly reward an aggressor who breached international borders and

204 As discussed in the later sections, there is a far greater threat level apparent in the lead up to hostilities in 1967 than in 1956, which may move sufficient blame onto the other side and thereby not resulting in a requirement that Israel return to the same lines that gave rise to the danger in the first place.
simply attempted to hold territory until an armistice came about to consolidate their gains despite the express wishes of the agreement.

It simply cannot be that the states can agree to a provision, expressly protect that provision a number of times, and then have that provision overridden. Even if the argument is that the notion of armistice lines has evolved to the point where it is, at present, now seen as at least bearing some strong resemblance in form and fact to border, Dinstein still recognized that a clear distinction was made between the two in the Declaration he cites above, which is from 1970.

Between the contents of the 1949 Armistice Agreements, and that the distinction is still drawn by the international community in 1970, this author submits that from the years of 1949 through 1967, the period during which the Armistice Agreements relevant to territory within the Mandate of Palestine were in force and effect, the Armistice Demarcations Lines were not assumed to be borders by international law.

**Israel’s Admission to the United Nations**

The UNSC passed Resolution 69, thereby recommending Israel to the UNGA for membership, resulting in UNGA Resolution 273, which admitted Israel as a member. The text of the UNGA resolution is notable for one sentence of its preamble; “Recalling its resolutions of 29 November 1947, and 11 December 1948 and taking note of the declarations and explanations made by the representative of the Government of Israel before the ad hoc Political Committee in respect of the implementation of said resolutions.”

Of consideration is whether or not Israel’s membership into the United Nations somehow gave it borders, and whether or not the above quoted clause binds Israel to UNGA decisions regarding territorial divisions within the Mandate of Palestine territory.

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205 Which this author does not agree with, but will entertain the notion here.  
206 UNGA, Resolution 69, March 4th, 1949.  
208 Ibid, Preamble.
In answer to the first proposition, it can be simply stated that Israel’s admission to the United Nations did not endow it with borders or the status of being a state. To prove the point, it must be noted that the UN does not create states, and membership in the UN does not make an entity a state; state level status must already be achieved in order to join the UN as membership is only open to states. Since states are already in existence before becoming members, their borders cannot be created, refined, or otherwise changed by way of admission to the UN. Furthermore, during discussions regarding Israel’s admission as a member, it was noted that not only were Israel’s borders undefined, but so was its territory in a very general sense. “The frontiers of the State applying for membership in the United Nations were as yet undefined. Moreover, the status of the area in and around Jerusalem and of the Holy Places all over Palestine, which were to have come under direct and effective United Nations control, was not yet determined.”

The Egyptian representative’s interpretation of the situation being clearly rooted in an understanding of what the Armistice Agreements provide for. Further statements by state representatives also bore out the notion that Israel’s borders were not fixed, especially with consideration to the resolutions being considered.

Turning now to the resolutions ‘recalled’ by the UNGA as part of Israel’s admission to the UN, two things must be noted. The first being the apparent disposition of states to the notion that “that the Conciliation Commission and the parties to the Lausanne Conference would implement those resolutions in the light of current conditions and in the light of all developments. There could be no doubt whatever but that the General Assembly would realistically apply those resolutions.” This was

209 See Charter of the United Nations, Article 4, both provisions (1) and (2) reference “states,” while provision (1) notes that the applying state must be both willing and able to carry out its obligations as a member. Since one of those obligations will invariably be to maintain their state so as not to be a threat to the peace, as well as implement any treaties signed or resolutions voted for, members must be able to accomplish the basic function of a state (exercising sovereign control over the territory in an effective and meaningful manner).


211 Ibid, United States Representative, Mr. Austin.
stated after affirming the importance of the operative clauses of those resolutions, which again raises questions as to them being ‘set in stone’.

In addition to reasons to question the rigidity of the ‘recalled’ resolutions, it was also stated by various delegates that Israel’s answers as to its commitment to the resolutions were unsatisfactory. The Lebanese delegation, for example, stated that “it could not conclude that the refugees would be permitted to return to their homes, if they so desired, to live in peace with their neighbours, nor could it conclude that Israel would not incorporate into its territory the New City of Jerusalem. Yet both those requirements had been specifically laid down by General Assembly resolutions.”

“Accordingly, the French delegation had carefully considered the various statements and explanations given by the representative of Israel. It had noted that some had referred to an international regime having territorial powers but limited to the Old City of Jerusalem and the surrounding Holy Places; others had alluded to a juridical status for the Holy Places, embracing a more extensive geographical area, but in practice restricted to the protection and control of the Holy Places. The French Government had made a critical analysis of those statements and had been convinced that, while Israel was not prepared at that juncture to bind itself to a definite formula, it was prepared, if its administrative rights were recognized, to concede that the protection of the Holy Places provided for in General Assembly resolution 194 (III) of 11 December 1948 should be under the effective control of the United Nations without prejudice to Israeli administration of the area.”

Worth noting is the distinction between the Holy Places and Jerusalem itself. In the original Mandate document, no mention is made of Jerusalem despite extensive protection rules being ordered for the Holy Places throughout the territory. Though Resolutions 181 and 194 reference the territory of Jerusalem, they also mention the Holy Places, indicating that the two are separate things and can be considered separately. Returning to the statement of the French representative, concerns for accommodating realities on the ground had apparently brought this view back into focus such that the priority should be regarding Holy Places rather than the territory of Jerusalem itself.

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212 Ibid, Lebanon Representative, Mr. C. Mauk. See the rest of the document for similar sentiments as expressed by other state representatives, including Belgium, France, and Yemen (which felt the Israeli answers were so insufficient that to admit Israel as a member under these conditions would be tantamount to acknowledging their successes as fait accompli)

213 Ibid, France Representative, Mr. Chauvel.
This was in keeping with an often stated position that Israel as it was being admitted to the UN, despite acknowledgment of no formalized boundaries, was not the same state that had been envisioned by the Partition Plan in Resolution 181. The Lebanese Delegate observed that

“If the present structure of Israel did not conform to those conditions, two courses were open to the Assembly: either to make the membership of Israel dependent upon acceptance of the original recommendations of the United Nations, or to admit it notwithstanding its failure to comply with those recommendations, thereby cancelling or revoking them... The State of Israel, in its present form, directly contravened the previous recommendations of the United Nations in at least three important respects: in its attitude on the problem of Arab refugees, on the delimitation of its territorial boundaries, and on the question of Jerusalem.214

In clarifying the Israeli position, Mr. Eban pointed out that the UN and its various organs had decided against (or failed at) implementation of Resolutions 181 and 194, and that it had fallen to Israel to try and secure Jerusalem.

“The Government of Israel, while believing that the international principle should be maintained, considered that, in existing circumstances, that principle should be expressed more realistically than in the previous resolutions of the General Assembly. The situation had considerably changed since November 1947. In that connexion, the fact of Jerusalem’s integration into the neighbouring States and the necessity to take a more limited view of the United Nations' administrative task should not be overlooked.”215

Mr. Eban further elaborated on Israel’s willingness to cooperate in with regards to international interests in the Holy Places rather than adherence to “full internationalization” of Jerusalem.

“Summing up his Government’s attitude on the Jerusalem problem, Mr. Eban stressed that the Government of Israel had co-operated to the fullest extent with the Statute drawn up in November 1947, and bore no responsibility for the failure of that project. That failure was due rather to the armed resistance of the Arab States and the refusal of United Nations organs to assume the obligations necessary for the fulfilment of the Statute.”216

“The Government of Israel advocated the establishment by the United Nations of an international régime for Jerusalem concerned exclusively with the control and protection of Holy Places, and would co-operate with such a régime.”217

Israel’s stated commitments, however, had a very practical tone based on ‘facts on the ground’.

215 Ibid, Israel Representative, Mr. Eban.
216 Ibid.
217 Ibid.
“Integration of the Jewish part of Jerusalem into the life of the State of Israel had occurred as a natural historical process arising from the conditions of war, the vacuum of authority created by the termination of the Mandate, and the refusal of the United Nations to assume a direct administrative responsibility on the scene.” 218

“The Government of Israel would continue to seek agreement with the Arab interests concerned in the maintenance and preservation of peace and the reopening of blocked access into and within Jerusalem. Negotiations on that subject would not, however, affect the juridical status of Jerusalem, to be defined by international consent.” 219

“Mr. Eban then stated the views of his Government on the boundary question, remarking that they did not seem to constitute a major obstacle on the road to a settlement. The fact that an Arab State had not arisen in the part of Palestine envisaged by the resolution of 29 November 1947, as well as the circumstances of war and military occupation, rendered essential a process of peaceful adjustment of the territorial provisions laid down in that resolution. The General Assembly itself had twice endorsed the need of such a peaceful adjustment and its representatives had even from time to time made proposals for effecting changes in the territorial dispositions of that resolution. The view expounded by the Israeli Government during the first part of the third session was that the adjustment should be made not by arbitrary changes imposed from outside, but through agreements freely negotiated by the Governments concerned.” 220

“Israel interpreted that resolution as a directive to the Governments concerned to settle their territorial and other differences and claims by a process of negotiation. It was understood that the Conciliation Commission shared that interpretation and had indicated its willingness to commence boundary discussions at an early stage of the meetings in Lausanne.” 221

Obviously, the statements by Israel that the UNGA Resolution takes into account upon granting of Israeli membership in the UN, do not reflect a complete abiding by the stated Resolutions. The unknown quality of Israel’s territory and the emphasis on internationalization of Holy Places rather than territory, specifically of Jerusalem, could not have left any doubt in the minds of the voting members that the specific provisions of Resolutions 181 and 194 regarding divisions of territory were not being agreed to by Israel. This was made all the more obvious by later comments from PM Ben-Gurion.

“We are not setting ourselves up as judges of the United Nations, which did not lift a finger when other States, members of the United Nations, openly made war on the decision adopted by the General Assembly on 29 November 1947, and tried by armed force to prevent the establishment of the State of Israel... We cannot today regard the decision of 29 November 1947 as being possessed of any further moral force since the United Nations

218 Ibid.
219 Ibid.
220 Ibid.
221 Ibid.
did not succeed in implementing its own decisions. In our view, the decision of 29 November about Jerusalem is null and void.”

“In all these arrangements there is, of course, nothing that alters in the slightest degree any of the existing rights in the Holy Places, which the Government of Israel will respect in full, or our consent to effective supervision of these Holy Places by the United Nations, as our delegation to the General Assembly declared.”

This final position was soundly articulated in an Israeli memorandum submitted to the Trusteeship Council.

“The Statute presumes that the General Assembly has power, in pursuance of its own resolution, to impose its administrative and executive control over the Jerusalem area, irrespective of the wishes of its population or the consent of a government now responsible for its administration The Charter of the United Nations offers not the slightest support for any such legal theory. The conditions in which the General Assembly, through the Trusteeship Council, may assume the administration of any area are exhaustively laid down in Chapter XII of the Charter. Whatever its position in 1947, when it was a "territory under mandate", Jerusalem no longer falls into any of the categories defined in Article 77, to which any form of international trusteeship may legally be applied. Moreover, the procedures of agreement required by Articles 79 and 81 have not been applied and are not feasible in this case. Apart from being legally ineligible for the operation of a trusteeship regime in the sense of Article 77, Jerusalem is, by its very nature, the exact antithesis of any territory to which any system of tutelage may properly apply. For the object of the Trusteeship System is to promote the advancement of backward territories towards self-government, and not to effect the transformation of mature and independent democracies into subject areas. Thus, the letter of the Charter, as well as its fundamental spirit, is subjected to comprehensive violation by this unconstitutional proposal.”

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**Status Update 3: Territorial Status After Israeli Admission to the UN**

The questionable ability of the UNGA to legally implement territorial divisions and status changes was made moot by the UN’s general unwillingness and/or inability (depending on which organ you analyze) to implement those divisions, coupled with movements on the ground by the parties concerned that frustrated any attempts at implementation. Israel’s declaration of independence relied on Resolution 181 to give it a right to exist but gave it no weight for establishing Israel itself or giving it boundaries and certainly not protection from attack by way of enforcing these boundaries. Since at no time did Israel and the opposing Arab parties agree to terms of the resolution at the same time, the only binding changes to status of territory are found in the Armistice Agreements, which specifically prohibit changes to or findings of status regarding territory until agreed upon during subsequent negotiations. That said, due to the aggressive actions by the Arab states, by way of invading the Mandate of Palestine, it can at least be assumed that territorial claims within the Mandates by them are impossible. Due to the un-implementation of the Partition Plan and the resulting lack of internal divisions within Palestine, Israel cannot be said to be outside of its territory (while inside the Mandate borders) due them not being identifiable. However, since Israel found that Resolution 181 guaranteed it a right to exist, the opposite must be true for the equally recognized right of an Arab state within the Mandate territory. Therefore, while it might not be clear when or where Israel is outside of its territory within the Mandate, it stands to reason that Israel cannot possibly occupy all of the Mandate territory without, at some point, being in the territory of the Arab state with an equally recognized right to exist (even if it has yet to come into existence). Were it not for the interference of regional Arab states, and if the Partition Plan had still gone unimplemented, it is likely that divisions would have been created along population distribution lines in accordance with a recognized right of self-determination for two distinct groups of people.

This state of affairs is unchanged by Israel’s admission to the United Nations. The reference to Israel’s commitments to Resolutions 181 and 194 are interpreted in conjunction with Israel’s statements
regarding the matter, which were equally considered by the UNGA when voting in favour of Israeli membership. That said, the fact that these considerations are in the preamble and not part of the action text that admits Israel to the UN implies that this was merely considered by the UN and was not made a conditional part of Israel’s admission, since that would require an ability to revoke Israel’s membership for non-compliance and that would certainly have required inclusion in the actionable section of the Resolution. Therefore, the legal status of the territories is unchanged in terms of division. There are still no legally enforceable internal boundaries.

Suez Crisis and Gaza

The focus of this research has been on territorial status in the Jerusalem and West Bank area. The Gaza Strip has gone largely unmentioned for three reasons; 1. Though Egypt occupied Gaza by the signing of the 1949 Armistice Agreements with Israel, neither it nor any other state put forth a claim to the territory (at least not a serious or exercisable one in the case of states that claimed a general right or title to the area), 2. Because of the aforementioned, and Israel’s return to the 1949 Armistice Lines at the conclusion of the ‘crisis’, questions regarding the status of the Gaza Strip do not suffer further complications than their being Mandate territories occupied by Israel after the 6-Day War, and so, because of later events concerning Jordanian claims to the West Bank, are answered by way of answering the more complicated question of status in the West Bank, and 3. Israel’s unilateral withdrawal from the Gaza Strip in 2005, marked by the removal of settlements and permanently deployed ground forces, has decided in practical terms that Israel will not be seeking to retain the territory, and therefore, in absence of an Israeli claim or obviously inapplicable foreign state claim to the area, title for the Gaza Strip goes to the Palestinians if only by virtue of no competing claims. This

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225 Lauterpacht, ‘Jerusalem and the Holy Places’, page 44. “If, then, there was no legal warrant for the Arab invasion of Palestine in 1948 aimed at the destruction of Israel, two consequences follow. First, by reason of the illegality of the conduct, no Arab State could rely upon its physical occupation of any part of Palestine as valid foundation for filling the sovereignty vacuum. Thus Jordan was not entitled to claim any of the areas west of the river Jordan (a matter of special relevance in connection with Jordan’s position in the Old City of Jerusalem – of which more will be said later) and Egypt was not entitled to assert sovereignty over the Gaza Strip.” It is worth noting that Egypt did not assert any such claim over the Gaza Strip.
answer is obviously applicable only to the Gaza Strip, and since it represents a *de facto* awarding of status (to be *de jure* upon the creation of a Palestinian state) rather than a *de facto* conclusion of status, there is no deep analysis to be done and is therefore left unmentioned by this author.

That said, there is a single event that transpires regarding the Gaza Strip that deserves, if not requires, consideration.

The Suez Crisis of 1956 arose due to a great many factors that, though interesting, are of no relevance to this research. Of relevance are the following facts:

1. In addition to general tensions and violent incidents that existed between Egypt and Israel, additional Egyptian action against Israel had a military character. Egypt had tried to blockade and disrupt Israel’s ability to use its Southern ports, including by opening fire on Israeli shipping from islands in the Gulf of Aqaba that Egypt had occupied and used to fire on Israeli ships in violation of the 1949 Armistice Agreements, trained fedayeen troops to conduct raids against Israel, and continued to do both, along with blocking of the Suez Canal since 1948, based on claims of an continually existing state of belligerency.

   “... the New York times on February 26, 1957, stated, 'Contrary to widespread assumption in the United Nations and in Washington, the issue is not originally the result of Israel’s armed invasion of Egypt. The issue was raised by Egypt’s long-standing insistence on maintain a ‘state of war’ with Israel and implementing it bot by both guerilla raids and a double blockade in the Suez Canal and the Strait of Tiran. It was this Egyptian maintenance of a ‘state of war’ and exercise of belligerent rights which Egypt derives therefrom that resulted in Israel’s military counter-action, Egypt has made no public move or promise to end the ‘state of war’ or to renounce the belligerent rights.'”

2. In 1956, Israel attacked Egypt and overran the Gaza Strip and the Sinai Peninsula.

3. Pressure from the United States forced Israel to return to the 1949 Armistice Lines, but the withdrawal resulted in certain security enhancement concessions that led to a stabilizing and more peaceful status quo with the ending of the Egyptian blockade and thereby allowing free

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226 UNSC, Resolution 95, September 1, 1951.
use of Israel’s southern port. “Israeli shipping now freely used the port of Elath, and the presence of UNEF troops in Gaza ended Fedayeen raids. Indeed the withdrawal of UNEF forces in May 1967 triggered the Six Day War.”

The key considerations herein are that Israel had a claim to self-defence measures, it overran both Mandate territory held by Egypt as well as Egyptian territory, and then was made to withdraw from both types of territories. The reason for this author’s emphasis on Israeli claims to self-defence without making a stronger case for it is because in the opposite event this section is moot. If Israel entered the Gaza Strip and the Sinai as purely an aggressor, then no gains are permissible. This would also sufficiently differentiate the 1956 conflict from the 1967 conflict, the latter of which is generally acknowledged to have allowed Israel’s actions based on self-defence considerations and therefore finds legality in Article 51 of the UN Charter (to be discussed later). Since no change in status is legal when attempted through aggressive warfare (meaning return to the Armistice Lines would not necessarily be out of recognition of those lines as frontiers but rather as Israel returning to positions it gained in acts of defense while surrendering the latest gains taken through aggression), and since Israel withdrew from these areas anyway thereby eliminating questions of prescription, the situation is considered only in light of Israel engaging in defensive war and then returning to said lines since this is the only set of circumstances whereby the Armistice Lines might be recognized as more than intended by Agreement.

The question to be dealt with regards whether or not Israel’s withdrawal to the Armistice Lines constituted recognition of those lines as having some sort of international frontier-type of character, and whether this can be applied to all the Armistice Agreements signed by Israel.

To answer this question, it is firstly observed that the Armistice Lines are neither a single set of Lines nor are they governed by a single treaty. The Lines were established at separate times by the separate

230 Ibid, Page 188.
Armistice Agreements Israel signed with five of the four states actively warring against it. Therefore any change of status resulting from this would likely only affect the Egypt – Israel Armistice Lines. Since Israel has withdrawn from the Gaza Strip as of 2005, indicating that the Armistice Lines in this area may have been used to delineate the Israeli pullout and the eventual final territorial boundaries, this issue would again appear to be moot regardless since Israel’s unilateral pullout was not stated to be in respect of the Armistice Lines, and that it would be without prejudice to “relevant arrangements [which] shall continue to apply.”

However, in the event that the Israeli pullback to the 1949 Armistice Lines after

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231 Though more states declared belligerency against Israel and provided material support in action of that declaration, it is recognized that the parties actually making war on Israel were those with sizable forces under direct command of their home state involved in the fighting. For the 1948 – 1949 period this covers Lebanon, Syria, Jordan, Egypt, and Iraq. No Armistice Agreement exists between Israel and Iraq, but the Armistice Agreement signed between Israel and Jordan references Jordanian troops taking the positions of Iraqi troops. Since Iraqi troops were relieved and removed from positions on the Jordanian Armistice Line, and since Iraq shares no borders with Israel, and since Iraq did not seek to hold its own set of Armistice Lines, there existed no reason to demarcate Armistice Lines between Israel and Iraq. Furthermore, since the signed Armistice Agreements result in each side being responsible to ensure that armed forces do not cross, Iraqi forces were neither in an apparent position to cross the lines nor were they manning them, and therefore as long as a state of non-violence continues between Israel and the Armistice signatories then in theory the position of Iraq would not matter (barring air or sea attack). This would explain the lack of apparent necessity in creating such an agreement and why the continued state of active war between Israel and Iraq might have simply been ignored due to lack of confrontation and, therefore, relevance.

