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ISRAEL AND INTERNATIONAL LAW

Eugene Kontorovich

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Israel and International Law
Instructor: Dr. Eugene Kontorovich

Course Description:

Almost every major issue in Israeli politics and the Israeli-Palestinian conflict is routinely discussed in the media using the terminology of international law— "occupation," "illegal settlements," and, most recently, "apartheid." But international law is a specialized field, and most individuals cannot independently evaluate such claims. In this course, we will look behind supposedly uncontested assertions about the legality of Israel's conduct to examine the underlying sources and rules of international law. Moreover, we will do what lawyers typically do (except in regard to Israel)—identify and define the relevant rules by looking at all the relevant precedents, rather than focusing myopically on the world's only Jewish state.

Faculty Biography:

Eugene Kontorovich is a professor at the George Mason University Scalia Law School, and the director of its Center for the Middle East and International Law, as well as the director of the international law department at the Kohelet Policy Forum, a Jerusalem think tank. He previously taught for a decade at Northwestern University and University of Chicago Law Schools. He is one of the world's leading experts in the legal aspects of the Arab-Israeli conflict, and has written dozens of academic articles. His writings also regularly appear in the *Wall Street Journal* and other leading publications.

Israel and International Law

Session I: Israel's Borders in International Law

1. San Remo & the Mandate
2. Uti Possidetis Juris Doctrine
3. UN Partition Plan
4. Armistice Lines & Sec. Res 242
5. *Oslo & the Gaza War*

Readings:

- The League of Nations Mandate for Palestine (1922), Articles I – VII.
- Abraham Bell & Eugene Kontorovich, Uti Possidetis Juris and the Borders of Palestine, *Arizona Law Review* (2016), (pp. 634-657, 676-681).
- Security Council Resolution 242 (1967).
- Eugene Kontorovich, Resolution 242 Revisited, *Chicago Journal of International Law* (2015), (pp. 134-138).

I

12 August 1922

C. 529. M. 314. 1922. VI.

Communiqué au Conseil et aux Membres de la Société

Genève, le 12 août 1922.

SOCIÉTÉ DES NATIONS

MANDAT POUR LA PALESTINE

LEAGUE OF NATIONS

MANDATE FOR PALESTINE

LEAGUE OF NATIONS*

MANDATE FOR PALESTINE

The Council of the League of Nations:

Whereas the Principal Allied Powers have agreed, for the purpose of giving effect to the provisions of Article 22 of the Covenant of the League of Nations, to entrust to a Mandatory selected by the said Powers the administration of the territory of Palestine, which formerly belonged to the Turkish Empire, within such boundaries as may be fixed by them; and

Whereas the Principal Allied Powers have also agreed that the Mandatory should be responsible for putting into effect the declaration originally made on November 2nd, 1917, by the Government of His Britannic Majesty, and adopted by the said Powers, 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, or the rights and political status enjoyed by Jews in any other country; and

Whereas recognition has thereby been given to the historical connection of the Jewish people with Palestine and to the grounds for reconstituting their national home in that country; and

Whereas the Principal Allied Powers have selected His Britannic Majesty as the Mandatory for Palestine; and

Whereas the mandate in respect of Palestine has been formulated in the following terms and submitted to the Council of the League for approval; and

Whereas His Britannic Majesty has accepted the mandate in respect of Palestine and undertaken to exercise it on behalf of the League of Nations in conformity with the following provisions; and

Whereas by the aforementioned Article 22 (paragraph 8), it is provided that the degree of authority, control or administration to be exercised by the Mandatory, not having been previously agreed upon by the Members of the League, shall be explicitly defined by the Council of the League of Nations;

Confirming the said mandate, defines its terms as follows:

Article 1

The Mandatory shall have full powers of legislation and of administration, save as they may be limited by the terms of this mandate.

Article 2

The Mandatory shall be responsible for placing the country under such political, administrative and economic conditions as will secure 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.

Article 3

The Mandatory shall, so far as circumstances permit, encourage local autonomy.

Article 4

An appropriate Jewish agency shall be recognised as a public body for the purpose of advising and co-operating with the Administration of Palestine in such economic, social and other matters as may affect the establishment of the Jewish national home and the interests of the Jewish population in Palestine, and, subject always to the control of the Administration, to assist and take part in the development of the country.

The Zionist Organisation, so long as its organisation and constitution are in the opinion of the Mandatory appropriate, shall be recognised as such agency. It shall take steps in consultation with His Britannic Majesty's Government to secure the co-operation of all Jews who are willing to assist in the establishment of the Jewish national home.

Article 5

The Mandatory shall be responsible for seeing that no Palestine territory shall be ceded or leased to, or in any way placed under the control of, the Government of any foreign Power.