232 Prime Minister’s Office, The Cabinet Resolution Regarding the Disengagement Plan, Prime Minister’s Office: June 6, 2004, found at [http://www.mfa.gov.il/mfa/foreignpolicy/peace/mfdocuments/pages/revised%20disengagement%20plan%206-june-2004.aspx](http://www.mfa.gov.il/mfa/foreignpolicy/peace/mfdocuments/pages/revised%20disengagement%20plan%206-june-2004.aspx). Addendum A(1) lists the considerations which informed the execution of the plan, and the Armistice Lines are not listed. A(2)(A) Government decisions regarding to settlement relocation is said to be made by “taking into consideration the circumstances prevailing at that time...” and A(2)(B) states that the ‘Security Fence’ will “take into account humanitarian consideration.” With certain deployment and restricted/pullout areas being subject to re-evaluation in light of “security considerations” according to A(6).

233 Ibid, Addendum A(1)(Seven). The word “which” in the quotation is a complete addition by the author and not a change of the tense of an existing word. This is done purely for sentence structure considerations and is not an attempt to alter any meaning of the document. It should further be noted that the full quote of this provision is “The process set forth in the plan is without prejudice to the relevant agreements between the State of Israel and the Palestinians. Relevant arrangements shall continue to apply.” The relevance of checking the full quote is that it is arguable that the entire provision concerns only those agreements and arrangements reached between Israel and the Palestinians, which would not apply to the 1949 Armistice Agreements to which the Palestinians were not signatories. However, that ‘relevant arrangements’ should be part of a separate sentence that does not include reference to the Palestinians (though may arguably do so by way of the sentence before it and so may simply not be explicit) implies that there are arrangements relevant to the conflict that the Palestinians may not be party to but shall still apply. Since the relevant Armistice Agreements are by this time essentially replaced by the conclusion of peace treaties between Israel and both Egypt and Jordan, any provisions of the agreements that survived by virtue of being tied to geographic territory but were not entered into as agreements could be considered existing relevant arrangements. This is the only way this author can think to find the Armistice Lines as being mentioned in consideration of the Israeli pullout plan, with the alternative being that they were simply deemed a complete non-issue due to having lost all meaning and applicability with the conclusion of relevant peace treaties. Otherwise the conclusion is that Israel felt no need to take the Armistice Lines into account and they no longer exist for any relevant purpose. While this may be true, it is worth exploring the alternative to cover all angles.
the Suez Crisis can indicate more about said Lines, it will be temporarily ignored that the later Israeli withdrawal in 2005 is apparently based on neither this previous pullback nor on the Armistice Lines.\footnote{Though it is noted by this author that when asked a question in relation to “withdrawing to the ’67 borders,” Israeli Prime Minister Ariel Sharon responded with reference to previously stated Israeli reservations and said “I don’t think that we ever discussed or announced that Israel will withdraw to the ’67 borders. We never said that – to the contrary. But where the borders will be, that will be discussed when we reach this point.” Thereby indicating a non-committal to stating where the borders will be (certainly implying that they will not be followed), and that Israel was not relying on previous notions of “borders,” such as those some argue existed within the Mandate of Palestine “pre – 1967,” for its withdrawal. Its withdrawal was unrelated to that. See: Ariel Sharon, \textit{Address by Prime Minister Ariel Sharon to the Foreign Press Corps in Israel}, January 11, 2004, Retrieved from Israel Ministry of Foreign Affairs, ‘Address by Prime Minister Ariel Sharon to the Foreign Press Corps in Israel’, Press Room, Israel Ministry of Foreign Affairs: mfa.gov.il, http://www.mfa.gov.il/MFA/PressRoom/2004/Pages/Address%20by%20Prime%20Minister%20Ariel%20Sharon%20to%20the%20Fore.aspx. The first quotation is taken from the first question asked, and the second quotation is taken from the first answer in response to said first question.}

By analyzing the circumstances of the time, Israel’s withdrawal from territories occupied in the wake of the Suez Crisis were clearly based not on an automatic adherence to the 1949 Armistice Lines but rather on security considerations and promises. Moreover, references regarding the Armistice Agreements both before and after the conflict indicate both the ongoing relevance of the Agreement since all their provisions, as well as the notion that breaches of the Agreements may be remedied.

UNSC Resolution 114, which was passed before the Suez Crisis, “Endorses the Secretary – General’s view that the re-establishment of full compliance with the Armistice Agreements represents a stage which has to be passed in order to make progress possible on the main issues between the parties.”\footnote{UNSC, \textit{Resolution 114}, June 4, 1956, Article 4. The phrase “full compliance with the Armistice Agreements” is used in Articles 2, 4, and 7.} Obviously this suggests that violations can occur, thus resulting in less than full compliance, but the Agreement will, or at least may, still stand and so adherence to it can be demanded. The same sentiment is used with regards to the Agreement between Israel and Syria in Resolution 111 of January 19, 1956, which also re-emphasized that the resolution recognizes the breach of the Armistice Agreement “without prejudice to the ultimate rights, claims and positions of the parties,”\footnote{UNSC, \textit{Resolution 111}, January 19, 1956, preamble. See also the rest of the resolution for an indication that breaches of the agreement may happen but they do not nullify the agreement in whole or in part.} and also Resolution 127 which calls for the “implementation of the provisions of that Agreement.”\footnote{UNSC, \textit{Resolution 127}, January 22, 1958, Article 6.} Though
there are no UNSC resolutions concerning Israel and Egypt after the Suez Crisis, right up to 1966 the UNSC is still “Reaffirming the necessity for strict adherence to the General Armistice Agreement.”

These resolutions and their timing tell us two things. The first being that violations of the Armistice Agreements do not necessarily entail that they cease to exist in law and that, as a result, they can still be effective and enforced. The second being that even if Israel’s withdrawal to the Egyptian Armistice Lines created any legal recognition of them it did not spread this newfound legal status to the other Armistice Agreements, or else it would surely have been mentioned as a new binding element of said agreements. That the adherence to those Lines between Israel and Egypt did not even warrant a special provision that reinforced the effect and status of the existing lines should be taken as an indication that Israel’s withdrawal was seen as nothing more than compliance with, and correction of a violation of, the 1949 Armistice Agreement it had signed with Egypt. Similar situations have occurred with Israel in other instances, such as with the end of the 6 – Day War where a ceasefire was breached and the UNSC “[Called] for the prompt return to the cease-fire positions of any troops which may have moved forward subsequent to 1630 hours GMT on 10 June 1967.” Considering the calls by the UN for Israeli withdrawal from territories captured in that war, especially noting the non-recognition of territory captured by force, it cannot possibly be argued that recognition of a ceasefire, or ceasefire type, line for forces to fall back to after a flare up of belligerent acts somehow constitutes recognition of that line as having a finalized international frontier type of character.

Further, we recall the earlier security concessions that Israel achieved. This indicates that Israel’s withdrawal was not based on some newfound sacrosanctity of the Armistice Lines, but rather that Israel should return to those Lines, thus ending Israel’s violation of the Agreement, and that measures should

238 UNSC, Resolution 228, November 25, 1966, preamble. It is worth noting that the Armistice Agreement with Lebanon is still referred to as being in force in UNSC, Resolution 332, April 21, 1973.

239 Actually, we learn three things; namely the effectiveness of UN Peacekeepers at keeping belligerent parties separated and therefore not engaging in hostile actions in cases of international armed conflict, at least based on the lack of Israel – Egypt UNSC resolution worthy incidents that occurred between the peacekeeping deployment and the 1967 War, which occurred after Egypt had expelled the peacekeeping force present.

be taken to ensure the non-violation of the Agreement by Egypt through methods that included a peacekeeping force. This makes evident the notion that the Armistice Agreements themselves were being upheld in their entirety and this is why Israel withdrew, having nothing to do with some undeclared, never to be applied in other similar situations (including mirror situations of Israel overrunning the same territory again), new found permanent status of the Armistice Lines. The Lines simply exist as per their original creation and in line with their original existence, with nothing having been added to their status by this or subsequent events involving similar breaches that were deemed to have been remedied.\textsuperscript{241}

Finally, the quick consideration of the Egyptian and Israeli peace agreement of 1975 gives the final indicator of the importance, or lack thereof, of the 1949 Armistice Agreement after on-the-ground realities render it moot. Article II of the peace treaty states that “The permanent boundary between Egypt and Israel in the recognized international boundary between Egypt and the former mandated territory of Palestine... without prejudice to the issue of the status of the Gaza Strip.”\textsuperscript{242} The 1949 Armistice Lines are neither obeyed, nor considered, nor mentioned. There is no action to amend the Armistice Lines as would be expected if they had acquired the status of international frontiers, but rather an agreed adherence to the previously existing and still recognized international boundaries that separated Egypt and the former Mandate of Palestine. Unfortunately, the lack of mention of the 1949 Armistice Agreements from the peace treaty also means the omission of a statement that the treaty replaces the 1949 Agreements, much as those Agreements replaced previous cease fire resolutions and

\textsuperscript{241} It should be noted that while breaches of the Armistice Agreements would be called out by the UNSC, not all violations were corrected. This is evident from the situation involving Syria’s claim to territory within the Mandate of Palestine based on the position of its forces on the eve of the 6 – Day War. The territory that Israel had wrested control of during the period before the conflict of 1967 could clearly only be held in violation of the 1949 Armistice Agreement with Syria in the absence of an agreed upon change of the Armistice Lines to the contrary (no such agreement exist). Clearly, the Armistice Agreements were still applied not only in the face of violations in order to remedy them, but applied even in the face of their continued and prolonged violation without subsequent full –re-compliance. The issue involving Syria is discussed in full in the later section of “The Syrian Wrinkle.”

agreements, and even precludes itself from overriding other agreements. Article VI(5) of the ‘Agreed Minutes’ of the peace treaty also notes that “there is no assertion that this Treaty prevails over other Treaties or agreements or that other Treaties or agreements prevail over this Treaty.” Similar language is used in the Jordanian peace agreement, which also omitted reference to the Armistice Agreements and defined the border “with reference to the boundary definition under the Mandate,” set out the border “without prejudice to the status of any territories that came under Israeli military government control in 1967,” but decided that the new peace treaty would prevail “in the event of a conflict between the obligations of the Parties under the present Treaty and any of their other obligations.”

While both treaties are deemed to have been conducted without prejudice to the status of the territories of the former Mandate, that neither mentions that they are variations of the 1949 Armistice Lines indicates that these Lines never achieved the international frontier standing that would have made them borders. Moreover, it proves that consideration of the Armistice Lines was not necessary for the settlement of claims between the parties (including border recognition and finalization), as demanded by the Armistice Agreements themselves. Lastly, despite the Egyptian Treaty not overriding other agreements, and therefore not expressly overriding the Armistice Agreement of 1949 in and of itself, the complete lack of reference to any territorial division stemming from Gaza, even as an oblique reference in defining the border between Israel and Egypt, should stand as a finalizing indicator that Israeli

243 Ibid, Agreed Minutes, Article VI(5).
244 Treaty of Peace Between the State of Israel and the Hashemite Kingdom of Jordan, signed at the Arava/Araba Crossing Point, October 26, 1994, found at Israel Ministry of Foreign Affairs Website http://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/israel-jordan%20peace%20treaty.aspx, Article 3(1).
245 Ibid, Article 3(2).
246 Ibid, Article 25(6).
247 This author is no expert at treaty drafting, but perhaps even a “continuing along the border of the former Mandate border with Egypt, passing without consequence or effect the former 1949 Armistice Demarcation Line, the territory West of which is referred to as the Gaza Strip.” The complete lack of mention of this line seems to imply its nullity and insignificance in terms of actual and effective international law, such that it is not even worth mentioning when identifying borders that touch those former lines. Of course, this is assuming too much, as the absence may simply be caused by concern for including reference to a thorny subject that might frustrate the creation of the peace treaty, and so it is enough to say the Treaty is without prejudice to the whole situation.
withdrawal from lands occupied during the Suez Crisis did not somehow endow the Armistice Lines with special and noteworthy status. It merely reaffirmed the existing provisions of the Armistice Agreement.

**Status Update 4: Territories of Palestine After the Suez Crisis**

There is no apparent change in status in the aftermath of the Suez Crisis. The Israeli withdrawal to the 1949 Armistice Lines had no effect with regards to strengthening the status of the Lines beyond what is set out by the 1949 Armistice Agreement provisions. The incident was not followed by claims of a new interpretation of the Lines, and the Lines were completely ignored during the Egypt – Israel peace treaty that defined the borders between the countries (as would be expected based on the Agreement provisions nullifying any influential powers on border creation or claims that the Lines might be construed to have). Therefore, the conclusion to be drawn is that the status of the Armistice Lines, and the status of the territory the lines would define, is unchanged. As such the territory of the Mandate of Palestine remains without legally binding or recognizable divisions.

**UNSC Resolution 228**

Resolution 228 warrants singling out due to the curious inclusion of the phrase “the territory of Jordan.”\(^{248}\) The resolution censures Israel for its military action in the “southern Hebron area on 13 November 1966.”\(^{249}\) The resolution includes the usual references to the Armistice Agreement, including in the proper text after the preamble,\(^{250}\) and in the preamble itself it condemns the violation of the Armistice Agreement, calls for the “strict adherence” to the Armistice Agreement, and yet still refers to the action as having taken place in “the territory of Jordan” (though only referred to as such in the preamble). This is an strange occurrence given that the Armistice Agreements preclude the area from becoming Jordanian territory without some sort of peace agreement that states as much. In fact, it is

\(^{248}\) UNSC, Resolution 228, Preamble.

\(^{249}\) Ibid.

\(^{250}\) Ibid, Article 2.
easily argued that strict adherence to the Armistice Agreement is not at all possible if final territorial settlements are made without a peace agreement that replaces the Armistice Agreement.

UNSC records on the meetings leading up to the resolution do not aid in solving this problem. While the Netherlands calls for “all Governments concerned to respect scrupulously the provisions of the General Armistice Agreements,” the Soviet Union restates that Israel launched a “military incursion into the territory of Jordan,” but without referencing the Armistice Agreement. During a previous meeting, the Secretary General gave a reported that utilized both sets of terms, including at the same time; “… informed that Israel tanks... had advanced across the armistice demarcation line into Jordan.” The Israeli representative even refers to borders in lieu of Armistice Lines, and that the attacks come from “across the Jordan border” and “near the Israel-Jordan border” though also makes use of the term “armistice demarcation line.” Israel even references a Mixed Armistice Commission document that states “that those acts of crossing the armistice demarcation line from Jordan into Israel and then back to Jordan... area a failure of Jordan to implement her undertaking derived from Article IV, paragraph 3, of the General Armistic Agreement.” The United States also used language of “military action on Jordanian territory” while then referring to the obligations of the Armistice Agreements. The American representative then goes on to quote from a resolution that uses the less definitive term “territory under its control,” and then proceeds to remain with this less definitive phrasing; “… from the territory controlled by one of the parties against the other.”

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254 Ibid, at para 50.
258 Ibid, at para 69.
259 Ibid, at para 86 and 87.
261 Ibid, at para 105.
word cautious Lord Caradon, who would less than a year later help craft Resolution 242, said "...deteriorating situation which now prevails on the borders between Israel and certain of its Arab neighbours – a situation which can be restored, we believe, only by strict observance of the obligations under the General Armistice Agreements." Though for Lord Caradon the excuse could be made that the United Kingdom was one of the only three countries to recognize Jordan’s annexation claims.

It is a curious occurrence. On the one hand, there appears to be an understanding amongst the states involved in the discussion that the territory in question is Jordanian, regardless of how seemingly confused and even contradictory those statements seem when paired with reliance on the whole implementation of the Armistice Agreements that would deny the very claim of decided territory. On the other hand, there are no calls for Israel to remove itself from Jordanian territory. As the later examples of UN resolutions and member statements will show (further on in this thesis), there is no concurrence that there is Jordanian title between its international border and its Armistice Line, especially with regards to Eastern Jerusalem. Jordan even surrenders its claims to the territory in 1988. So the question becomes, what weight should be given to this particular issue?

This author is of the opinion that the Resolution does not undermine the position articulated in this thesis. The relevant wording is in the preamble, outside the provisions seeking implementation, while language referring to the Armistice Agreements appears in both sections. The representatives of various states present at the discussion leading up to the resolution almost universally referred to the Armistice Agreements and emphasized their importance, also making use of the term ‘armistice demarcation line.’ This indicates that there was a notion of supremacy regarding the Armistice Agreements, and in light of that fact, as well as the absence of any declarations by states that they had come to regard as valid any Jordanian claims to, or final settlements of, the territory, it seems possible to declare that the principle of adherence to the Armistice Agreements prevails in the face of less official and non-declaratory statements, thereby overriding their lesser legitimacy. Furthermore, such a state of

262 Ibid, at para 78.
affairs in contravention of the Armistice Agreements was not firmly repeated by the international community, and subsequent ending of claims and statements regarding the principle of non-acquisition of territory through force of arms (what else could Jordan’s claim to the West Bank have been considered?), would seem to undermine a finding that the territory being regarded as Jordanian was *de jure* if even regarded as *de facto* (remembering that the other Arab states found Jordan’s role to be one of trusteeship, and thus the territory was not Jordanian). In any event, the confused mess of the situation should sufficiently indicate that no such right of sovereignty over the territory had crystalized for Jordan.

**STATUS UPDATE 5: TERRITORY OF PALESTINE ON THE EVE OF THE 6 – DAY WAR**

There has been no substantive change. For all intents and purposes the Armistice Agreements are still in effect. The Armistice Lines within the territory still do not amount to international boundaries and claims beyond said boundaries are still preserved by the still applicable and enforceable Armistice Agreements. The confused UNSC Resolution 228 contradicts itself and does not amount to an acknowledgment of Jordanian sovereignty in the West Bank area, despite the apparent disposition of some of the states in voting for the resolution, and in light of the international disposition on the subject in the future.

**Part II: Wars, Resolutions, and the Vagueness of the UN**

**6 – Day War**

The 6 – Day War of 1967 brought about a change of positioned unfathomed just one week before the war’s end. In sum, Israeli forces captured all the territory within the borders of the Mandate of Palestine, as well as the Sinai Peninsula and the Golan Heights area. Since the lands beyond the
Mandate borders are clearly beyond any possible Israeli natural claim to sovereignty, and in any event have since been returned, the focus shall continue to be kept on the Mandate territories.

**Israel: Aggressor or Defender?**

Article 51 of the UN Charter guarantees that no member state’s right to self-defence is impeded in any way by the Charter itself.\(^{263}\) For its part in the 6 – Day War, “Jordan does not deny initiation of hostilities along the Jordanian-Israeli frontier (and in Jerusalem in particular) on June 5, 1967, but contends her recourse to force was permissible under Article 51’s exception of collective self-defense.”\(^{264}\) Essentially, Jordan’s position is that it was aiding in the defense of another state (Egypt) and therefore Israel, not Jordan despite firing first, was the aggressor. This is a legitimate point of view, but it relies on Egypt acting in self-defence against Israel acting as an aggressor,\(^{265}\) otherwise Jordan’s action was in support of an illegal rather than a legal action. Most recently, this type of behaviour has been described by the international community thusly:

“A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:
(a) that State does so with knowledge of the circumstances of the internationally wrongful act; and

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\(^{263}\) *Charter of the United Nations*, Article 51.

\(^{264}\) *Gerson, Israel the West Bank and International Law*, page 71.

\(^{265}\) To be the aggressor, i.e. the party waging aggressive warfare, then the crime of aggression must be committed. Though essentially being defined as any act of warfare undertaken in contravention to the principles of the UN Charter (such as self-defence, and arguably the more recent advent of ‘Responsibility to Protect’ doctrine, it is worth consulting the UN’s own definition on the subject from their 1974 resolution; UNGA, *Resolution 3314*, December 14, 1974, Article 1 defines Aggression as “the use of armed force by one state... or in any other manner inconsistent with the Charter.” Article 2 states that “the first use of armed force by a State in contravention of the Charter shall constitute prima facie evidence of an act of aggression...” while Article 3 lists a non-exhaustive list of acts that would qualify as an act of aggression. For the purposes of this section in evaluating the Israeli response to Egypt, the most important item on the list is sub (C), which lists “the blockade of the ports or coasts of a State by the armed forces of another State” as being a crime of aggression. Also listed are instance of varying attacks, which are charges that are further levied against Egypt, and these are referred to as “flagrant instances of aggression” by Yoram Dinstein in *War, Aggression and Self-Defence*, page 129. Yoram Dinstein further cautions that Article 2 contains a *de minimis* clause that prevents low level threats or acts of aggression from being “invoked as an act of aggression” (*War, Aggression and Self-Defence*, page 128). This all indicates that true acts of aggression give rise to serious threats or incidents and allow for a response in the form of self-defence, which itself is not an act of aggression but rather an act in response to aggression. Therefore, if Egypt’s acts constitute aggression, then Israel’s acts constitute self-defence, while Jordan’s acts constitute support of an aggressive act and thus become an extension of that aggression, which Israel may also defend itself from.
(b) the act would be internationally wrongful if committed by that State."\(^{266}\)

So if Egypt’s acts were wrongful, then Jordan is as much of an aggressor as Egypt. This brings to bear the obvious question of whether or not Israel’s actions could be considered defensive in nature at the time. “Phrased differently, were Egyptian actions prior to the 1967 War sufficiently provocative to be deemed an ‘armed attack’ against Israel, permitting, in return, resort to military measures for self-defense under Article 51 of the Charter?\(^{267}\) It has been articulated that...

“The crux of the issue, therefore, is not who fired the first shot but who embarked upon an apparently irreversible course of action, thereby crossing the legal Rubicon. The casting of the die, rather than the actual opening of fire, is what starts the armed attack...\(^{268}\) the Israeli campaign amounted to an interceptive self-defence, in response to an incipient armed attack by Egypt (joined by Jordan and Syria). True, no single Egyptian step, evaluated alone, may have qualified as an armed attack. But when all of the measures taken by Egypt (especially the peremptory ejection of the United Nations Emergency Force from the Gaza Strip and the Sinai Peninsula; the closure of the Straits of Tiran; the unprecedented build-up of Egyptian forces along Israel’s borders; and constant sabre-rattling statements about the impending fighting) were assessed in the aggregate, it seemed to be crystal-clear that Egypt was bent on an armed attack, and the sole question was not whether war would materialize but when.

That, at least, was the widely shared perception (not only in Israel) in June 1967, based on sound judgement of events. Hindsight knowledge, suggesting that – notwithstanding the well-founded contemporaneous appraisal of events – the situation may have been less desperate than it appeared, is immaterial. The invocation of the right of self-defence must be weighed on the ground of the information available (and reasonably interpreted) at the moment of action, without the benefit of post factum wisdom.\(^{269}\)

Shaw emphasizes the difference between anticipatory self-defence, which he claims is gaining ground in terms of acknowledgment as a legitimate form of self-defence, and interceptive self-defence, which is an already acceptable form of self-defence.\(^{270}\) “One suggestion has been to distinguish anticipatory self-defence, where an armed attack is foreseeable, from interceptive self-defence, where an armed attack is imminent and unavoidable so that the evidential problems and temptations of the


\(^{267}\) Gerson, *Israel the West Bank and International Law*, page 71.


\(^{269}\) Ibid, page 192.

former concept are avoided without dooming threatened states to making the choice between violating international law and suffering the actual assault.”

“Interceptive self-defence is lawful, even under Article 51 of the Charter, for it takes place after the other side has committed itself to an armed attack in an ostensibly irrevocable way. Whereas a preventive strike anticipates a latent armed attack that is merely ‘foreseeable’ (or even just ‘conceivable’), an interceptive strike counters an armed attack which is in progress, even if it is still incipient: the blow is ‘imminent’ and practically ‘unavoidable’. To put it in another way, there is nothing preventive about nipping an armed attack in the bud. But the real (in contradistinction to the suspected) existence of that bud is an absolute requirement. Self-defence cannot be exercised merely on the ground of assumptions, expectations or fear. It has to be demonstrably apparent that the other side is already engaged in carrying out an armed attack (even if the attack has not yet fully developed).”

In light of this understanding, it is conceivable why it might be a generally acknowledged fact that an attack on Israel appeared so imminent that Israel’s actions were considered to be in self-defence. This may be further evidenced by the fact that the “General Assembly by an overwhelming vote defeated, on July 4, 1967, the Albanian draft resolution seeking to declare Israel the aggressor,” by a margin of “seventy-one votes against twenty-two, with twenty-seven abstentions.” Should further consideration on the topic be required, Shaw points out that Israel may even have been able to rely on a simple claim to self-defence rather than interceptive self-defence.

“It could, of course, also be argued that the Egyptian blockade itself constituted the use of force, thus legitimising Israeli actions without the need for ‘anticipatory’ conceptions of self-defence, especially when taken together with the other events. It is noteworthy that the United Nations in its debates in the summer of 1967 apportioned no blame for the outbreak of fighting and did not condemn the exercise of self-defence by Israel.”

It is worth noting that as was mentioned during the Suez Crisis section, referring to the war of 1956, many of the actions taken by Egypt, including the buildup of forces and blockading of the Straits of

271 Ibid.
274 Stone, Israel and Palestine, page 46.
276 Shaw, International Law, page 1138.
Tiran, were condemned as warlike action by the UN resolutions of that time, and were the pretext used by Israel to justify its invasion of 1956. With all this taken into consideration, it seems unlikely that Egypt could not have considered that the same already condemned warlike actions might provoke a military response in the name of self-defence, whether any one action alone amounted to an ‘attack’ or not. Furthermore, that the blockading of the Israeli southern port could be considered an act of war (as blockades are considered to be exactly this) lends full credibility to the notion that Israel’s right of self-defence could be exercised regardless.

Since Israel’s actions were in self-defence against Egypt’s aggression, the Jordanian action on behalf of Egypt is taken as being in support of the Egyptian actions that brought about the Israeli strike in 1967, which is to say that Jordan supported an aggressive act of war and so is equally guilty of the crime of aggression (based on the same principles that they had hoped would find them innocent by way of association with the right of self-defence).

That Israel was not the aggressor in the war has important consequences for the disposition of Israel regarding the remaining territories of the Mandate of Palestine, even if it does not affect the status of the territories in and of itself.

**UNSC Resolution 242**

In the wake of the unexpected upset that was the 6 – Day War of 1967, the UNSC eventually weighed in, nearly six months later, with a highly negotiated and carefully worded Resolution. The pertinent sections of which are recreated below.

“The Security Council,

...
Emphasizing the inadmissibility of the acquisition of territory by war and the need to work for a just and lasting peace in which every State in the area can live in security,

... 1. **Affirms** that the fulfilment of Charter principles requires the establishment of a just and lasting peace in the Middle East which should include the application of both the following principles:
   
   (i) Withdrawal of Israel armed forces from territories occupied in the recent conflict;

   (ii) Termination of all claims or states of belligerency and respect for and acknowledgement of the sovereignty, territorial integrity and political independence of every State in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force;

There are two issues commonly at play when this resolution is referred: “first, that it fails to distinguish between aggressive conquest and defensive conquest; second, that it fails to distinguish between the taking of territory which the prior holder held lawfully and that which it held unlawfully.”

Judge Stephen M. Schwebel summarizes these distinctions thusly:

“(a) a State acting in lawful exercise of its right of self-defense may seize and occupy foreign territory as long as such seizure and occupation are necessary to its self-defense;
(b) as a condition of its withdrawal from such territory, that State may require the institution of security measures reasonably designed to ensure that that territory shall not again be used to mount a threat or use of force against it of such a nature as to justify exercise of self-defense; (c) where the prior holder of territory had seized that territory unlawfully, the State which subsequently takes that territory in the lawful exercise of self-defense has, against that prior holder, better title.”

It should be emphasized that, with regards to the third point, this is not to say that the incoming state acting in self-defence has the best title, but rather simply that it is better than the unlawfully present state being ousted. This logic similarly applies to Israel’s earlier territorial acquisitions by way of warfare (or conquest, if you prefer), which is technically applicable to all of its territory given the intentions of the invading neighbouring states. The failure of the United Nations to implement the Partition Plan, or any other form of territorial allocation and division, meant that Israel, at the time of its declaration of independence, did not have title to any territory within the Mandate, (except presumably that which it could claim on right of self-determination principles) but certainly had better claims to title

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than any outsider state. The only relevant claims to title within the Mandate would have been those of
the two peoples’ recognized as having rights of self-determination that required the existence of
separate countries for each of them. This is what makes the UN’s focus on an alleged illegality as a result
of Israel’s presence in random territories of the Mandate of Palestine so counter-productive; the real
issue that needed to be addressed was the establishment of Palestinian claims in order to ‘bank’
territory before the issue was essentially decided by facts on the ground. Especially troubling is that
instead of attempting to change tactics, the UN continued to focus on the notion that Israel’s presence
in territories occupied has been the true impediment to peace rather than reading the resolution for
what it is, namely a strategy to create the peace that was lacking and so end the insecurity that brought
about Israel’s occupation and in doing so, by removing the need for it, end the occupation and effect
Israel’s withdrawal. In popular parlance, the notion is referred to as the ‘land for peace’ concept,
whereby peace is gained and Israel withdraws from territories it only felt a need, or at least could only
justify its presence based on that need, to occupy because of the threats it faced. This had been, and
would be again, borne out historically with regards to Israel’s relations with its neighbours.

Taking the earlier discussed issues with Egypt as an example, Israel returned the Gaza Strip and
Sinai Peninsula to Egypt after guarantees were made to negate the threats that Israel used to justify its
invasion in the first place. Fast forwarding to the 6 – Day War, the Egyptian threats that led to Israel’s re-
invasion were more severe than those that led to the 1956 invasion. After Egypt offered security
guarantees in a peace agreement, Israel agreed to withdraw from the Sinai (the Gaza Strip was never

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280 For example of the expression of the emphasis of Israel providing or returning land in exchange for peace, see Shaw,
International Law, page 1221.
For the origin of the concept, see UNSC, Resolution 242, November 22, 1967.
In essence, Israel would return territory (though not necessarily all territory or territories) and the Arab states it had warred
with would provide it with peace and security (by simply not making war against Israel any longer). Debate arises over how
closely related these two concepts are, despite being part of the same Article 1 of the Resolution. Some focus on the
requirement of the Israeli withdrawal, while others point to the two issues relying on one another. This author sides with the
latter view, agreeing with Justice Schwebel (see the immediately previous reference) that a state acting in self-defence is within
its rights to demand an agreement that provides for the nullification of the issue(s) that gave rise to the need for self-defence in
the first place. Since the lack of peace and attacks from certain territories is what gave rise to Israel’s right to and action of self-
defence, it stands to reason that a condition for Israel’s return to the lines it violated in order to defend itself would depend on
the threat no longer existing, thereby giving Israel no reason to still be in these territories. It is worth noting that Israel’s peace
agreements with Jordan and Egypt first guaranteed peace and security, after which Israel began its agreed upon withdrawal
from “territories occupied.”
claimed by Egypt and they simply included a provision that the agreement not prejudice the territory’s status. See ‘Peace Treaties’ below). By contrast, Syria had long attacked Israel from the Golan Heights, and Israel took those positions in the 6 – Day War. No peace had occurred and so Israel’s presence remains on territory that had been a threat to it when in the hands of a belligerent enemy state. Even the Jordanian peace offers an example. Though Jordan had released its claims over territory West of the Jordan river and beyond its international borders, after negotiating a peace with Israel, it did secure for itself some highly limited rights regarding Holy Places in Jerusalem (see ‘Peace Treaties’ below).

Since we have already established a lack of borders within the Mandate of Palestine, it would logically follow that Israel’s occupation of territories of the Mandate in 1967, notwithstanding its actions based in self-defence, are no more legal or illegal than its occupation of territories of the Mandate before 1967. In both situations Israel acted defensively against aggressive neighbours, and in both situations Israel took territory within the Mandate borders (notwithstanding the territories beyond the borders of the Mandate that do not impact the status of Mandate territory and so are outside the scope of this thesis).

The provisions against recognizing territorial gains of any kind from specifically aggressive warfare should be of obvious necessity to any student of international law, with the point being well made by Elihu Lauterpacht;

“The correct principle [is]... ex injuria jus non oritur, out of a wrong no right can arise. Or, relating the proposition more closely to the situation, territorial change cannot properly take place as a result of the unlawful use of force. But to omit the word ‘unlawful’ is to change the substantive content of the rule and to turn an important safeguard of legal principle into an aggressor’s charter. For if force can never be used to effect lawful territorial change, then, if territory has once changed hands as a result of an unlawful use of force, the illegitimacy of the position thus established is sterilized by the prohibition upon the use of force to restore the lawful sovereign. This cannot be regarded as reasonable or correct.”

This sentiment was echoed by Julius Stone, who explained that “the Arab state-favored meaning would underwrite unconditionally the risks of loss from any contemplated aggression. By such a rule an international law that sets out by the *ex injuria* principle to discourage aggressors would end with a rule encouraging aggressors by insuring them in advance against the main risks involved in case of defeat.”

Though this principle is more easily dismissed today as ‘outdated’, it is important to bear the intertemporal concept in judging past actions in light of the law as it stood at the time and this principle had serious weight given the understanding of international law, including as practiced by states, at the time. Schwebel points out that even “the United Nations itself [has] given considerable weight to conquest in Korea, to the extent of that substantial territory north of the 38th parallel from which the aggressor was driven and remains excluded – a territory which, if the full will of the United Nations had prevailed, would have been much larger (indeed, perhaps the whole of North Korea).”

Returning to the concept of contemporaneity, it helps to consider what was in the minds of the drafters of the resolution, particularly with reference to Israel needing to withdraw from ‘territories’ instead of from ‘all the territories’. Lord Caradon, representative of the United Kingdom to the United Nations, and chief drafter of Resolution 242, said the following on the issue:

“Much play has been made of the fact that we didn’t say ‘the’ territories or ‘all the’ territories. But that was deliberate. I myself knew very well the 1967 boundaries and if we had put in the ‘the’ or ‘all the’ that could only have meant that we wished to see the 1967 boundaries perpetuated in the form of a permanent frontier. This I was certainly not prepared to recommend.”

During the discussion before the vote on the Resolution, attempts were made to refer to an understanding that despite the failure of attempts to include the terms ‘the’, ‘all’, or ‘the all’ before

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284 ‘The Six – Day War, Resolution 242: The Drafters Clarify its Meaning’, *The Six-Day War*, Committee for Accuracy in Middle East Reporting in America (CAMERA): sixdaywar.org, http://www.sixdaywar.org/content/242drafters.asp, quoting: Institute for the Study of Diplomacy, *U.N. Security Council Resolution 242*, pg. 13, qtd. in *Egypt’s Struggle for Peace: Continuity and Change, 1967-1977*, Yoram Meital, pg. 49. This quote was first seen by this author elsewhere, but no longer remembers where originally. The website used was chosen because the same page contains a number of other well cited references to the same issue from others who were involved in the creation of the resolution. This includes commend from U.S. representative Eugene Rostow who “did not see how anyone could seriously argue, in light of history of resolution in Security Council, withdrawal to borders of June 4th was contemplated.”
‘territories’, the phrase could still be interpreted as requiring Israel to do exactly that. This drew an immediate reply from Lord Caradon, who said that

the draft resolution is a balanced whole. To add to it or to detract from it would destroy the balance and also destroy the wide measure of agreement we have achieved together. It must be considered as a whole and as it stands. ... every delegation has a right, of course, and a duty to state its views. ... But the draft resolution does not belong to one side or the other or to any one delegation; it belongs to us all. I am sure that it will be recognized by us all that it is only the resolution that will bind us, and we regard its wording as clear. All of us, no doubt, have our own views and interpretations and understandings.... On these matters each delegation rightly speaks only for itself."286

**Status Update 6: Territorial Status Change in the Wake of Resolution 242**

The resolution’s deliberate ambiguity was clearly designed so as to not force an Israeli withdrawal to the 1949 Armistice Lines. Though the compromise may have been to satisfy those who wanted a full withdrawal as opposed to those who wanted to see large Israeli territorial gains, at least within the mandate, instead of placing provisions to deliberately acquiesce to Israeli territorial gains based on modifications (agreed to or otherwise) based on the Armistice Lines, allowing for the insertion of the phrase “without prejudice to the internationalization of Jerusalem,” the vague worded afforded no limitations or guidelines. Aside from affirming that the Armistice Lines are not international borders to be adhered to, no territorial status change of note is derived from the resolution, other than essentially legitimizing Israel’s occupation of all territories until a peace is reached with the relevant states (or, perhaps more generally, actors) so as to provide Israel with a security guarantee, the absence of which is provided (in theory) via the occupation.

While this concept saw the speedy withdrawal of Israel from the Sinai in exchange for peace, it has only served to reinforce a lack of territorial divisions within the Mandate of Palestine borders, and likely emboldened parties to engage in territorial aggrandizement dreams with limited restraint (possibly tempered only by a lack of desire to absorb large Arab/Palestinian population centers).

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286 Ibid, at paras 58 through 61.
Resolution 242 does not require Israel to withdraw from all territories captured, and the lack of limitation or guidelines regarding possible annexation fall subject to the ongoing lack of actual territorial allocation within the Mandate borders. Much as was the case with the Armistice Lines, but now without the presence of Arab armies to prevent a further Israeli advance. This essentially leaves Palestine legally open in terms of ability to determine territorial claims, with only the recognized right of an Arab people to express their right of self-determination within Palestine through a state of their own prohibiting full annexation by Israel. This prevents a full legal awarding of the entire territory to Israel as though it had emerged as the single victor of a lengthy civil war that had suffered outside state interference; much like the case of Vietnam, which would finally be resolved in the decade following this resolution.

The “Syrian Wrinkle”

Perhaps the least considered wrench thrown into the legal understanding of general territorial status regarding the lands of the former Mandate of Palestine comes from the often overlooked Syrian gains made during the 1948-1949 War. While the Israeli Armistice lines with Lebanon followed the border of Lebanon and the Mandate of Palestine, those lines between Israel and Syria did not. This is often forgotten, and often does not appear on most maps showing territorial changes that have been seen by this author. The answer for this is likely because while Israel did not advance into Syria, Syria did advance into the Mandate of Palestine taking control of a ‘whopping’... 66.5 square kilometers. As low as this number sounds, it does include an incredibly strategic ten meter wide strip of land that encircles the parts of the Sea of Galilee that border Syria, thereby putting the entirety of that body of water inside of the Mandate of Palestine borders. With territory in the ‘Holy Land’, it is often a game of inches.

On the surface, this might appear to be no different to the situation with Jordan and Egypt, both of whom also took control of territory within the Mandate of Palestine. However, the situation is very

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288 Ibid.
different with Syria as the territory Syria took control over was intended for the Jewish state that was envisioned in the Partition Plan. It is the only instance of an Arab state wresting control of Jewish planned Partition territory. It is especially interesting as it is the only instance of territory of the former Mandate that is still claimed by an Arab state. Egypt never claimed the Gaza Strip, and Jordan’s attempts to claim the West Bank were largely thwarted and officially given up on just over 20 years after their loss in 1967. But Syria has retained its claims.