Article 6

The Administration of Palestine, while ensuring that the rights and position of other sections of the population are not prejudiced, shall facilitate Jewish immigration under suitable conditions and shall encourage, in co-operation with the Jewish agency referred to in Article 4, close settlement by Jews on the land, including State lands and waste lands not required for public purposes.

Article 7

The Administration of Palestine shall be responsible for enacting a nationality law. There shall be included in this law provisions framed so as to facilitate the acquisition of Palestinian citizenship by Jews who take up their permanent residence in Palestine.

Article 8

The privileges and immunities of foreigners, including the benefits of consular jurisdiction and protection as formerly enjoyed by Capitulation or usage in the Ottoman Empire, shad not be applicable in Palestine.

Unless the Powers whose nationals enjoyed the afore-mentioned privileges and immunities on August 1st, 1914, shall have previously renounced the right to their re-establishment, or shall have agreed to their non-application for a specified period, these privileges and immunities shall, at the expiration of the mandate, be immediately reestablished in their entirety or with such modifications as may have been agreed upon between

PALESTINE, *UTI POSSIDETIS JURIS*, AND THE BORDERS OF ISRAEL

Abraham Bell* & Eugene Kontorovich**

Israel's borders and territorial scope are a source of seemingly endless debate. Remarkably, despite the intensity of the debates, little attention has been paid to the relevance of the doctrine of uti possidetis juris *to resolving legal aspects of the border dispute.* Uti possidetis juris *is widely acknowledged as the doctrine of customary international law that is central to determining territorial sovereignty in the era of decolonization. The doctrine provides that emerging states presumptively inherit their pre-independence administrative boundaries.*

Applied to the case of Israel, uti possidetis juris *would dictate that Israel inherit the boundaries of the Mandate of Palestine as they existed in May, 1948. The doctrine would thus support Israeli claims to any or all of the currently hotly disputed areas of Jerusalem (including East Jerusalem), the West Bank, and even potentially the Gaza Strip (though not the Golan Heights).*

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INTRODUCTION

Israel's borders and territorial scope are a source of heated and longstanding debate.[1] The fiercest arguments concern Jerusalem—many states deny Israeli claims to sovereignty in "East Jerusalem" (areas occupied by Jordan from 1948–1967 and incorporated thereafter by Israel into the Jerusalem municipality), while others, such as the United States, deny Israeli claims to sovereignty in any part of Jerusalem, East or "West."[2] But the debates go well

1. *See, e.g.*, HENRY CATTAN, PALESTINE AND INTERNATIONAL LAW: LEGAL ASPECTS OF THE ARAB-ISRAELI CONFLICT 122–30 (1973); HOWARD GRIEF, THE LEGAL FOUNDATION AND BORDERS OF ISRAEL UNDER INTERNATIONAL LAW (2008); ELIHU LAUTERPACHT, JERUSALEM AND THE HOLY PLACES 5 (1968);Yehuda Z. Blum, *The Missing Reversioner Reflections on the Status of Judea and Samaria*, 3 ISR. L. REV. 279 (1968); Alan Levine, Note, *The Status of Sovereignty in East Jerusalem and the West Bank*, 5 N.Y.U. J. INT'L L. & POL. 485, 485–502 (1972); Stephen M. Schwebel, Comment, *What Weight to Conquest?*, 64 AM. J. INT'L L. 344, 344–47 (1970).

2. *See, e.g.*, John Quigley, *Jerusalem: The Illegality of Israel's Encroachment*, 9 PALESTINE Y.B. INT'L L. 19 (1996/97); Larry Kletter, Note, *The Sovereignty of Jerusalem in International Law*, 20 COLUM. J. TRANSNAT'L L. 319 (1981). For more on the United States' view on Jerusalem, see *Zivotofsky ex. rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015).

beyond Jerusalem. The location of Israel's eastern frontier is the heart of debates about the status of Israel's presence in the West Bank.[3]

Remarkably, despite the intensity of the debates, little attention has been paid to the relevance of the doctrine of *uti possidetis juris*[4] to resolving legal aspects of the border dispute. *Uti possidetis juris* is widely acknowledged as the doctrine of customary international law that has proven central to determining territorial sovereignty in the era of decolonization.[5] The doctrine provides a clear guideline for the borders of newly created states formed out of territories that previously lacked independence or sovereignty.