Since this represents a territorial claim outside of its international borders, one might think this claim is easily dismissible. Others might use the incident to try and claim this as an example that perhaps the 1949 Armistice Lines do have some merit as official borders. This latter group would run full well into the crux of what makes the Syrian position regarding this territory so confusing; Syria does not claim territory in the region, or demand Israeli withdrawal from the region, based on the 1949 Armistice Agreements, which created a ‘no-man’s land’ designation for territory seized by Syria inside the Mandate of Palestine pending final settlement.289 During the 1949 to June 4, 1967 (the eve of the 6-Day War) period, Syrian and Israeli forces clashed on multiple occasions in confrontations of varying degrees of severity. During the course of those engagements, Israel managed to make territorial gains over Mandate territory in Syrian control. “According to Professor Moshe Brawer, the foremost Israeli expert on the geographical aspects of this matter, Syria held some 18 of the 66.5 kilometers of the demilitarized zone on the eve of war in June 1967.”290 It is this remaining territory, rather than the 66.5 square kilometers seized, or the Syrian border with the Mandate of Palestine, which “former Syrian ambassador to the U.S. Walid al-Moualem stated that Syria has never recognized,”291 that Syria intends to claim.292 That there somehow exists a recognizable and specific boundary of ‘June 4, 1967’, is not a


“Where the Armistice Demarcation Line does not correspond to the international boundary between Syria and Palestine, the area between the Armistice Demarcation Line and the boundary, pending final territorial settlement between the Parties, shall be established as a Demilitarised Zone from which the armed forces of both Parties shall be totally excluded…”


new concept. In addition to being the apparent implication of the term “pre – 1967 borders,” a
document submitted to the UN by the Arab League, carefully worded so as to maximize potential
territorial claims without closing off any doors to future claims, called on Israel to withdraw from “the
occupied Syrian Golan Heights to the line of 4 June 1967 and from the remaining occupied Lebanese
territory up to the internationally recognized borders, including the Shab’a farmlands....”293 Interestingly,
this statement indicates that 1) Israel should withdraw to the international borders of Lebanon,294 but
that 2) with regards to Syria, rather than withdrawing to international boundaries, Israel should
withdraw to this line of June 4 1967. Obviously indicating that this line is not a border, but that Israel’s
occupation of territory beyond that (including territory not on the Syrian side of the border) must end.
That the call was for a return to this line instead of the Armistice Lines of 1949 is particularly noteworthy
due to the implication that the line does not provide the effects or considerations of a border to order
Israel to return to, and so the demand is not based on it. This raises the question of what significance, if

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293 The letter was from Jordan, expressing the wishes of the Arab League, addressed to the UN Secretary – General, and as such appears in both the General Assembly and Security Council records (hence the duplication of document number information for both entries).


294 Another reason for choosing the term “international borders of Lebanon” instead of any other term (“Israel’s June 4 1967 boundaries,” “The Armistice Lines of the 1949 Armistice Agreement between Lebanon and Israel”) has to do with ongoing conflict over the border in this area. Though the sheer weight of evidence, including maps issued by the UN, Syria, and Lebanon, favours the finding that the Sheba Farms region is Syrian territory (meaning Israel is occupying territory outside its borders either way), the claim of Lebanese title to this small area has been used as a pretense for Hezbollah attacks and ongoing justifications for violence. The United Nations, in certifying Israel’s pullout from Lebanon, demarcated the “Blue Line” as the border to which Israel must withdraw. It was after doing so that the claim emerged. The use of language in the Arab League letter delivered by Jordan further leaves room for the notion that even withdrawal from this area may not end the conflict; it is demanded Israel withdraw from the remaining occupied Lebanese territories, including the farms in question. One wonders what the expected territorial claim is to be if Israel does withdraw from this region. In any event, it is clear that there is an Arab consideration of a Lebanese border that differs from the UN “Blue Line” that the UN has affirmed repeatedly as valid and in need of being respected. Though it is an interesting issue of territorial title and conflict, it is outside the scope of the Palestinian territories, and so this author shall not address it further. However, for examples of the UN stance on this issue, see the United Nations Security Council, ‘Security Council Condemns Violence Along Blue Line Between Israel and Lebanon, Extends Mandate of UNIFIL Until 31 July: Resolution 1583 (2005) Adopted Unanimously’, Press Release SC/8299, 5117th Meeting: January 28, 2005, concerning the adoption of Resolution 1583, found at http://www.un.org/News/Press/docs/2005/sc8299.doc.htm. An official Israeli stance on the matter, communicated by the Foreign Ministry Spokesperson, can be found on the website for the Israel Ministry of Foreign Affairs, “The Legal Status of the Shabaa Farms,” April 8, 2002, found at http://www.mfa.gov.il/mfa/pressroom/2002/pages/the%20legal%20status%20of%20the%20Shabaa%20farms%20-%2008-apr-2002.aspx. Also the opinion of the UN Secretary – General from just before the Israeli withdrawal; United Nations Security Council, Report of the Secretary – General on the Implementation of Security Council Resolutions 425 (1978) and 426 (1978), S/2000/460, 22 May 2000, paras 14-19, found at http://domino.un.org/unispal.NSF/5ba47a5c6ce5f41b802563e000493b8c/97bad2289146f58a852568e9006d99bd.
any, the “line of 4 June 1967” could possibly hold. It is a random, un-agreed to, and otherwise
unrecognized positioning of troops before an Israeli offensive, and yet is referred to as though somehow
the date of the Israeli offensive is what gives the line power (i.e. the claim would be the same in
principle but based on different positions and “lines” had the Israeli offensive occurred earlier or later).

This “line of 4 June 1967”\textsuperscript{295} is not based on existing borders. It is not based on the Armistice
Lines. It cannot possibly be based on the right of conquest in war or else it would be overridden by the
Israeli victory. If the claim went all the way to the Armistice Lines on the pretense that they were
somehow borders then the claim would be less confusing. The claim for land return is not based on the
inadmissibility of Israeli territorial gains based on warfare, but seems based on the inadmissibility of
Israeli territorial gains based on its victory in the 6-Day War, as though undoing any gains from that
event alone thereby undoes Syria’s defeat in that area. One can only wonder if this means that Syria’s
claims would not fall inside the Mandate of Palestine territorial borders at all had Israel somehow
managed to reclaim all the rest of that territory before June 5\textsuperscript{th}, 1967.\textsuperscript{296} Needless to say, it is a vexing
position. It cannot be based on inadmissibility of title to territory based on conquest or else Syria can
have no claim and it would not explain why the rest of Israel’s gains in that area before the 6-Day War
are agreeable to Syria. It also raises questions for those who put forward opinions about the 1949
Armistice Lines as borders for the eventual Palestinian state; namely, would an Israeli withdrawal from
the Golan Heights require also an Israeli withdrawal from Mandate of Palestine territory not claimed by
the Palestinians and also originally part of the Jewish Partition section? If the answer is yes, then the
1949 Armistice Lines somehow managed to override international borders despite their explicit intent
not to do so. If not, then it undermines the use of the 1949 Armistice Lines as the automatic borders and
strengthens claims that the provisions of the Armistice Agreements pertaining to the lack of prejudicing
territorial decisions that the Armistice Lines provide. If the argument is based on prescription and

\textsuperscript{295} Hof, ‘The Ongoing Dispute over the Line of 4 June 1967’, page 2.
\textsuperscript{296} An even more interesting thought experiment is what the Syrian claim might be had Israel failed to retake all of the territory
in this area while also managing to take Syrian territory. Would Syria still claim a need for a return to the June 5, 1967 lines?
Would they prefer a return to their originally created borders?
maintaining a status quo and 18 to 19 years of Syrian control overrides existing international law, then it is uncertain how the subsequent 47 years and counting of Israeli control does not therefore create a new status quo that overrides the Syrian claim (and, of course, complicates matters in the West Bank due to similar arguments, especially regarding Jerusalem), unless the term for prescription is less in situations of uncertain territorial title and this is being alleged as the case here (though alleged silently...). It is a vexing proposition that further complicates debate regarding the status of territories due to the failure of the United Nations to speak on this and related issues during the 1949 – 1967 period.

The only possible cure for this issue for the side of those who claim the Armistice Lines as borders could be that they are borders and Syria is magnanimously offering a compromise as part of a peaceful resolution whereby they would have returned to them only that territory still under their direct control on the eve of the 6 Day War. This is a flimsy assertion given that it begs the question why Syria would not base its decisions regarding the territory it would want to retain in light of particular needs, strategic positions, or associated resources, but instead on the simply arbitrary measurement of where its troops happened to still held ground.

It is an odd position that this author refers to as the “Syrian Wrinkle,” due to the fact that it must put a wrinkle into the arguments of the often stated position that Israel must fully withdraw from territories captured in the 6-Day War on the basis that territorial acquisitions based on force of arms are inadmissible. If Israel must give all of the 66.5 square kilometers back to Syria, based on either non-acquisition of territory based on force or else the Armistice Lines being borders, then Syria is allowed to make and consolidate its territorial gains outside of its international state boundaries by force of arms. If Israel must only return the territory still held by Syria on the eve of the 6-Day War then not only is Syria allowed to make and consolidate territorial gains outside of its international state boundaries by force of arms, but Israel is also allowed to make territorial gains within the Mandate of Palestine beyond the
1949 Armistice Lines through force of arms. If Syria has no claim to the territory because it is beyond its borders, then the 1949 Armistice Lines do not act as borders.

The only possible ‘fix’ this author can think of, for the argument that the Armistice Lines take on the character of borders is that since the West Bank and Gaza Strip were both beyond the Armistice Lines while simultaneously inside the Arab Partition territory. However this implies that something in the character of the partition lines from resolution 181 still apply and therefore Israel has full claims to title over those formerly Syrian controlled lands in Northern Israel but not over the West Bank and Gaza Strip. This argument is obviously questionable due to the fact that it would mean that Palestinian claims should be based on those partition lines and not on the Armistice lines of 1949, and therefore Palestinian claims should be much greater than they are. As far as starting points for negotiations go, this is highly problematic, and so unless that right does exist but Palestinians have chosen to tailor their claim (without mentioning that they are doing so) to only exclude all lands beyond Egyptian and Jordanian control based on 1949 Armistice Agreements as a means of conceding claims for negotiations (again, impossible to imagine a party doing this without taking credit for having done so), the line of reasoning is completely ‘wrinkled.’

From this author’s point of view, the “Syrian Wrinkle” has the uncomfortable effect of damaging the greatest number of arguments supporting the 1949 Armistice Lines as borders while reinforcing a lack of legal standing for legal borders within the Mandate without doing anything to aid in actually determining the status of the territories. All that is confirmed is that states outside the Mandate’s borders should not have any claim within the Mandate of Palestine nor do their claims prejudice the status of said territories. If the concept is of any help at all it is merely in clearing the slate of false arguments without providing any of its own; only reaffirming international boundaries that were already affirmed in the eyes of the international community.
Yom Kippur War and UN Resolution 338

Unlike the previous major engagements of the Israel – Arab conflict, the Yom Kippur War takes place entirely outside of the territories of the former Mandate of Palestine. Since no territory changes hands, the status of the territories of Palestine is unaffected by the war itself. No subsequent agreements pertaining to this episode of the conflict purport to affect territorial status either. As such, the war itself is not discussed by this thesis.

The only item of note for this research stems from UNSC Resolution 338. The resolution is short, simple, and yet in later UN resolutions it is often mentioned in conjunction with UNSC Resolution 242. To quickly deal with the issue, the full text of the resolution is created here.

“The Security Council
1. Calls upon all parties to the present fighting to cease all firing and terminate all military activity immediately, no later than 12 hours after the moment of the adoption of this decision, in the positions they now occupy;
2. Calls upon the parties concerned to start immediately after the cease-fire the implementation of Security Council resolution 242 (1967) in all of its parts;
3. Decides that, immediately and concurrently with the cease-fire, negotiations shall start between the parties concerned under appropriate auspices aimed at establishing a just and durable peace in the Middle East.”

That the resolution includes a “decision” provision, that is a provision which was “decided” by the UNSC, is noteworthy since “decisions” by the UNSC are binding. The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter. Not all UNSC resolutions (in whole or in part) are, of course, decisions. The UNSC may also, among other things, “call upon the parties...,” “investigate,” “determine,” “consider,” and “recommend.”

298 Shaw, International Law, page 1219.
299 Charter of the United Nations, Article 25.
300 Ibid, Article 33(2)
301 Ibid, Article 34.
302 Ibid, Article 34.
303 Ibid, Article 37(2).
304 Ibid, Article 36(1).
From this consideration, it becomes evident that the only thing “decided” in UNSC Resolution 338 is that negotiations will begin between the warring parties “under appropriate auspices” in order to reach a peace settlement. The provision that mentions Resolution 242 only “calls upon” the parties to implement said resolution “in all its parts.” Why Resolution 338 is so often married with Resolution 242 as though it makes it binding, or more binding, is unknown to this author. The often contentious provision where Resolution 242 “affirms” the requirement for peace and then suggests what principles “should” be applied, seems no more (though perhaps less) binding than the UNSC provision of Resolution 338 that “calls upon” the parties to implement it. Even if it were binding it would essentially only be calling for the parties to implement the fact that the UNSC affirms that the principles of the Charter require the establishment of peace, and that the UNSC has some suggestions about how the parties “should” try and accomplish this. Thus implying this is either the UNSC recommending a previous recommendation, or else is a binding decision that the UNSC recommends something in the seemingly impossible event that the “decision” is applicable to a different position than its own.

Peace Treaties

As already mentioned, the Israeli peace treaties with Egypt and Jordan settle the territorial issues between the countries based on the original, and still legally relevant, international boundaries already in existence. The Egyptian – Mandate of Palestine border being reaffirmed in 1979, and the Jordanian – Mandate of Palestine border being reaffirmed in 1994. Both treaties emphasized as being without prejudice to final territorial considerations within the Mandate of Palestine. Of significance is that these settlements made no use of the 1949 Armistice Demarcation Lines, much as would be expected based on the provisions of the Armistice Agreements, and that they reaffirmed the primacy of international borders. Of note is the fact that “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

305 UNSC, Resolution 242, Article 1.
take place, Israel will give high priority to the Jordanian historic role in these shrines.” By recognizing this “historic role” presumably stretching no further back than Jordan’s occupation in 1948, this section appears to establish an interest for Jordan more in line with the expectations of what the role of the UN was to be based on Israeli statements to the UN on this matter during considerations regarding Israel’s admission to the UN. That said, the provision seems not to bind Israel to anything in particular beyond considering this fact in negotiations, and so it would appear that the UN interest may still win out.

**STATUS UPDATE 7: TERRITORIAL STATUS CHANGES RESULTING FROM PEACE TREATIES**

There is no territorial status change that results from the peace treaties. The treaties do, however, clarify the lack of claims of Egypt and Jordan to any territory within the Mandate of Palestine, and the importance of existing international boundaries. This also indicates an absence of internal divisions within the Mandate boundaries. Either the Armistice Agreements were concluded with the peace treaties, and so the Armistice Demarcation Lines no longer have any standing because the document that governs them has ended, or else the Lines had ceased to be relevant once Israel overran them (and did not return to them) and they were superseded by new ceasefire lines. Not that it matters for the territorial divisions within the Mandate, since the Armistice Lines did not create actual divisions or territorial allocations, being merely the lines of cease fire.

**Part III: Inconsistency, Contemporary Examples, Self-Determination**

This would be a very lengthy section if given a full treatment. In the interest of time and ease of reading, the focus shall be limited to parallel examples in the world at the time of the events concerned, UN Resolutions in a general sense regarding their wording changes, the ICJ Advisory Opinion on the

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306 *Israel – Jordan peace treaty*, Article 9(2).
“wall,” and the recent UNGA admission of Palestine as a non-member state, creating UN recognition of state status for a Palestinian state.

**Contemporary Examples**

There are a multitude of examples as to the international disposition to territorial changes within internationally recognized borders available for analysis. Through this analysis we obtain a certain degree of understanding how international custom has viewed the creation of states within existing international boundaries.

**The Former Yugoslavia and Quebec**

Based on the discussed rules often relied on by states regarding border inviolability and territorial integrity, it is clear that the international community abhors instability. This explains attempts to recognize as legally binding that which cannot possibly be as such. The more recent example of the collapse of the former Yugoslavia gives some insight into how far the grasping at straws may go in order to achieve this. The Badinter Arbitration Commission passed a decision to recognize the internal administrative boundaries of the former Yugoslavia as new borders, based on their supposed permanence granted by the constitution as well as the special circumstances of the declared dissolution of Yugoslavia itself. However, Peter Radan has taken great pains in during his research to show that while the Badinter commission was incorrect in their actions, even their stated principles regarding borders to not work in cases of secession, being applicable only in cases where a state is deemed to have completely broken up. Radan points out that this view has been held by others, including the Canadian government; “there ’is neither a paragraph nor line in international law that

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protects Quebec’s territory [and that] international experience demonstrates that the broders of the entity seeking independence may be called into question.” The Supreme Court of Canada even observed that “Quebec would lose the Furthermore, Radan’s work has made the case that the international preference for border stability being grounds for recognizing internal administrative borders is neither mandatory under international law nor preferable in terms of conflict de-escalation when no treaty exists that specifies the borders. Peter Radan tends to advocate for plebiscites in order to divide territory so as to create more homogenous divisions that would lessen conflict, which would function in this situation even in the face of Buchannan’s criticism that such methods favour where majorities just happen to be at the time of voting. Making the point by quoting Hurst Hannum’s conclusions:

“Self-determination should be concerned primarily with people, not territory. ... if our concern is with peoples rather than territories, there is no reason to regard existing administrative or ‘republic’ boundaries within states as sacrosanct. In most cases, the best way of determining the wishes of those within a new state would be through a series of plebiscites to redraw what were formerly internal boundaries. ... Accepting the possibility of altering borders might be a useful precondition for recognition of a new state whenever a significant proportion of the population appears not to support the new borders.”

In applying these considerations to the current research focus, Palestinians within the West Bank area have been there throughout this conflict and have been unable to move. Though the areas close to the 1949 Armistice lines may not be inhabited by them, it cannot be ignored that drawing boundaries along ethnic lines in this area would be both desirable and easy to decide upon based on the separation between settlers and Palestinians, and could serve as a means of delineating where a

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309 Ibid.
310 Peter Radan, Post-Secession International Borders, Pages 58-59, 60, 61, 67, and 69.
311 See also Radan’s extensive criticism of the Badinter Arbitration Commission in: Peter Radan, ‘The Badinter Arbitration Commission and the Partition of Yugoslavia’.
312 Peter Radan, ‘Post-Secession International Borders’, Page 175.
313 Buchannan, Justice, Legitimacy, and Self-Determination, page 374.
conceptual border between two countries that exist in the minds of those on the ground may already exist.\textsuperscript{315}

**Korea, Vietnam, Cyprus, Sri Lanka, and Germany**

Examples of new border recognition have at times occurred due to a lengthy passage of time, though with reference to this thesis the 18 year lifespan of the armistice lines is clearly below any possibly established threshold. In the case of the Korean Peninsula, even after 25 years the armistice line was still not deemed to be a true border as the United Nations issued repeated calls for a peaceful reunification of Korea\textsuperscript{316}\textsuperscript{317} (it took until 1991 before the UN would finally admit the two Koreas as individual members, 41 years after the war started).\textsuperscript{318} Germany would recognize the extinguishing of its claims to its lost Eastern territories as part of its unification in 1990.\textsuperscript{319} By contrast, Vietnam was in a lengthy state of civil war in which Northern and Southern governments were each recognized by different states,\textsuperscript{320} both of which saw their applications for membership in the United Nations rejected.\textsuperscript{321} Upon the ending of the war after 19 years, which included on-the-ground intervention by foreign states, no calls were made for North Vietnam to de-occupy South Vietnam. This is similar to the Sri-Lankan civil war, the conclusion of which also saw no calls for the Sri-Lankan army to de-occupy from

\textsuperscript{315} A conceptual understanding of two countries in the minds of those involved has shaped perceptions in the past that partition and secession is desirable if not necessary. Burak Cop and Dogan Eymirlioglu, ‘The Right of Self-Determination in International Law Towards the 40\textsuperscript{th} Anniversary of the Adoption of the ICCPR and ICESCR,’ in Perceptions, Winter 2005. Page 143.

\textsuperscript{316} UNGA, Resolution 3390, November 18, 1975.

\textsuperscript{317} Arguably, the case could be made that the borders were, by then, taken to be a matter of fact and the call for the peaceful reunification of the Korean Peninsula was a call for two separate state entities to come together as a single country, as occurred with Germany in 1990. This interpretation is preferred by Crawford who supports the position that North Korea essentially seceded from the recognized Korean territorial unit and became a state by virtue of its ability to fulfill the Montevideo Convention Article I criteria for statehood, and its borders were defined by the territory over which it was able to perform said criteria (being all territory under its control up to the armistice line). Therefore, North Korea may have been a secession state by July of 1953, the date of the ceasefire agreement.

See Crawford, The Creation of States in International Law, pages 45 – 46 for the Montevideo criteria, and pages 471-472 and 477 for commentary on North Korea.

\textsuperscript{318} UNGA, Resolution 46/1, September 17\textsuperscript{th}, 1991.

\textsuperscript{319} Shaw, International Law, page 965.

\textsuperscript{320} There was also a prevalent view that Vietnam truly was two separate states instead of one going through a civil war. Crawford, The Creation of States in International Law, page 674, footnote 31.

captured territories that were within the international boundaries it had never left during the 25 year civil war marked by various ceasefire agreements.\textsuperscript{322}

Cyprus is an example to watch due to the de facto division of the Island state since the invasion by Turkey in 1974. Despite repeated calls for the withdrawal of Turkish forces and the reunification of the island, attempts to resolve the conflict have failed, leading to a growing possibility that the separation is becoming ingrained as a matter of fact as made evident by the 2004 “Annan Plan” that sought unification of the island state but under a federal framework.\textsuperscript{323}

These examples indicate that while 18 or even 25 years may be insufficient to establish a new norm for borders, but after 30 years there was an apparent readiness to interfere in the internal affairs of Cyprus to take into account changes on the ground in the North, though still in the form of a united Cyprus. Sometime after the 40 year mark, the international community appears more willing to accept developments even in the face of what they’d wanted to the contrary, even when it means the loss of territorial claims for themselves (as in the case of Germany after 45 years).\textsuperscript{324} This would almost seem in line with the much earlier mentioned \textit{British Guiana and Venezuela Boundary} case that agreed to a “fifty year adverse holding rule” in 1896.\textsuperscript{325} Though only binding on the parties, subsequent actions by states may be an indicator of a generalized time period of acceptability in this regard. That such territorial changes may still occur should not be of surprise to students of international law. A study produced by

\textsuperscript{323} Burak COP, Dogan EYMIRLOGLU, “The Right of Self-Determination in International Law Towards the 40\textsuperscript{th} Anniversary of the Adoption of the ICCPR and ICESCR,” in Perceptions, Winter 2005. Page 131.
\textsuperscript{324} - Vietnam (19 years) and Sri Lanka (25 years) were conflicts with moving front lines, though Sri Lanka did see cease fire agreements, the last of which officially ran from 2002 to 2008 despite breaches of varying levels.
- The two Koreas were admitted to the UN after the armistice line of the Korean War was left unchanged for 41 years. Though debatably the North Korea fulfilled the requirements of being a state at the time the cease fire agreement was signed, this lengthy fact on the ground bears some resemblance to the time lapse that saw Germany surrendering claims to Eastern territories lost 45 years previously (these two examples are not perfect, however, as they both reached the aforementioned level after, if not due to, the collapse of the Soviet Union. Therefore it is uncertain that recognition occurred because it had finally been long enough as opposed to simply being an opportune moment with the collapse of the USSR). It is worth noting that 25 years after the signing of the armistice agreement, the UN still called repeatedly for the reunification of Korea thereby possibly not yet recognizing the DMZ as a border.
- After 30 years of division, the UN was ready to suggest a plan for internal partition to create two federal states in Cyprus under a common flag. This plan was rejected. As the 40\textsuperscript{th} year of the division approaches, it will be interesting to see if this begins a time of more serious consideration for the formal international partitioning of Cyprus.
\textsuperscript{325} Shaw, \textit{International Law}, page 506.
Mark Zacher\textsuperscript{326} demonstrated that the territorial integrity norm has still been growing and developing over the last century. Though Zacher places the year of the crystallization of this norm whereby border alterations due to warfare are null and void as occurring in the mid 1970’s, since 1975 “there has not been a single major case of successful territorial aggrandizement,”\textsuperscript{327} the fact that he notes over 100 major territorial claims and attempts since 1975 would imply that the norm is still in the process of being accepted by all.\textsuperscript{328}

**A Brief Interlude to Define ‘State’**

“Article 1 of the Montevideo Convention on Rights and Duties of States, 1933 lays down the most widely accepted formulation of the criteria of statehood in international law. It notes that the state as an international person should possess the following qualifications: ‘(a) a permanent population; (v) a defined territory; (c) government; and (d) capacity to enter into relations with other states’.

The Arbitration Commission of the European Conference on Yugoslavia in Opinion No. 1 declared that ‘the state is commonly defined as a community which consists of a territory and a population subject to an organised political authority’ and that ‘such a state is characterised by sovereignty’.”\textsuperscript{329}

States display sovereignty by exercising effective control over the entirety of the territory which they claim sovereignty over. It requires the ability to effect changes in a meaningful way. Likewise, being able to enter into relations or agreements with other states requires the same ability, that is to effect the very changes agreed to over the whole of the area they claim sovereignty over. This narrowed reading of the term is required in an age of international corporations and non-state actors that are capable of reaching agreements with governments. The difference between a state and a non-state actor when they reach an agreement with the government of another country is that states can implement that which they have agreed to within their own borders (the extent of their sovereignty)


\textsuperscript{328} *Ibid*, whole document, pages 120-143, but in particular see footnote 2 on page 123 for clear expression of this exact sentiment.

without interference, as where non-state actors are at the mercy of forces stronger than themselves and may only implement these agreements if allowed to do so by their home or host state (as would be indicated by the laws of that state) that could otherwise overrule them.

The Inconsistency of the UN

UN Resolutions

UN resolutions on the issues relating to the Mandate of Palestine area, whether with regard to Jerusalem, territory in general, or the purpose of past resolutions being sighted, are as confused as they are numerous. This author’s initial attempt to catalogue them and bring them to bear turned into an absurd project that added insufficiently to the overall argument considering the sheer amount of space they took up. Since the legal standing of the territorial status of the territories has already been expressed, and since the true value of UN resolutions after the 6 – Day War of 1967, notwithstanding Resolution 242, is their use as a showcase for the changing UN opinion on territorial status, the resolutions will be addressed in brief and with greater generality.

Adnan Abdelrazek, “a former member of the United Nations Unit on the Question of Palestine,” documents some of the changing language used by the United Nations. He notes that the Armistice Agreements had “no legal effect on the continued validity of the provisions of the partition resolution for the internationalization of Jerusalem” in the eyes of the international community. With this in mind, he notes that the UNGA begins condemning Israel for actions taken that would “alter the status of Jerusalem” in 1967, while the UNSC begins doing the same in 1968. These condemnations included a refusal to acknowledge any changes in status along with any Israeli attempts to apply legislative and administrative measures would be deemed invalid. While Abdelrazek merely implies the

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331 Ibid, page 165.
332 Ibid, page 166.
obvious connection that this must refer to the internationalized status of Jerusalem, Henry Cattan has outright stated that it could not be anything else; “The only ‘status’ or ‘legal status’ or ‘specific status’ which Jerusalem possesses is that laid down in resolution 181 of November 19, 1947.” Cattan argues that this was done to invalidate any changes Israel might seek to make, though, problematically, he fails to consider that this disposition appears to be entirely in reference to changes Israel is making as of 1967.

This position makes no sense given that the international status of Jerusalem would have already been long ago affected and subverted by Israel’s actions in West Jerusalem, and, as discussed, this would all be in keeping with Israel’s stated understanding of the resolutions concerning Jerusalem and what Israel intended to do about it (which was considered as part of Israel’s admission to the United Nations, both in the resolution itself as well as during the discussion leading up to the vote). Cattan attempts to deal with the fact that half of Jerusalem was not under Israel’s control for a lengthy period of time by pointing to a difference in terms of the entry of Israel into Jerusalem and that of Jordan. Cattan asserts that Israel and Jordan both annexed parts of Jerusalem into their territory, but that Israel did so illegally against the will of the original inhabitants while Jordan did so legally because the ‘annexation’ was more of a union that was done in accordance with the wishes of the population (not that this argument wears well). Since Jordan is an aggressor who invaded the Mandate, this cannot possibly be the case, and since the opinions expressed by Cattan would indicate that Israel’s very existence in the Mandate was against the wishes of the population then even by Cattan’s own standards there is a problem of

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334 Ibid.
338 Ibid, page 10 to 11.
339 It is worth noting that the same argument was put forward by Russia during its recent invasion of Eastern Ukraine, where the UNGA [underscored] that the referendum held in the Autonomous Republic of Crimea and the city of Sevastopol on 16 March 2014, having no validity, cannot form the basis for any alteration of the status of the Autonomous Republic of Crimea or of the City of Sevastopol.” UNGA, Resolution 68/262, April 1st, 2014, para 5.
Israel occupying all territory within the Mandate with the same amounts of legality or illegality. Furthermore, whether Jordan’s annexation was done in accordance with the wishes of the people or not, such an action would still be an attempt to alter the status of Jerusalem. The bodies of the UN did not specify that Israel’s altering the status of Jerusalem was illegal because they did not think a majority of people there would like it, but rather that it was illegal to change the status of Jerusalem itself, which Cattan asserts is that of an international city as referred to by the relevant UN resolutions.

It is worth noting that in 1971, UNSC Resolution 298 refers to both “the status of the City of Jerusalem,” as though it is a single entity, and also that Israel is taking actions to change the status of the “City” through implementation of measures in the “occupied section of Jerusalem.” In and of itself, this resolution makes no sense. If the territory in question is the single international “City of Jerusalem,” then Israel’s administrative actions would be illegal no matter which part of the city it takes place in. However, the resolution clearly indicates the issue is with the extension of administrative measures in only the “occupied section of Jerusalem,” which must clearly mean Israel is only occupying the Old City section of East Jerusalem that Israel conquered in 1967 (based on references made in the preamble). The status of Jerusalem simply cannot be that of a single united City if the same measures Israel applies in one part of the City are illegal despite having been legal in other parts. Israel began making these administrative changes regarding Jerusalem before it was even admitted to the United Nations, and no resolutions before 1967 came forward to demand Israel not change said status. Likewise, there exists no resolution condemning Jordan for doing the same thing in East Jerusalem. Furthermore, presumably Israel’s uniting of the city under a single administration, with past guarantees of respecting international interests, would be more in line with the expectations of the United Nations that Jordan’s declared annexation and no international oversight. This is not to say that it makes Israel’s actions right, but it does raise the question as to what the UN thought the status of Jerusalem was when

even greater changes to the status went without comment. The only reasonable interpretation is that
the UN acquiesced to having lost its claims for authority over Jerusalem in order to establish a
permanent international regime (which it was of dubious legal ability to do anyway). This is a case of all
or nothing. If Jerusalem was not divided by the Armistice Lines and the applicable status of the City
remained that of an international and united entity, then Israel must be occupying all of Jerusalem. If
the status of the City was undetermined due to the Armistice Agreements and the lack of
implementation of the UN’s plan, then Israel should not be occupying any of the City in a legal sense (at
least no more so than it is occupying other territories taken during the 1948 – 1949 conflict). It simply
cannot be that the status is of a whole and united City, the status of which cannot be changed, but Israel
is only occupying half of it and its administrative changes only affect the status when applied to the
same half it is supposedly occupying. The only way this could be Israel’s disposition is if the status of the
City of Jerusalem is that of a divided City, which would be in contravention to the Armistice Agreements,
and that the other half must belong to the only state to have exercised control over said half, i.e. Jordan.
But then Jordan would have made gains from conquest beyond its borders, and through aggressive
warfare no less, making the entire proposition both illegal as well as in conflict with the stated principle
of no acquisition of territory through force that has become a staple of UN resolutions on this matter.

Returning to evolving language, Adnan Abdelrazek notes that the UNSC began using the
“terminology ‘Palestinian and other Arab territories occupied by Israel since 1967, including
Jerusalem.’”342 This takes the confusion a step further as it now identifies some sort of title or
recognized claim to territory that is held, without specification, by the Arabs and Palestinians in the area,
including with regard to Jerusalem. This would not only indicate a change in status of Jerusalem, as well
as other territories within the Mandate, but that it had effectively been awarded already without prior
notice. Unfortunately, it is not even so simple as to assume the UN meant that they recognized
Palestinian claims within the Mandate and the “Arab territories” referred to only regard those outside of

the Mandate borders. Though ignored by Abdelrazek, one hopes not intentionally, reflects a change in language use by the UN, which had previously referred to the “Arab territories, including Jerusalem,” without mention to the Palestinians. Eventually, the terms would change such that, with regard to territory inside the Mandate borders at least, Israel was in occupation of Palestinian territory that included Jerusalem.\textsuperscript{344}

Far from seeking to not have the status changed, the various UN bodies have apparently been content to attempt to redefine status on the fly and award it to different groups. Though Abdelrazek identifies the UN approach as having been one of “still hoping for an international community role, particularly concerning the holy places. The 1967 war and the strong Israeli measures for changing the reality on the ground in the direction of irreversible ‘ownership’ of the city brought the UN to a defensive mode of approach, hoping unsuccessfully to stop the Israeli scheme.”\textsuperscript{345} Status changes to the city had already been \textit{de facto} recognized if the changes that affect status were only condemned beginning in 1967. Furthermore, it is not possible to claim the status of Jerusalem as something new (i.e. belonging to a specific party, and then a new party after that) but that Israel’s actions are somehow altering the status as per past resolutions that can only be interpreted as alluding to the internationalized status that never came to pass. This makes the resolutions extremely confusing and of no help in making a legal determination of any kind. If the UN is certain that the status of Jerusalem is now that of Palestinian territory, then Israel’s actions cannot possibly be affecting anything. For starters, the reference to resolutions that Israel is changing the supposed internationalized status cannot possibly apply, and that is to say nothing of the fact that Israel’s actions cannot possibly be altering the supposed status of Jerusalem belonging to a Palestinian state if no such state has ever existed (see below discussion for elaboration on this topic).

\textsuperscript{343} UNSC, \textit{Resolution 446}, March 22, 1979, Paragraph 2.
\textsuperscript{344} Adnan Abdelrazek, “A UN Perspective on the Status of Jerusalem,” pages 169 -170. Abdelrazek identifies this as the “new terminology” that was adopted by the General Assembly from 2003 up to his writing in 2009.\textsuperscript{345} \textit{Ibid}, page 270.
**UNGA Resolution 67/19: Palestine Recognized as a Non-Member State**

The resolution that recognizes Palestine as a non-member state is a confusing document that sites a number of other conflicting documents as the basis for its train of logic. Without restating all points on the resolutions already mentioned, Resolution 67/19[^346] contains the following issues:

**Recalling Resolution 181.**

This has the same effects that it would have had in the past; namely none. The unimplemented resolution serves only as a reminder that two states were intended within the Mandate of Palestine territory, and that the UN had hoped to have authority over an internationalized Jerusalem.

**Reaffirms the “inadmissibility of the acquisition of territory by force,” which it says is set out in the Charter.**

Just as it was problematic with Resolution 242, the phrase’s situation here is no more improved. For starters, the Charter also sets out that territorial integrity must be respected, which cannot be the case regarding the Arab invasions and supposed divisions caused by them, but is less readily applicable to Israel (unless Resolution 181 stands) due to the lack of borders inside the Mandate borders. This would be followed by a specific ‘reaffirmation’ that the annexation of East Jerusalem is not recognized.

It lists the following UNSC resolutions as relevant: 242, 338, 446, 478, 1397, 1515, and 1850.

242 has already been discussed, as has the superfluous 338. 446 and 478 seek to not recognize Israeli changes in the area, with the latter resolution condemning Israel’s proclaimed uniting of Jerusalem under its authority, and both refer to Israel as occupying “Palestinian and Arab territories, including Jerusalem,” thereby indicating a final territorial status decision made by the UN, which it is not

[^346]: UNGA, Resolution 67/19, December 4, 2012.
able to do. 1397 and 1515 were calls for a cessation of hostilities in the territory and to abide by peace making guidelines to bring about a Palestinian state, the latter item being also the sentiment of 1850.

The reaffirmation that Israel must withdraw from Palestinian territory that was occupied as a result of the 6 – Day War, including East Jerusalem.

This is problematic for the obvious reason of both extent of the withdrawal as well as why East Jerusalem is being awarded, or considered to already have the status of belonging, to the Palestinians. It would seem less possible for this to be the case in light of Resolution 181, the UNSC affirmed validity of the 1949 Armistice Agreements, and the open ended nature of 242 (which leaves Jerusalem an open question).

A reaffirmation that all Palestinian territory taken by Israel in 1967, including East Jerusalem, is considered occupied and the Palestinians have a right to said territory.

This again deals with territorial rights that are still not clear, and yet the UNGA is making broad assumptions.

Recalling the UN acknowledgement of the proclamation of the State of Palestine in 1988.

Unless the UN is stating that Palestine has been a state since 1988, this can only be for historical reference.

Recalling the ICJ advisory opinion on the ‘wall case’.

Presumably this is part of reaffirming that the Geneva Conventions are applied in the ‘Occupied Territories’, but it had been applied overly broadly to territory seized by fighting, which does not necessarily indicate that a state does not have rights to said territory or that the territory necessarily belongs to another party.
Reaffirming the UN commitment to a two-state solution with an “independent, sovereign, democratic, viable and contiguous State of Palestine” based on the “pre-1967 borders,” which is apparently in accordance with international law.

The non-existence and legally empty phrasing of “pre-1967 borders” need not be further elaborated on by this author given previous mentioning of it. Of note, however, are the terms “viable and contiguous” with reference to the conditions of a future Palestinian state. “Viable” presumably means that it is capable of functioning in terms of its inner workings while maintaining an independent stance and exercising full sovereignty over its territory; i.e. no Israeli interference. The term “contiguous” is perplexing by its inclusion. At first glance it might be supposed that this is to tell Israel that it cannot divide up the West Bank into sections, as was contemplated in the Allon Plan (see “Israeli Unilateral Action” below), however one would assume this is covered by the UN’s position that the identifying lines that make up the West Bank are, somehow, borders. Therefore, the implication would seem to be that the UN is advocating for joining the Gaza Strip to the West Bank. At this point readers should move from puzzlement to outright alarm as the United Nations is now suggesting carving up Israel, whose territorial borders must be recognized by virtue of having delineated those of Palestine. This is a quick turn around on the earlier mentioned notions of territorial integrity. Even if the UN is only suggesting that access be granted to easily move across Israel from one to the other (which is not what the word “contiguous” suggests), then the UN’s demand amounts to a deep and penetrating violation of Israel’s sovereignty. It should be noted that contiguity is not a staple of “viable” states, given that non-contiguous states include the U.S., Russia, and Pakistan before the independence of Bangladesh (this is with reference to countries that have territory attached to the same landmass but separated by other countries, not with reference to states with territories separated by natural waters).
Bearing in mind the mutual recognition made between Israel and the PLO in 1993 as part of the Oslo peace process.

This did not involve recognition of a state or of borders or of territorial claims, but rather a recognition of negotiating partners who would deal with each other in good faith. It certainly does not stand as proof of the existence of a Palestinian state anymore than recognizing a stranger on the street equates to acknowledging the property line of their house (or if they even have a house).

Affirming the right of states to live in peace within internationally recognized borders.

This still raises the question of the internationally recognizable borders. The only ones in the area are the Mandate borders. Resolution 181 was unimplemented, and even if it had been the borders it set out were not those the UN is identifying in this resolution. As per earlier discussion, the 1949 Armistice Lines cannot possibly be borders. The only relevance of this insert could be as referring to future borders to be decided.

Recognizing the 132 States that already recognize the State of Palestine.

This would be more compelling if it were based on the factual existence of state like activity or existence of Palestine. But without addressing the issues of factual existence of a state, this part of the preamble merely sounds like the UNGA saying they will recognize Palestine because everyone else is. There is no legal consideration here.

Stressing the permanent responsibility of the UN regarding the question of Palestine.

This would be more accurate if it were based on the notion of the UN’s responsibility towards Mandate territories and Trust territories. Unfortunately, if Palestine is a Mandate territory then it cannot very well be a state (since Mandates are territories without state abilities or administration), and
it was never moved into Trusteeship. Though to say that the United Nations owes the Palestinians something is an understatement in the eyes of this author.

“Reaffirming the principles of universality of membership of the United Nations.”

Given that this resolution has nothing to do with the UN membership of Palestine, this provision has no place in the resolution, not even as part of the preamble.