Today, it is generally accepted that the borders of newly formed states are determined by application of *uti possidetis juris* as a matter of customary international law. The doctrine even applies when it conflicts with the principle of self-determination.[6] Summarizing the operation of the rule, Steven Ratner explains, "Stated simply, [the doctrine of] *uti possidetis* [*juris*] provides that states emerging from decolonization shall presumptively inherit the colonial administrative borders that they held at the time of independence."[7] Recent decades have shown that *uti possidetis juris* applies to all cases where the borders of new states have to be determined, and not just in its original context of decolonization.[8] Thus, for instance, *uti possidetis juris* was used to determine the borders of the states created by the dissolution of the Soviet Union,[9] Czechoslovakia,[10] and Yugoslavia.[11]

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3. *See, e.g.*, DAVID MAKOVSKY, WASHINGTON INSTITUTE FOR NEAR EAST POLICY, IMAGINING THE BORDER: OPTIONS FOR RESOLVING THE ISRAELI-PALESTINIAN TERRITORIAL ISSUE 1–7 (2011); Toby Harnden & Adrian Blomfeld, *Benjamin Netanyahu Rebukes Obama Over 1967 Plan*, THE TELEGRAPH (May 20, 2011, 7:52 PM), http://www.telegraph.co.uk/news/worldnews/middleeast/israel/8527226/Benjamin-Netanyahu-rebukes-Barack-Obama-over-1967-plan.html; Frank Jacobs, *The Elephant in the Map Room*, N.Y. TIMES: OPINIONATOR (Aug. 7, 2012, 12:43 PM), http://opinionator.blogs.nytimes.com/2012/08/07/the-elephant-in-the-map-room/?_r=0.

4. Sometimes written as "*uti possidetis iuris*."

5. *See* Malcolm N. Shaw, *The Heritage of States: The Principle of* Uti Possidetis *Today*, 67 BRIT. Y.B. INT'L L. 75, 115 (1996).

6. *Id*. at 123–25.

7. Steven R. Ratner, *Drawing a Better Line: Uti Possidetis and the Borders of New States*, 90 AM. J. INT'L L. 590, 590 (1996).

8. Anne Peters, *The Principle of Uti Possidetis Juris: How Relevant Is It for Issues of Secession? in* SELF-DETERMINATION AND SECESSION IN INTERNATIONAL LAW 95–137 (Christian Walter et al. eds., 2014).

9. *See* Justin A. Evison, *MIGs and Monks in Crimea: Russia Flexes Cultural and Military Muscles, Revealing Dire Need for Balance Of* Uti Possidetis *and Internationally Recognized Self-Determination*, 220 MIL. L. REV. 90, 95 (2014).

10. Ratner, *supra* note 7, at 597–98.

11. *See* PETER RADAN, THE BREAK-UP OF YUGOSLAVIA AND INTERNATIONAL LAW 5 (2002).

Although it was once merely a regional rule, the doctrine is now applied to border disputes around the world.[12] As the International Court of Justice ruled in *The Case Concerning the Frontier Dispute (Burkina Faso/Republic of Mali)*:

> [T]he principle of *uti possidetis* [*juris*] seems to have been first invoked and applied in Spanish America, inasmuch as this was the continent which first witnessed the phenomenon of decolonization involving the formation of a number of sovereign States on territory formerly belonging to a single metropolitan State. Nevertheless the principle is not a special rule which pertains solely to one specific system of international law. It is a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs. Its obvious purpose is to prevent the independence and stability of new States being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power. . . . At first sight this principle conflicts outright with another one, the right of peoples to self-determination. In fact, however, the maintenance of the territorial status quo [] is often seen as the wisest course, to preserve what has been achieved by peoples who have struggled for their independence.[13]

The application of the principle of *uti possidetis juris* to the legal borders of Israel seems straightforward. Israel emerged as a new state in 1948, when it declared statehood at the expiration of the Mandate of Palestine.[14] The new state of Israel was immediately invaded by its neighbors and several non-neighboring Arab states,[15] and at the conclusion of hostilities, Israel possessed only part of the territory of the Mandate (the remaining Mandatory territory was occupied by Syria, Egypt, and Transjordan).[16] Israel and its neighbors reached armistice agreements,[17] but they failed to reach peace treaties or boundary agreements. For its part, the British Mandatory government—the immediately prior ruling authority until 1948—did not propose or reach any agreement on borders with the new state.[18] While there had been proposals to divide the territory of Palestine between

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12. *See* Shaw, *supra* note 5, at 104, 106–11; Temple of Preah Vihear (Cambodia v. Thai.), Judgment, 1962 I.C.J. Rep. 6, 17–27 (June 15); *see also* Joshua Castellino, *Territorial Integrity and the "Right" to Self-Determination: An Examination of the Conceptual Tools*, 33 BROOK. J. INT'L L. 503, 509–10 n.34 (2008).

13. *In re* Frontier Dispute (Burk. Faso v. Mali), Judgment, 1986 I.C.J. 554, 565–67 (Dec. 22).

14. *See* BENNY MORRIS, 1948: A HISTORY OF THE FIRST ARAB-ISRAELI WAR 178 (2004).