Finally the actionable paragraphs of the resolution may be analyzed. Firstly, the UNGA saw fit to once more reaffirm the self-determination rights of Palestinians and their right to an independent state based on the Palestinian territory occupied since 1967 (presumably all Mandate territories not under Israeli control after the 1949 Armistice Agreements, based on the preamble. The reasoning for this being Palestinian territory, apparently based at least in part upon the notion of the Armistice Lines as borders, need not be further dissected). Secondly, the UNGA gives Palestine ‘non-member observer State status’ within the UN, which is problematic as Palestine does not meet any of the criteria for being a state aside from ‘recognition’ which is supposed to be the recognition of having achieved the other criteria of being a state. Thirdly, the UNGA once more states that Palestinian territory has been under occupation since 1967 (therefore, presumably, all other territory was Israeli and it is extremely fortunate that the 1949 Armistice Lines happened to reflect that fact by sheer coincidence. Unless the territory beyond the Armistice Lines became Palestinian sometime before the 6 – Day War, which has gone unexpressed in this resolution), and that the Palestinian state should once again be both “contiguous and viable” (with all the earlier mentioned legal problems that this phrasing entails). Finally, and possibly most confusing of all, the UNGA calls for a two state solution and a peace settlement that resolves ‘outstanding’ issues, including Jerusalem and borders.
It is no stretch to state that this Resolution contains fatal flaws. Some points mentioned seem out of place and even contradictory to what came before it – for example, there simply cannot be any outstanding issues regarding Jerusalem and borders when the decision has been that East Jerusalem is Palestinian territory and the borders of Palestine follow the 1949 Armistice Lines (based on the “pre – 1967 borders” phrasing). These are not issues still to be resolved. The issue would actually be Israeli occupation that the UN has called for an end to. If there are determinations left to be made regarding Jerusalem and borders then this means the UN recognition of their having already been decided is completely false. Furthermore, since the allocation of East Jerusalem to the Palestinians is based on the notion that Jerusalem was cut in two by the 1949 Armistice Agreements, then it is entirely confusing as to how the issue of Jerusalem is not automatically solved by the solving of the borders issue, which the UN claims to have determined. Borders are final and inviolable unless parties agree to change them. If peace depends on making new determinations about these borders, then either conquest is being rewarded with territory, which the preamble swears the UN is against, or else there is an admission that these are not actual borders and the earlier statements to the contrary are factually incorrect. Rather than being some nefarious scheme, it is likely that this is the result of what inevitably happens in any large organization with a large number of varied members providing input; too many chefs in the kitchen. That said, there is no need for the existence of a clandestine plot for this sort of confused writing and expression of international law and legal norms to be damaging to the UN’s standing in the eyes of those whose cooperation the UN most needs to resolve the issue.

The entire resolution is an odd list of contradicting ideas and resolutions, which manages to give consideration to the superfluous but no consideration to binding international instruments like the Armistice Agreements (the consequences of which would be inherited by the United Nations if it somehow was exercising responsibility over a Mandate territory, since the agreement deals with territory within the Mandate borders). At its most harmful to the cause it seeks to support, confused exercises such as this Resolution fail to give any credence to the notion that the Armistice Lines are or
were borders, and when anchored outside of objective legalities the understanding of the situation can be subject to the whims of members of the international community. This was displayed most recently by Australia in June of 2014 after the country’s attorney-general publicly took the stance that it is overly prejudicial to use the terms “occupied” or “annexed” in relation to the status of East Jerusalem and it will no longer engage in the practice.\footnote{Herb Keinon, “Australia will no longer refer to Jerusalem as ‘occupied’,” The Jerusalem Post: Jpost.com, June 5, 2014, found at: \url{http://www.jpost.com/International/Australia-will-no-longer-refer-to-Jerusalem-as-occupied-355455}.} When claims begin to rely on terminology rather than legal fact, there emerges the risk of appearing to lose ground should anyone decide to recalibrate their language and use more legally appropriate terms, even if the country in question is simply refusing to use the terminology but their “government’s policy hasn’t changed at all.”\footnote{The reaction in response to Australia’s newfound caution with regards to words was one of predictable outrage from the predictable sources, that includes the threat of trade sanctions from Arab states. It is hard not to imagine their frustration when terms taken for granted are questioned, and without a sound legal basis for their use the remaining tactic available is to encourage their use through more pressured rather than reasoned means. See nsnbc, “Australia’s Palestine Policy Could Prompt Trade Sanctions,” nsnbc international: nsnbc.me, June 14th, 2014, found at \url{http://nsnbc.me/2014/06/14/australias-palestine-policy-promt-trade-sanctions/}.} The lack of basis in fact and reality makes these terms open to use, non-use, and interpretation, such that their inclusion without specificity or legal backing does nothing to help further the Palestinian goal of having a state despite recognizing one which does not exist in fact, and worst of all may actually weaken the Palestinian bargaining position even more.

To explain this last point, it must be remembered that the peace negotiation arrangements that the resolution refers to are of an ongoing nature. The Agreements set out a number of things, and while the vast majority of them are of little consequence to this research, the most important thing they do is

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\item \footnote{Adam Levick, “Australia’s Refusal to Call East Jerusalem ‘Occupied’ is Attacked by the Guardian, The Algemeiner: algemeiner.com, June 13th, 2014, found at \url{http://www.algemeiner.com/2014/06/13/australias-refusal-to-call-east-jerusalem-occupied-is-attacked-by-the-guardian/}. It is worth noting that the Australian position has not actually changed with regards to their view of the situation since the Oslo Accords, and this change in nomenclature is merely designed to move them back to a place of neutrality whereby they felt the issues of borders and Jerusalem should be settled through negotiation. At some point, more deterministic language was used and this survived, both in Australian policy and elsewhere. So when a state corrects its language to return to its original position of neutrality on the basis of the legal international instruments in play, the apparent result is described by detractors as moving to a pro-Israel position and undermining Palestinian claims. One would think the real issue is that those claims are based on the most recently chosen phrasing than on actual international legal principles, but cooler heads are often at the mercy of the loudest voices taking part in hot button issues, regardless of knowledge or correctness. Adam Levick’s article was in response to the one published two days earlier by Ben Saul, “Australia won’t describe east Jerusalem as ‘occupied’ – and is wrong to do so,” The Guardian: theguardian.com, June 11th, 2014, found at \url{http://www.theguardian.com/commentisfree/2014/jun/11/australia-wont-describe-east-jerusalem-as-occupied-and-is-wrong-to-do-so}.} 348
\end{enumerate}
provide the Palestinian Authority with powers to engage in a type of quasi-governance and international work using powers that are derived from arrangements between the PA and Israel.\textsuperscript{350} In exchange for being granted these powers, and afforded the room to use them (which would not be possible under previous Israeli control arrangements), the powers are deliberately kept to less than those of a state and the Palestinian Authority agrees not to take any unilateral action during the course of the agreements that might seek to alter or breach them in any way.

“Since such permanent status negotiations are still pending and since the Interim Agreement is still in force, it is a legal obligation that no action be taken to alter the legal status of these territories. Accordingly, any declaration or assertion of statehood by the Palestinian Authority would constitute a violation of the Interim Agreement. Such a violation would refer not only to the obligation not to change unilaterally the legal status of the West Bank and Gaza, but also to the substantive provisions of the agreement with regard to those powers and responsibilities remaining outside of the jurisdiction of the Palestinian Authority.”\textsuperscript{351}

The Israeli position on this, which would view a declaration of statehood as a serious breach, has been quite clear;

“a unilateral declaration by the Palestinian Authority on the establishment of a Palestinian state, prior to the achievement of a Final Status Agreement, would constitute a substantive and fundamental violation of the Interim Agreement. In the event of such a violation, the Government would consider itself entitled to take all necessary steps, including the application of Israeli rule, law and administration to settlement areas and security areas in Judea, Samaria and Gaza, as it sees fit. Israel reiterates its position, in accordance with the agreement of the PA, that the Final Status must be the result of free negotiations between the parties without the implementation of unilateral steps which will change the status of the area.”\textsuperscript{352}

While Israel could have possibly been expected to ignore claims of statehood, taking actionable measures to try and force a reality of statehood via the United Nations certainly steps well beyond the pale of even what the Israelis were saying “would constitute a substantive and fundamental violation” of the agreements and peace process. In effect, the United Nations’ resolution to recognize and admit a

\textsuperscript{350} Crawford, \textit{Creation of States in International Law}, Page 445.

\textsuperscript{351} Shaw, \textit{The Article 12 (3) Declaration of the Palestinian Authority}, page 21.

\textsuperscript{352} Crawford, \textit{Creation of States in International Law}, Page 445. The quote, recreated by Crawford, is from the Israeli Government Decision on the Wye River Memorandum of November 11\textsuperscript{th}, 1998, at \textit{para} 8.
non-member state of Palestine had only the legal action of causing an agreement breach too big to ignore and leaving Palestinians unconscionably vulnerable in the face of open ended and vague Israeli abilities to re-impose occupation type rule and unravel any progress that has been made. That there might have been a movement within the PA to try for this resolution anyway is one thing, but the United Nations should know better, especially when it claims to.

**Is Palestine now, or has it ever been, a State?**

This question comes up more often than it should, and will likely do so with even greater frequency after the passing of UNGA Resolution 67/19. Without speaking to the merits of Palestinian statehood itself, the simple answer to both questions is “no.” In order to break down the problem quickly it is worth referring back to the already elaborated upon history of the situation within the Mandate of Palestine borders. No Palestinian state, or Arab state within Palestine, asserted itself prior to 1967 as being the inheritor of the non-Israeli/Jewish portion of the Mandate territory. Israel’s fighting during this time is largely characterized by its fighting other states, and the fighting concludes, or at least pauses, thanks to Israel signing the Armistice Agreements with other states. No Palestinian state is party to the agreements, nor to subsequent ceasefires. No Palestinian state emerges from these events in all the years before 1967, and there are no calls from the United Nations expressing deep urgency over the occupation of a Palestinian state. This does not change after the 6 – Day War either. Instead for some years there is merely a reference to Arab territories, which include Jerusalem, that were seized by Israel in 1967.\(^{353}\) It is more than a decade after the 6 – Day War before ‘Palestinians’ are included in such resolutions. Since no Palestinian or Arab state had emerged from the Mandate of Palestine before that time, and since no invading Arab state could rightly claim title to territory within the Mandate borders, we are forced to conclude that there was no state of Palestine.

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\(^{353}\) For examples, see UNGA, *Resolutions 2949*, (1972) and 32/91, (1977), as well as UNSC, *Resolutions 446* (1979) and 465 (1980).
“In order for a new State to be created (and indeed be recognized thereafter by the international community), the entity in question must actually and openly assert a claim to statehood. A new State cannot arise implicitly or incidentally by way of circumstances or by way of inference. It may only be established as a concrete and explicit act of will. The U.S. Restatement of the Foreign Relations Law notes that, ‘[w]hile the traditional definition does not formally require it, an entity is not a State if it does not claim to be a State’. Crawford concludes that, ‘[s]tatehood is a claim of right. Claims to statehood are not to be inferred from statements or actions short of explicit declaration’.”

The question of whether or not one emerged since, in the face of continuous Israeli occupation of the area since 1967, should not be a controversial matter.

“An entity claiming statehood but created during a period of foreign military occupation will be presumed not to be independent.”

“[U]nder international law, a state will maintain its statehood during a belligerent occupation... but it would be anomalous indeed to hold that a state may achieve sufficient independence and statehood in the first instance while subject to and laboring under the hostile military occupation of a separate sovereign...”

“Nor does the fact that the Egyptians and Jordanians occupied and controlled a significant portion of the defined territory immediately following the end of the mandate aid the defendants’ cause. To the contrary, the fact is a stark reminder that no state of Palestine could have come into being at that time.”

Were that insufficient, we may refer back to the Montevideo criteria to understand that Palestinians do not exercise sovereignty over the territory they claim, and the powers enjoyed by their government are at the mercy of agreements with Israel. This bears no resemblance to state function. Moreover, it is unlikely that the Palestinian Authority, the recognized government of the Palestinians, could exercise sovereignty even without Israeli interference. To take the example of the Gaza Strip, after the Israeli withdrawal the PA managed to lose all control over the area and “has been effectively totally replaced in practice by the Hamas organization. Gaza operates de facto as a separate entity from the Palestinian Authority in the West Bank.”

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355 Crawford, Statehood in International Law, page 148.


action, as occurred even during the writing of this section.\textsuperscript{359} This means the inability of the PA to exercise what is arguably the defining characteristic of government,\textsuperscript{360} and an essential point for bearing resemblance to being a state in fact, is not just recognized but relied on by the international community in their dealings with violent developments in the region.

Moreover, even interim agreements that the PA themselves have entered into with Israel as part of the permanent status negotiations have recognized that vital authorities of state governance remained with Israel and not the PA.\textsuperscript{361}

“The essential point is that critical functions seen as indispensable to statehood in international law have by agreement between the relevant parties been recognised as matters subject to Israeli control. This includes what is termed the capacity to enter into relations with foreign States in the Montevideo Convention.”\textsuperscript{362}

Lastly, it is fundamental to note the cognitive disconnect between declaring that Palestine is a state while trying advocating for that same state’s creation, and may do more harm than good. Crawford has likely articulated this best;

“The essential point is that a process of negotiation towards identified and acceptable ends is still, however precariously, in place. That being so, it misrepresents the reality of the

\textsuperscript{359} Tovah Lazaroff, Ben Hartman, Khaled Abu ToaMeh, “US: Palestinian Authority not liable for Wednesday’s Gaza rocket strike on Israel,” The Jerusalem Post: jpost.com, June 12\textsuperscript{th}, 2014, found at http://m.jpost.com/HomePage/FrontPage/Article.aspx?id=99358072&url=http%3A%2F%2Fwww.jpost.com%2FDiplomacyAndPolitics%2FArticle.aspx%3FID%3D358072&R=R1. It should be noted that no deep academic researching or Google-ing is needed to confirm information as basic as this. This article that so perfectly encapsulates the point in its headline alone was not something this author even had to look for. It popped up in his Facebook feed. This is not a grey area, and it should not be treated as such. This issue complicates the situation even further when Hamas denies full control over the area and even goes so far as to blame the Palestinian Authority for rocket attacks, as it did early during the summer 2014 round of violence; Meir Halevi Siegel, “Hamas Blames PA for Rocket Fire,” TheJewishPress.com: jewishpress.com, July 6, 2014, found at http://www.jewishpress.com/news/breaking-news/hamas-blames-pa-for-rocket-fire/2014/07/06/

\textsuperscript{360} Shaw, The Article 12 (3) Declaration of the Palestinian Authority, page 15 to 16. On page 16 Shaw refers to Judge Huber, who in the Island of Palmas arbitration emphasized in particular that independence constituted a principle of ‘the exclusive competence of the State in regard to its own territory’. While this does not mean that international law requires that no putative State may rely in fact upon assistance from States even if that aid is critical nor that internationally sanctioned and agreed arrangements cannot be made that have the effect of circumscribing the new State’s freedom of action in certain areas, it does mean that constitutional limitations upon the basic functioning of such an entity in the sense of subjugation to the authority of another State in key areas would preclude statehood as a matter of principle.” In the case of the PA, this subjugation to the authority of another is carried out by the state of Israel in the West Bank and the non-state actor Hamas in the Gaza Strip.

\textsuperscript{361} Ibid, pages 17 – 19.

\textsuperscript{362} Ibid, page 19.
situation to claim that one party already has that for which it is striving. It may also be counterproductive.”

**STATUS UPDATE B: FINAL TERRITORIAL STATUS CONCLUSIONS POST UN CONSIDERATIONS**

The most problematic aspect of UN resolutions regarding the status of territories within the borders of the Mandate of Palestine is their singular lack of clarity. This was undoubtedly done at first in order to achieve consensus and pass resolutions, but the result is decades of resolutions that claim to base unstated status determinations on past resolutions that make no status determinations. The ICJ itself decided against any attempt to determine the status of the areas, simply noting that Israel was making changes which must therefore be changing the status of territory (the status of which was undetermined) and that the West Bank must be outside of Israel (a finding that would require knowledge as to what their status was) and so the Geneva Conventions apply everywhere inside that area.

Even more troubling, in sections where status appears to be alluded to, such as when referring to Arab or Palestinians territories that are composed of one half of Jerusalem and ‘all the’ territories Israel came to occupy as a result of the 6 – Day War, we must rely on evaluation of UN resolutions over the course of decades in order to try and determine what meaning was intended. After the 6 – Day War Israel was only occupying Arab territories, but was also occupying an ostensibly whole City of Jerusalem. At some point a new status understanding took hold and suddenly some territories were Arab and others were Palestinian, but without clarification as to which were which including with reference to East Jerusalem, the reference to which indicated that at some point Israel ceased to occupy all of Jerusalem and was suddenly only occupying half of it (though who they were occupying it from was left unsaid). As Resolutions became more specific and dealing with only the Mandate of Palestine area, and with the concluding of peace agreements, it was then stated that all territories occupied by Israel as a result of the 1967 war (though without mention to the territory that had been occupied by Syria),

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363 Crawford, *Statehood in International Law*, page 446.
including East Jerusalem, were Palestinian, and that Israel had crossed Palestinian borders in order to do so. This is problematic as it requires: 1. A finding of status in favour of a party that should have no claims to territories in the area since they had to cross international boundaries in order to invade, 2. Finding said status requires ignoring Agreements signed in good faith by the parties concerned, and reaffirmed and upheld by the UN at every turn until inconvenient to do so, 3. Attempting to ascribe any binding nature to these UN findings would be to give the UN the power to make territorial determinations for member states in contravention to treaties they’d signed, and 4. Giving the UN the ability to not only define territorial boundaries but also assign territorial status and transfer it from one party to another (as with the West Bank moving from Arab, ostensibly Jordanian, territory to Palestinian, and that Jerusalem could be whole and united and fully occupied by Israel, and then only half occupied and thus implying awarding of the territory to Israel and then, presumably, Jordan followed by a transfer to the Palestinians). These powers are simply beyond the UN.

Furthermore, the UN’s interpretation of its own resolutions raises serious questions as to how they should be followed and which resolutions may be deemed applicable. If it was made clear at the time that Resolution 242 did not require a complete withdrawal, thereby seemingly being in accordance with the pre-existing Armistice Agreements, then it is uncertain how UN resolutions based on 242 can call for a withdrawal from ‘all the’ territories and expect it to have legal standing. It is further troubling when the UN can take it upon itself to recognize something as a fact, like state level status, in spite of clear facts to the contrary. Of greatest concern is the fact that state members have been voting for UN resolutions that clearly state one thing while proclaiming they intend for their stance to be another. Since voting is an actual act, it should be a greater indicator of state dispositions than mere declarations, however the votes themselves are largely just for declarations. Thus it is difficult to say whether or not the UN positions are actually indicative of the positions of its members. That said, the fact that the UNGA is the only body that can lay claim to Jerusalem via Resolutions 181 and 194, any resolutions that indicate the UNGA’s disposition to the status of Jerusalem must be taken as binding of the UN’s view on
the matter regardless of the opinions of member states who voted for it. Therefore, member states are now in the uncomfortable position of having said their vote meant one thing, but it has had the effect of something else entirely. While a state’s vote indicating the UN’s position for a divided Jerusalem might not override that same state’s official stance in favour of a united internationalized Jerusalem, it still has the effect of making the UN’s position on the matter one of speaking in favour of division. In doing so, these states have effectively killed the internationalization possibility by way of having the UNGA give up its claims to do so in favour of supporting a rival claim that has no basis law beyond a right to make the claim in negotiations.

And so for all the bluster and desk pounding, the seemingly endless list of UN resolutions regarding the Mandate of Palestine area have resulted in zero effect on status since the 1950’s. Once it became clear the UN had effectively given up on the Partition Plan and that internal divisions would be settled by the parties concerned and finalized through peaceful negotiations, largely by way of the Armistice Agreements, the lack of binding internal divisions for the Mandate territory were essentially finalized. The UNGA claims to Jerusalem, though dubious from the beginning, were effectively nullified by the later UN positions on this issue. Thus, by reaffirming Palestinian rights to specific areas based on legal fiction, the UN missed every opportunity to try and secure Palestinian rights based on legal facts and move all parties towards a solution.

The end result is that the recognition of a right for two states to emerge within the Mandate territory still stands, but there is no binding internal division determination. This lack of boundaries is reaffirmed by the Armistice Agreements, and Resolution 242 further indicates that final territorial determinations will not rely on the simple previous disposition of military forces. Coupled with the UNGA’s abandonment of its forever suspect claims to Jerusalem, Israel’s control over the entirety of the Mandate area means that Israel is both inside its borders but also outside of its borders in areas where it occupies territory that will become a Palestinian state. Unfortunately, there is no way to be certain where Israel is truly an occupier until retroactive determinations are made based on status settlement.
The best indicator of where the future borders will be is to take stock of the location of those Palestinians whose right to self-determination is being infringed upon due to exclusion from meaningful democratic processes due to being both outside of Israel (based on Israeli disposition towards them) but not yet within their own state.

In sum, Israel’s borders are not finalized, the disposition of territories within the Mandate of Palestine borders are not finalized, and no amount of confused and self-contradicting UN resolutions will create dividing boundaries where none existed. Incredibly, this non-outcome has cost the United Nations dearly in terms of its credibility as an honest broker and authority regarding international law and its own rules, and has also undermined the territorial claims and negotiating positions of the Palestinian people.

**STATUS UPDATE ADDENDUM: SPECIFIC CONSIDERATION REGARDING JERUSALEM**

There has been a great deal of discussion regarding Jerusalem in particular. Though not addressed on a fully individual basis, the applicable considerations regarding the status of Jerusalem have been discussed at length in this thesis. In sum, there have been no internal divisions created or implemented within the Mandate of Palestine borders of any legal significance (notwithstanding the apparent border-to-be created by Israel upon withdrawal from the Gaza Strip). Jerusalem did receive special mention from the UN on various occasions, and its intended internationalized status was laid out in Resolutions 181 and 194, both of which are essentially defunct. Israel’s reliance on the principle of

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364 In the Separate Opinion of Judge Higgins in the ICJ *Wall* case, the following was expressed: “I fail to understand the Court’s view that an occupying Power loses the right to defend its own civilian citizens at home if the attacks emanate from the occupied territory – a territory which it has found not to have been annexed and is certainly ‘other than’ Israel. Further, Palestine cannot be sufficiently an international entity to be invited to these proceedings, and to benefit from humanitarian law, but not sufficiently an international entity for the prohibition of armed attack on others to be applicable. This is formalism of an un-evenhanded sort.” (Judge Higgins, “Separate Opinion of Judge Higgins,” in *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, International Court of Justice (ICJ), 9 July 2004, at para 34, page 215.) When this type of error in judgment and basic logic is pointed out in the work of the ICJ, by one of the judges working on the case, and yet support for the position still stands as the virtual *de jure* opinion expressed by the UN, it is easy to say that the credibility of the UN suffers, even if only in the eyes of the party to the conflict that holds the full and exclusive power and ability to see the withdrawal from these territories so vehemently demanded.
Resolution 181 for the unqualified right of the state of Israel to exist somewhere in the Mandate as part of a recognition of statehood being a necessity for the Jewish right of self-determination, while translating to a recognition of a similar such right for Palestinians, does not somehow create any such right of internationalization for Jerusalem. The internationalization desire is not about self-determination, and in fact recognizes that the principle of self-determination within the internationalized city will likely lead to voted changes regarding the Statute of Jerusalem that was proposed. All the same, the UNGA desired to impose a permanent separation under effective UNGA control, which this author maintains violates core principles of Mandate territories. Since the Mandate of Palestine was never actually moved into Trusteeship and no Trusteeship agreement was created, the only way for the UNGA to achieve legal authority to have a say over such things would be if the parties involved acquiesced, which is unimaginable as far as possibilities go.

Beyond lacking the authority, and the likely illegality of the act even if the authority existed, the internationalization of Jerusalem is further undermined by two facts. Firstly, when the UNGA voted to admit Israel to the UN, they did so while considering both the relevant resolutions regarding an internationalized Jerusalem as well as Israel’s comments and commitments regarding such a regime. Israel made it clear that it would be willing to accept, or at least contemplate, an international role over Holy Places, but not territory. This was more in keeping with the original Mandate document, which made no mention of Jerusalem itself. Those states involved in the discussion who voted in favour appeared to be satisfied with this line of reasoning, and so it stands to reason that the understanding was one of international authority, or at least input, regarding the Holy Places but not the City of Jerusalem itself.

Secondly, regardless of the opinions of the official stance of their states, UN members voted in favour of resolutions that contained clear language indicating an understanding of the status of Jerusalem separate from any possible understanding derived from the relevant resolutions on the City. By declaring Jerusalem to be among those Arab, and then Arab and Palestinian, and then just
Palestinian, territories taken by Israel, the UNGA was essentially stating that it belonged not to the UN but to other parties. The death of the UN claims to the City were further underscored by resolutions declaring Israel to be occupying only East Jerusalem, and that East Jerusalem belongs to the Palestinians, thereby indicating that the other half of Jerusalem belongs to Israel since it is not occupying it. Setting aside considerations regarding the fact that Israel’s position in East Jerusalem is legally the same as its position in West Jerusalem, thereby requiring an understanding that Israel is either occupying all of Jerusalem along with all territory beyond the Partition Plan or else it isn’t at all, these statements clearly indicate that the UN does not assert any claims to the area they failed to implement plans of authority for or even discuss having authority over since their failure to implement.

In lieu of the absence of a claim from the UN, which can no longer be exerted due to having expired from apparent acquiescence over so long a period, and the inability of states outside of the Mandate borders to levy legal claims (especially if based on occupation stemming from aggressive warfare), then the only parties remaining with claims over Jerusalem are Israel and the Palestinians. The lack of internal divisions or borders or regimes for territory leave the claims as virtual equals, but with the key difference of Israel already being in existence as a state, already exercising control and authority over Jerusalem, may retain control tempered only by Palestinian rights to self-determination as guaranteeing a minimum territorial allotment.

For the Palestinian claim to succeed over the Israeli claim, there would need to be evidence of an inability to practice the right of self-determination without this specific piece of territory, coupled with the people in this territory being unable to practice their right of self-determination under Israeli rule. This author can imagine no such argument that would accomplish both tasks. The closest may be the status of Palestinians within Jerusalem as being not at the same legal level of all other Israeli citizens, but even if true it could be easily cured with the granting of full Israeli citizenship over the whole City and would not indicate an inability for the new Palestinian state to practice a right to self-determination without the City.
Leaving final territorial divisions for negotiators and politicians to accomplish, it is enough to say that the internationalization of Jerusalem is essentially off the table as a legal claim, though international claims to interest of some kind in the Holy Places is certainly acceptable based on past Israeli statements and current agreements with Jordan, and that the division or ‘united borders’ of the City are as binding as the Resolution 181 Partition Plan boundaries and the 1949 Armistice Agreement Demarcation Lines; which is to say not legally binding or even influential regarding legal determinations of status. Therefore Jerusalem falls prey to the same open ended vagueness that plagues the entirety of the territory within the borders of the Mandate of Palestine, leaving the Palestinians in the same unenviable negotiating position.

Part IV: Self-Determination to Achieve Minimum Territory Allotment

Self-Determination and the Palestinians

That there exists a right of self-determination for Palestinians is now one of the more widely accepted assumptions in the Israel-Palestine debate. The implications of such a right set forth guidance towards a legal remedy for, or at least understanding of, a potential end to the conflict.

Concepts of the Right of Self-Determination

The right of self-determination was originally conceived as a in a pseudo state-like manner, since “in practice it [had] been restricted to ‘saltwater’ decolonization.” The belief was that colonized

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365 The author does not imply that this is particular assumption is incorrect, but rather that it is often taken as a given with as much consideration and research backing it as the incorrect assumptions made in the conflict. Even a broken watch is right twice a day. Except for mine, which is digital and no longer in the business of making statements regarding time.

366 Allan Buchanan, Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law, New York: Oxford University Press, 2004. Page410. The significance of the term “saltwater decolonization” should be underscored as indicating the mindset of the international community at the time. It shows the prevalent concern being the overseas holdings of European empires. That this delineation as to what constitutes a colony occurred should be of no surprise given the scramble
territories should determine their own destiny free from European colonial rule, which would be exemplified by “an independent domain of political control.” This domain of control is differentiated between constitutive self-determination, which “occurs when a group makes a fundamental choice concerning its political status” (one that affects the very nature of the state, such as independence or unification with another state), and ongoing self-determination, which is the exercise of self-government through a political process (that need not be in the context of full independence). In either case, until more recently the right to self-determination was deemed to be vested to a territory rather than groups of people identified in any manner other than their presence in the territory.

Allan Buchanan identifies self-determination as “[implying] an independent domain of political control,” which when exercised “over some significant aspects of [the group’s] common life” will constitute self-governance. This self-governance is expressed through the existing state, which international custom strongly maintains will be based on the inviolable borders a state happens to have, including entirely arbitrary ones drawn by colonial powers before withdrawing from the territory. This concept is known as uti possidetis, which in the de-colonization context means that the territory a newly formed state has at the moment of independence and decolonization will be the official territory of the new state, and was reiterated by the ICJ in the Burkina Faso-Mali Case. The line of thinking appears to stem from a desire to “[uphold] the general principle of the need for order and stability,” and “minimize threats to peace and security.” High regard for stability, and the international desire for “peace and security,” has more recently begun to see use in justifying border changes other than those

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367 Buchanan, Justice, Legitimacy, and Self-Determination, page 333.
368 Ibid.
369 Ibid.
371 Buchanan, Justice, Legitimacy, and Self-Determination, page 333.
373 Ibid.
374 Ibid, page 123.
agreed to between the negotiating parties.\textsuperscript{376} That said, intervention by outside states to affect change and aid in secession constitutes a break of sovereignty and territorial integrity.\textsuperscript{377} This type of action is precisely what the permanence of the colonial created borders is meant to avoid; by freezing the international borders in place, a newly emerging state should not be compromised by outside interference or internal separatist movements, and stability would be preserved.\textsuperscript{378} “Where the boundaries of an independent State are altered by the secession of part of that State and a third State is involved in circumstances amounting to intervention, then the principles of respect for the territorial integrity of States at least will be breached.”\textsuperscript{379} Clearly, the invasion by Arab states was a breach of the self-determination factor of the peoples of the Mandate of Palestine, and would have been equally a breach if a secession had been attempted (though arguably it was via annexation and then relinquishing of the claim to the West Bank by Jordan. However since Jordan could not have title in order to annex in the first place, it could not give away that which it does not have, either physically or in terms of rightful title).

However, while the right to self-determination may be conceived of as a right held by the people of a state in aggregate, it is possible that the state may take action that impedes the right of self-determination of certain groups within the state. When such groups are excluded from democratic institutions and otherwise discriminated against in meaningful ways that prevent them from participating in determinations about the direction of the state, their right to self-determination may require expression through an entirely separate state where their rights are upheld since they cannot express their rights through the current state. In such cases, secession becomes a possibility of some limited recognition.

\textsuperscript{376} Joshua Castellino, \textit{International Law and Self-determination}, page 143.
\textsuperscript{377} Ibid.
\textsuperscript{378} Ibid, pages 125 and 133.
\textsuperscript{379} Ibid, page 143.
Secession Granted by the Right of Self-Determination

The Remedial Right Only Theory, advocated by Allan Buchanan,\textsuperscript{380} may recognize two possible circumstances “as being sufficient to generate a (unilateral) right to secede: (1) large-scale and persistent violations of basic individual human rights, and (2) unjust taking of a legitimate state’s territory.”\textsuperscript{381} An interpretation of the first possible circumstance was articulated in a 1970 UN Declaration emphasized the primacy of territorial integrity over the right of self-determination except in cases where the government is not representing groups based on discriminatory grounds.\textsuperscript{382} An example of the possible circumstance would be the unjust occupation of an existing sovereign territory, whether in whole or in part. This second instance is subject to the claims of state sovereignty over the territory being established, with a decline in certainty of such a state of affairs correlating to a decline in the validity of a claim for secession.\textsuperscript{384} Malcolm N. Shaw notes an example of such uncertainty in the Mandate of Palestine since “the sovereignty of the area was in dispute prior to the Israeli occupation.”\textsuperscript{385}

Buchanan suggests a possible third allowance for secession: “(3) serious and persisting violations of intrastate autonomy agreements by the state”\textsuperscript{386} (exemplified by Chechnya).\textsuperscript{387}

Regardless of which argument in favour of secession is levied, the seceding territory will be bound by existing rules of \textit{uti possidentis}, thereby excluding changes to existing international borders.

\textsuperscript{380} Buchanan, \textit{Justice, Legitimacy, and Self-Determination}, page 354.
\textsuperscript{381} Buchanan, \textit{Justice, Legitimacy, and Self-Determination}, Page 353.
\textsuperscript{383} UN Declaration of Principles of International Law Concerning Friendly Relations and Cooperation among States: “Nothing in the foregoing paragraphs shall be construed as authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a Government representing the whole people belonging to the territory without distinction as to race, creed or colour.”
\textsuperscript{384} Dersso, “International Law and the Self-Determination of South Sudan,” page 5.
\textsuperscript{385} “Not only does there have to be a denial of the right to public participation (exclusion from the political processes on the basis of ethnicity or region or any similar ground) and violation of other human rights, but in addition to the violation of such human rights should be of such nature that the integrity of the state is brought into question.”
\textsuperscript{386} Buchanan, \textit{Justice, Legitimacy, and Self-Determination}, page 356.
\textsuperscript{387} Shaw, ‘Peoples, Territorialism and Boundaries,’ page 481.
(unless otherwise agreed by the states concerned). This was reaffirmed by both the ICJ in *Burkina-Faso v Mali* and by the Yugoslav Arbitration Commission. The later African Commission on Human and Peoples’ Rights decision of 1995 in *Katangese Peoples’ Congress v. Zaire* “maintained that the right to self-determination is exercised primarily internally, whereas the absolute right to secede does not exist.” While finding that “all peoples have a right to self-determination,” the Commission believes that self-determination may be exercised in any of the following ways independence, selfgovernment, local government, federalism, confederalism, unitarism or any other form of relations that accords with the wishes of the people but fully cognisant of other recognised principles such as sovereignty and territorial integrity. The Commission felt “obligated to uphold the sovereignty and territorial integrity of Zaire,” due to an “absence of concrete evidence of violations of human rights to the point that the territorial integrity of Zaire should be called to question and in the absence of evidence that the people of Katanga are denied the right to participate in Government.”

Even in cases where there may be existing oppression such as to give way to a recession remedy to secure rights of self-determination, there has been no indication from the international community that they will necessarily interfere in the event of violent confrontation. Castellino weighs the Biafra case against the independence of Bangladesh, and concludes that the “Biafran Civil War remained a civil war for the prime reason that the Nigerian Government was strong enough to subjugate the forces of separatism.” Bangladesh, on the other hand, was able to resist Pakistan and gain its independence thanks to the intervention of India, thereby resulting in Pakistan’s loss of East Pakistan and the creation of a new state. This shows that, when successful, war can be used to create new territorial rights and secessions when an emerging state is secured by either its own efforts or those of others, with the state

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388 Shaw, ‘Peoples, Territorialism and Boundaries,’ pages 490-491 and 496.
389 Ibid, page 496.
393 Ibid, at para 5.
then setting itself up and asserting itself on the new territory.\textsuperscript{396} “This renders the international system’s supposed values of anti-violence and pro-peace and security mere rhetoric,”\textsuperscript{397} according to Castellino, who finds the international disposition in the face of these historic examples, which occurred during the time periods relevant to similar considerations for the Israel – Palestine scenario, seemingly giving weight only to victorious struggle during civil wars. That said, Castellino hastens to point to Bangladesh as a more isolated incident, the precedential value of which is clouded by accusations of genocide or genocidal acts committed by the Pakistani army.\textsuperscript{398} Usually, however, “with the limitations of international law the momentum of the status quo always seems harder to break due to the formation of newer identities and ties within the dispute territory. In most of the cases of disputed territory this is true whether it be Northern Ireland, Cyprus, Kashmir or East Timor. In all these cases settled populations over time complicate matters and make a ‘solution’ to the original problem much more complicated.”\textsuperscript{399}

Secession is a remedy of last resort for restoring a peoples’ right to self-determination in the face of unending and oppression. The international preference for stability will usually preclude strong calls for the dismemberment of existing states. As such, the rule appears to be more akin to the idea that the international community will recognize a status quo once it feels it has sufficiently developed, requiring either time or a firmly held belief in the betterment of the new situation (such as its inhibiting genocide). But states are, and must be, cautious when doing this, as they may risk sanctifying illegal acts of invasion and aggression as a result, such as if an independent Northern Cyprus were suddenly recognized as a state. That said, as a situation becomes de facto and continues to exist for a great length of time, changes made, even if illegal, will complicate matters and require re-evaluation of the matter. Settlers in Northern Cyprus, for example, have increasingly expanded communities and sentiments will grow regarding the righteousness of forcing people out of homes they may have held for two generations at this point.

\textsuperscript{396} Ibid.
\textsuperscript{397} Ibid, page 170.
\textsuperscript{398} Ibid, page 171.
\textsuperscript{399} Ibid, page 192.
Right of Self-Determination as Indicating Minimum Palestinian Territory

In trying to envision the legal principles for setting up a Palestinian state, bearing in mind all the aforementioned that leaves us with a territory ensconced by the Mandate of Palestine borders but with no internal divisions, we can rely on the principles of self-determination, statehood, and even UN resolutions to formulate a guide for making Palestine.

Since the new state would be emerging by way of the right to self-determination, and since there are no binding territorial divisions to help guide in determining the location of all the territory that will comprise this new state, the first step is to examine where this right to self-determination is still waiting to be exercised. The obvious answer to this is the West Bank. However, as we’ve already established the lack of divisions and the lack of legal (though not political) restraints preventing Israel from annexing territory (except that which is about to be excluded in this section), this means that the territory as is traditionally defined would not, in its entirety, comprise a minimum territorial allotment. Based on what the Palestinians are asking for, it would actually compromise the maximum territorial allotment they are seeking. The territory to automatically be considered must be examined on a far more individual basis by examining where Palestinians, whose right to self-determination has yet to be realized, are located. This is an important distinction as it would necessarily exclude all Palestinians who have Israeli citizenship as they are able to participate in Israel’s democracy and therefore express their right to self-determination that way. As already discussed, the right to self-determination does not guarantee a group a state, and the right can be exercised via democracy within an existing state. The right of self-determination may give rise to a type of right (though not an internationally guaranteed one) to secede and form a separate state (or at least to try to do so) in cases where self-determination is simply impossible to express in the current state due to discrimination. This is what makes the ability to identify Palestinians who are and are not Israeli citizens. Those who are have the means of self-determination already, while those who don’t, and who tend to live in the West Bank and Gaza Strip, are the ones who need their own state. So by analyzing the existing population distribution positions of
Palestinians in the West Bank, we arrive at the completed first step of the minimum guaranteed territory; where Palestinians whose right to self-determination has not been realized are living, then that is the area to make up a Palestinian state.

This, of course, is too simplistic and obviously not the end. The area allotment around individual Palestinians would depend on a variety of factors. For starters, if they own additional land in the form of farms or factories, then those would necessarily be attached to them (territorially speaking). Road networks connecting Palestinians to each other would also necessarily need to exist, at least on the whole. As already stated, this author can fathom no reason why a ‘contiguous’ state would be a right, but it seems obvious that no state could possibly function effectively if it is cut up into many tiny enclaves that are disconnected from each other. The situation would be unmanageable for any government. Again, this is not to say that the Gaza Strip and West Bank must be linked, as these are sizable enough areas on their own that they can be governed in the presence of a competent government capable of exercising sovereignty. However, if the new state of Palestine were made up of island villages, then the ability to police them, administer them, and generally assert effective control over them becomes impossible when passage is barred due to an Israeli border being in the way. Likewise, it is not sufficient to link these island villages up with roads that are subject to Israeli interference via closures and checkpoints, as this necessarily harms the Palestinian ability to exert sovereignty in even the most practical of senses (such as laying new electrical or water lines). So, ignoring the UN’s suggestion that a Palestinian state needs to be contiguous, the new state should be one or more sizable pieces (given the Gaza Strip, or the possibility of certain Israeli designs that are not necessarily illegal and could feasibly be done in a manner consistent with what is being laid out here. See below), each of which allows for free movement on roads and between different areas of the country, never subject to Israeli interference. More specifically, this means that an Israel may not

400 Let us hope that it was merely either a suggestion or else a poorly phrased means of telling Israel not to carve up the territory it had already told Israel it must vacate in full, since the alternative, and most logical original interpretation of that word’s inclusion, suggests the UN is ready to make demands that completely eviscerate sovereignty and are completely illegal to impose upon unwilling state.
hamper the movements or lives of Palestinians within their own state, and so an arrangement that consists of checkpoints, security zones, and curfews inside the Palestinian state is an absolute non-starter.

This automatically creates issues for Israeli settlements that are isolated in the middle of large Palestinian population centers. While, in theory, the lack of boundaries gives Israel the opportunity to appropriate and annex lands that settlements are on, it could not do so when this would destroy the Palestinian ability to exercise unimpeded sovereignty and live without Israeli controls. Israel would need to think very carefully about which settlements they would want to keep, as creeping territorial acquisitions towards some settlements would have the effect of isolating others since to connect all the settlements to Israel would cause the creation of tiny enclaves of Palestinian villages, as mentioned above. The only possible way Israel could get around this would be by providing full citizenship to said Palestinians and incorporating them into Israel so that their right to self-determination is expressed in this manner, since the removal of Palestinians from their places of residence would be an obvious violation of their human rights and is therefore not an option. However Israel has gone to great lengths to avoid the right of return for Palestinian refugees due to fears of the demographic shifts that would result from admitting more Palestinians and, therefore, the granting of Israeli citizenship to large numbers of Palestinians in order to appropriate various lands in the West Bank is unlikely to happen when the more logical course of action is to move the Israeli settlers, possibly to another settlement in order to shore up the Israeli claim to that area.

Further considerations stem from the UN’s use of the term “viable.” Viability implies that the state is not crafted in such a way that its borders choke it off from all it needs. The ability to engage in international relations might also be considered an aspect of ‘viability’, and given the Israel–Palestinian ‘relationship’ this may well indicate that the West Bank cannot be an enclave of Israel and must have free and unrestricted access to Jordan. Furthermore, the ability to access water and farm lands owned by Palestinian farmers would be of absolute necessity. Due to water issues throughout the region, it is
possible that this could be somewhat mitigated by arrangements where Israel provides the new Palestinian state with fresh water from Israeli sources (be they natural or desalination plants). This arrangement currently exists between Israel and Jordan, and that is despite Israel not having occupied or annexed large swaths of Jordanian territory. None of this is to say that Israel must determine lands that would best aid a Palestinian start-up state, nor take into account full self-sufficiency (something of decreasing importance in our globalized world economy, and something that would likely be impossible for an advanced economy in a region that is deficient of various minerals and resources that are in abundance elsewhere). The Palestinian state need be only unhindered in accessing the materials and lands that its people own and possess, and should own and possess due to being located directly within their midst and not adjacent to, or easily accessible by, Israel.\textsuperscript{401}

Maps that show the current positions of Palestinian villages gives some notion as to obvious areas that will make up the new Palestinian state. Unfortunately, adjacent areas that would have been easily drawn within their state-to-be have been shrinking due to the increasing settler presence. This creates competing claims, as people whose right to self-determination under Israeli control is being exercised would not (at least in this obvious case) desire to be part of a new Palestinian state. The obvious reality of this situation is that the longer the conflict drags on without a settlement, which is only made less likely when the UN and its associated organs do not come across as honest brokers or plausible interpreters of international law (or even fact), is that the Palestinian negotiating position worsens. This is not to say that their claims worsen, as they face the same restrictions on making claims that the Israelis do (self-determination), but rather their ability to see those claims awarded to them diminishes as competing claims arise (competing claims that would be preferred by Israel, whose withdrawal from territory is necessary in order to turn a Palestinian claim into a reality).

\textsuperscript{401} This is not to suggest that this means Israel may appropriate anything near them. This section is merely attempting to establish an obvious minimum territorial allotment that is legally guaranteed (or at least should be) to the Palestinians for their future state. Territory that, like the right of the Palestinian state to come into existence, is beyond negotiation or questioning. This territory would form the base of the Palestinian negotiating position, with a negotiated settlement taking place over the territory that makes up the difference between the minimum allotment and the maximum amount sought (i.e., the 1949 Armistice Demarcation Lines).
Competing claims and a broken international system for reaching a settlement raises the specter of what Israel might do when it has had enough of the current status quo and it feels unilateral action is the only way to end the deadlock and bury this conflict, or at least the issue of occupation, once and for all.

The Risk of Israeli Unilateral Action

The UN, regardless of its intentions, has aided in pushing Israel into a position where it feels a lack of ability to get a fair deal. If Israel feels that the Palestinians want too much and that neither the ICJ nor the UN have legitimacy or ability to adjudicate the complicated issues associated with this conflict, then the risk of Israel turning to its own devices in order to achieve a settlement becomes very real in light of the possibility of determining legal minimum boundaries that Israel could withdraw to.

This issue has recently risen in prominence within Israeli discourse.

“‘Netanyahu spoke of the need for separation just after he made clear that there will be no negotiations with the Palestinians in light of the latest circumstances,’ said one MK who was present at the session. ‘It is impossible not to wonder whether this was Netanyahu’s opening salvo [of a campaign for] unilateral separation from the Palestinians, especially when he made these comments after MKs asked him explicitly about unilateral measure.’ ‘Notice something else,’ the MK told Makor Rishon. ‘That is the exact same terminology used by Ariel Sharon when he began to move toward the disengagement plan in Gaza.’”

This is appears to go even further than past talk of unilateral considerations what would have seen Israel take unilateral steps but not unilaterally withdraw all together; “The idea of taking unilateral stapes is gaining ground, from the center-left to the center-right,’ Netanyahu said in the Goldberg interview.”

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404 Ibid.
other MK’s who are against such action and speak in terms of “land swaps,” indicating some respect for the notion of some sort of de facto territorial division title already existing in their minds. These statements against annexation were followed by calls of MK’s for a map of territory Israel would aim to keep, and a reply from the Prime Minister’s Office that showed greater concern for unilateral action indicating a lack of reciprocal guarantees and possible security issues; “Anyone with political experience knows that you don’t make concessions without [getting] anything in return, especially with a government partnered with a terror organization that wants to destroy Israel,” officials said. The sources also referred to the 2005 disengagement from Gaza as proof of the futility of these measures.

The conversation is clearly either underway or budding at the highest levels of Israeli politics, and so it is likely only a matter of time before frustration at a lack of progress leads to unilateral action in a type of exasperated sigh of having no other recourse (regardless of whose demands are reasonable or who is causing negotiation and settlement issues. Whether true or not, one side needs simply to feel that there exists no point in trying anymore in order to see unilateral action contemplated by the aforementioned side). Changes are already occurring, including recent Israeli moves to open up the Temple Mount to Jews who wish to pray there, having been banned by Israeli law since 1967 and by Jordanian rule before that.


It would not be without precedent for Israel to submit a proposal for its withdrawal from the West Bank area based on lines that are clearly of supreme favourability to Israel. The “Allon Plan” was proposed in not long after the 6-Day War, and would have seen Israel retain large swaths of the West Bank, along with a corridor through the Jordan Valley, leaving the West Bank divided in two parts (between which Jordan would have crossing rights) with the Northern keeping the narrow land corridor section connecting to Jordan (over which Israel would have crossing rights) and the Southern section being a complete enclave but with a right of traversing Israeli held territory that would connect Jerusalem to the Jordan Valley road, and the Southern half of the Gaza Strip. At the current rate, and with improvements in technology, it is not inconceivable that in an extreme unilateral action by Israel the following scenario could be possible: Israeli retention of the entire Jordan Valley, excluding only Jericho which would connect to Northern West Bank though not Jordan, the complete cutting off of the West Bank from the Dead Sea as part of the maintenance of a security zone and North-South route down the Jordan side of Israel, and various minor or major chunks of territory near the 1949 Armistice Lines being absorbed into Israel to maintain settlement blocks and strategic positions. This is not merely abstract daydreaming, but rather based on considerations that the distribution of Palestinian control, current layout of the Israeli security wall and associated measures, as well as exclusion zones for Israeli settlements and ‘fire zones’ in the Jordan Valley, bear increasing resemblance to the Allon Plan in the

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409 A reference map, though crudely drawn, was first seen by this author in Gerson, *Israel the West Bank and International Law*, page 276 (unmarked. Final map and page before the “Index of Law Cases” begins).

410 *Ibid* was the first instance of viewing the map and reference to the plan by this author and, as such, is included as the first reference. However, the map is crudely drawn, and so it is pertinent to view better and more exact maps of the proposal. Therefore, see also:


Note that the map omits the proposal’s plan of annexation of southern Gaza, but is still worth a look.


Though not a source this author would rely upon in general, the map and close up provides the desired illustration. See next footnote for author’s note on choosing of map sources.
Large settlements deep inside the West Bank could result in finalization of the Israeli Security Barrier/Fence/Wall jutting into Palestinian territories to encircle these population centers, creating deep ‘zig zags’ in the territorial boundaries of Israel and the Palestinian state-to-be that would no doubt be an inconvenience to those populations that would face a long journey around the security divisions because much shorter and direct routes are cut off.

Who is to say that this extreme does not even end in the total annexation of Jerusalem and the annexation of the Jerusalem road, thereby splitting the West Bank in two. Including the Gaza Strip in the equation, the Palestinians would be left with a three piece non-contiguous state, not entirely unlike the original proposed state in 1947 though a great deal smaller. In order to satisfy the requirement that the territory be free from Israeli interference and “viable,” Israel could use modern engineering techniques to construct reinforced underground tunnels that connect the two ‘halves’ of the West Bank and that would connect Jericho to Jordan. Since these routes would go through Israeli annexed territory, Israel could take aim to shut them down in the event of armed conflict and so would consider its security position to be in roughly the same standing as before, with a Palestinian West Bank enclave. An air route could be granted access that would follow the land corridors. In terms of concerns about the West Bank

412 This author has seen many maps on the subjects from various sources over many years and cannot recall the first instance of his seeing one and considering its shape and disposition. UNISPAL has a collection of articles and maps that are relevant to this consideration and as such have been chosen for use in lieu of the original forgotten source seen. Office for the Coordination of Humanitarian Affairs (OCHA), The Humanitarian Impact of Israeli Declared “Firing Zones” in the West Bank, United Nations Office for the Coordination of Humanitarian Affairs occupied Palestinian territory, August 6, 2012, found at http://unispal.un.org/unispal.nsf/4a1faa9cfed1076a8525771b00540804/17f7d6896660a4be85257a52004843d97?OpenDocument. Note the barrier dispositions on the map with regards to those of the Allon Plan.

413 Ibid, The Humanitarian Impact of Israeli Settlement Policies, 7 December, 2012, found at http://unispal.un.org/unispal.nsf/4a1faa9cfed1076a8525771b00540804/9a87427d5bbd433985257b0500537870?OpenDocument. Note the jurisdictional lines running North to South with sufficient width to join the Israeli settlements around Jerusalem, thereby dividing the West Bank in two. Were one to seek to draw lines, perhaps representing underground highways, that were to connect the Southern section of the West Bank to Jordan by crossing as little Israeli or Israeli controlled territory as possible, then the simplest method would be to join the Southern section to the Northern section near Jerusalem (possibly even West of Jerusalem within 1949 – 1967 Israeli held territory, depending on the extent of the Israeli zones of control surrounding Jerusalem), and then connecting the North of the West Bank to Jericho which then connects to Jordan.

414 Ibid, The Humanitarian Impact of the barrier, July 2013, found at http://unispal.un.org/unispal.nsf/4a1faa9cfed1076a8525771b00540804/ee597cde07fb400c85257ba30049e6a67?OpenDocument. Note the deep cuts the Israeli barrier would have to make into the West Bank in order to encase these settlements behind the protection of the barrier. Short underground tunnels could be sufficient to link up the settlements to each other as well as the Palestinian ‘slivers’ to the rest of the West Bank territory without the need for long travel times around these security measures. This would be the only conceivable solution without either removing the settlements, absorbing the Palestinian areas in question into Israeli proper, or allowing overland border passages of some kind during some parts of the day.
becoming another launching pad for rockets, mortars, and raids, Israel would likely be capable of securing the border it creates when it no longer needs troops to attend to security checkpoints and patrols inside the Palestinian territory, amplified by the latest in Israeli technological innovations such as its various interceptor developments that were so widely advertised during its more recent clashes. If Israel feels confident in its ability to foil such attacks and prevent raids and bombers from crossing its security areas, then that would represent the effective end of one of Israel’s chief concerns regarding such a withdrawal; security. The possibility is developing that Israel could have the ability to create such an effective defensive position that its only reason left to bother with negotiations would be a desire for official peace (which they may be willing to live without if it’s available to them on a practical level that could cement their territorial claims the longer they hold on to it) and an aversion to admonishment by the UN and the international community at large (which after so many decades has produced entrenchment and the further weakening of the Palestinian negotiating position, along with continued Israeli presence in all territories the UN has so sternly begged Israel to vacate).

Such ideas are not novel, as the original partition plan called for a neutral land route that would connect one part of the Jewish partition to Jerusalem, and the Jewish and Arab partitions were essentially in six slices (three each) which met the rest of their state territory at points that implied either shared routes or no contiguity in the event of conflict (these routes were also inconvenient in terms of travel due to more direct routes being unavailable because of the opposite number’s territory being in the way). Even a more forgiving unilateral action that gave Palestinians some or shared control of certain areas is not a new consideration, based in the international idea of condominium whereby administration of certain areas is shared.415 That said, were Israel to use this type of aggressive unilateral strategy, it would likely have to ‘go big or go home’ due to an understandable lack of cooperation amongst the Palestinians which would make such shared administration impossible, having to opt instead for Israeli supervised and controlled connection between its territorial areas and Jordan.

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Given the legal ambiguities and lack of defined territorial title, coupled with what by now must be complete Israeli disillusionment with the UN and a lack of desire to make the types of concessions Palestinians demand (who are equally unwilling to accept Israeli demands), Israeli unilateral action is not just talk; it is a real possibility. If Israel affects a complete withdrawal from the rest of the West Bank and declares the matter finished after having annexed settlement blocks, large chunks of territory, and Jerusalem, then what will happen to the Palestinian cause? Will there be as much of a push when the issue is for Israel to withdraw from half a city and likely 10-20% (purely a guess by the author) of the West Bank, some of which it can be argued the world was very ready to accept Israeli annexation of? What if the determination is that the legal minimum territorial allotment necessary for a “viable” Palestinian state are met at the end of the unilateral pullout and that the only remaining issue might be one of passage (which could arguably also be accomplished unilaterally if underground passes are built at the narrowest and shortest points and designed with security measures in mind to nullify risks of infiltration or danger, and then are just left open for Palestinian use. A similar arrangement could be constructed for linking Jericho to Jordan with underground sections beneath Israeli used and populated areas while open areas give way to an above ground but watched and guarded road to the Jordanian border)? If the gross inconveniences of travel are removed and even Israeli interference in Palestinian – Jordanian border crossings are removed, then the cries of “occupation” will be vastly mitigated. Instead cries may ring out against Israeli annexation of parts of the West Bank and East Jerusalem, but if Israel advertises its decision based on international legal arguments then those cries might be mitigated (and would likely be reduced anyway as the incredulity of a situation of ongoing occupation is ostensibly removed). There has been consensus that the 1949 Armistice Lines would give way to different borders (though many believe said borders should be based on those lines, as discussed there is no legal reason for doing so), so that implies some degree of acceptance of time giving way to Israeli claims. How long until time offers prescription for possible unilateral annexation moves?
While this author believes the Israelis are running out of time to solve and finalize this occupation issue before world opinion and pressure become injurious and force their hand, so too are the Palestinians running out of time to reach a settlement before Israel takes unilateral action with only itself in mind. The above nightmare scenario for Palestinians described by this author is not a novel idea regarding final disposition of the territory inside the Mandate of Palestine. The original crude and low tech version of such a suggestion was articulated in an official proposal within Israel nearing half a century ago, from a time before a Palestinian people with a right to a Palestinian state was part of the public international discourse and such agreements would have been completed between Israel and Jordan. Perhaps the only thing worse than an Israeli proposal of this nature being negotiated on by an Arab delegation that isn’t Palestinian could be said Israeli proposal being negotiated within the Knesset only based on Israeli interests alone, creating a Palestinian state unlike what Palestinians want regardless of the legal standing of its borders. This situation is neither remote nor minor, and should be considered before a permanent hardening of negotiating positions.

Part V: Conclusions

Conclusions

Having established that there exists no binding or legally significant divisions or borders within the Mandate of Palestine territories, there is nothing to hold territorial ambitions to the often imagined “pre – 1967 Borders.” However, based on the principles of self-determination and the continued customarily binding intention of a two state solution within the former Mandate territory (going back to the views expressed in resolution 181), an independent Palestinian state must come into existence. The requirements of a “viable” state that fulfills the requirements of allowing for sovereignty in the exercise of self-determination would see territorial allocation and exclusion of Israeli interference within said territory that would guarantee exclusive exercise of sovereignty by the Palestinians themselves. While it
is unknown exactly what this territory would look like, it would presumably be based on the current locations of Palestinians in the West Bank that are excluded from Israeli society and therefore unable to exercise their right to self-determination through the Israeli democratic process. This minimum territory would also include associated lands that are owned or used by Palestinians, are clearly isolated from Israel by virtue of being surrounded by Palestinians, and is non-negotiable but without ending negotiations. Rather, this territory can serve as a narrowing of the scope of negotiations. It is not a distribution of territory claimed by Palestinians, but rather a distribution of territory owed to them. The remaining territorial negotiations would be over the difference between the minimum distribution and the maximum Palestinian claim (ostensibly only considering those claims that seek territorial distributions based on the 1949 Armistice Lines, or “Pre-1967 Borders”).

However, Israel is in a position of incredible power in terms of negotiations, a position that has only been strengthened by the UN’s blundering and essential surrendering and nullifying of claims due to palpable and material ‘errors’ on their part (despite their intentions to the contrary). Without legally binding boundaries internal to the former Mandate of Palestine, without effective UNGA claims to authority in deciding matters within the former Mandate or over Jerusalem, and with an understanding of legally required minimum territorial allocations for a Palestinian state, instead of narrowing the scope of the negotiations the aforementioned give Israel a road map for a legally sanctioned unilateral withdrawal from the territories it has no desire to keep. Requirements for a negotiated solution would, in theory, still be binding just as they were when Israel pulled out of the Gaza Strip in 2005. That Israeli unilateral action might narrow the number of issues on the table is not the same thing as reaching a negotiated settlement as was achieved by Israel with regards to Egypt and then Jordan with comprehensive peace treaties. And yet this cannot provide any consolation to Palestinians. Israeli action of this type also reduces the scope of what Israel believes needs to be negotiated over, specifically territorial allocation, Jerusalem, and settlement retention. There is nothing of consequence left for Israelis other than issues of continued violence and an ongoing state of belligerency. However this point
may be moot in the wake of increasingly effective Israeli defensive measures or devastating Israeli reprisals that effectively leave Palestinians worse off with every attack and counter-attack. The result of an Israeli unilateral move of this type would create an effective status quo that Israel may try and cling to in the face of opposition until it is accepted as fait accompli. With nothing but rarely effective acts of violence to use as leverage, the only remaining tactic available to Palestinians would be international pressure, which has had obviously limited results thus far and is unlikely to strengthen over half a city and a mere percentage of territory already supporting large numbers of Jewish settlers. It is unlikely pressure would increase under these conditions.

The United Nations has been an abject failure in its role as authority on international law and status as a neutral, balanced, and trusted broker. In a single minded attempt to secure claims based on rhetoric and phrasing, repeated opportunities were missed to begin securing Palestinian territorial claims based on actual law. The result has been the situation we are presented with today, hurts the very cause the UN claims to care so much about. It is difficult to recall another situation where something has been strived for with such efforts only to produce the opposite results. The only consolation is knowing that even in a unilateral Israeli action there would still be an independent and sovereign Palestinian state. For all its spectacular failings, even the United Nations has yet to cause this legal position to be undermined.
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