15. *See id.* at 181.

16. *See id*. at 375. The possessory status of some areas was difficult to determine; these areas were considered demilitarized "no-man's zones."

17. *See* Lebanese-Israeli General Armistice Agreement, Isr.–Leb., March 23, 1949, UN Doc S/1296; Armistice Agreement Between the Hashemite Jordan Kingdom and Israel, Isr.–Jordan, Apr. 3, 1949, U.N. Doc. S/1302; Israeli-Syrian General Armistice Agreement, Isr.–Syria, July 20, 1949, U.N. Doc. S/1353; Egyptian-Israeli General Armistice Agreement, Egypt–Isr., Feb. 23, 1949, U.N. Doc. S/1264.

18. *See* MORRIS, *supra* note 14, at 178–79.

two new states (one Jewish and one Arab), Israel was the only state to emerge from the Mandate of Palestine.[19]

Israel's independence would thus appear to fall squarely within the bounds of circumstances that trigger the rule of *uti possidetis juris.* Applying the rule would appear to dictate that Israel's borders are those of the Palestine Mandate that preceded it, except where otherwise agreed upon by Israel and its relevant neighbor. And, indeed, rather than undermine the application of *uti possidetis juris*, Israel's peace treaties with neighboring states to date—with Egypt[20] and Jordan[21]—appear to reinforce it. These treaties ratify borders between Israel and its neighbors explicitly based on the boundaries of the British Mandate of Palestine.[22] Likewise, in demarcating the so-called "Blue Line" between Israel and Lebanon in 2000, the United Nations Secretary General relied upon the boundaries of the British Mandate of Palestine.[23]

Given the location of the borders of the Mandate of Palestine, applying the doctrine of *uti possidetis juris* to Israel would mean that Israel has territorial sovereignty over all the disputed areas of Jerusalem, the West Bank, and Gaza, except to the degree that Israel has voluntarily yielded sovereignty since its independence.[24] This conclusion stands in opposition to the widely espoused position that international law gives Israel little or no sovereign claim to these areas.[25] Amazingly, however, such pronouncements reveal no awareness[26] of the

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19. *Id.*

20. Treaty of Peace, Egypt–Isr. art. II, Mar. 26, 1979, 18 I.L.M. 362 (1979) ("The permanent boundary between Egypt and Israel is the recognized international boundary between Egypt and the former mandated territory of Palestine . . . .").

21. Treaty of Peace, Isr.–Jordan, Oct. 26, 1994, 34 I.L.M. 43 (1995) ("The international boundary between Israel and Jordan is delimited with reference to the boundary definition under the Mandate . . . .").

22. As we discuss in Part III, while explicitly based on the Mandatory boundaries, the peace-treaty boundaries in some cases differed from earlier frontiers, and the treaties also recorded some areas of unresolved disagreement between the parties.

23. *See* U.N. Secretary-General, *Report of the Secretary-General on the Implementation of Security Council Resolutions 425 (1978) and 426 (1978)*, ¶ 6 n.1, U.N. Doc. S/2000/590 (June 16, 2000) ("As noted in my report of 22 May, the international boundary between Israel and Lebanon was established pursuant to the 1923 Agreement between France and Great Britain entitled 'Boundary Line between Syria and Palestine from the Mediterranean to El Hamme', which was reaffirmed in the 'Israeli-Lebanese General Armistice Agreement' signed on 23 March 1949.").

24. *See supra* note 22.

25. *See, e.g.*, Barack Obama, President, U.S., Remarks by the President on the Middle East and North Africa (May 11, 2011), https://www.whitehouse.gov/the-press-office/2011/05/19/remarks-president-middle-east-and-north-africa; David Cameron, Prime Minister, U.K., Mahmoud Abbas, President, Palestine, David Cameron and Mahmoud Abbas Press Conference (Mar. 13, 2014), https://www.gov.uk/government/speeches/press-conference-in-jerusalem.

26. Some writing in support of Palestinian territorial claims obliquely concedes the relevance of the doctrine while refusing to apply it to Israel. Jean Salmon, for instance, in discussing whether a state of Palestine was created by declaration in 1988, writes that the borders of Mandatory Palestine have been transferred to the compound entity of Israel and a

application of *uti possidetis juris* to the borders between Israel and its neighboring states.[27] Indeed, the literature on both the doctrine and the Israeli-Arab conflict has almost entirely ignored application of *uti possidetis* to Mandatory Palestine.[28]

At its expiration in 1948, the borders of the Mandate of Palestine, both internal and external, were relatively well demarcated and uncontroversial. Thus

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future Arab Palestine by operation of *uti possidetis juris*. At the same time, Salmon implicitly denies the benefit of the doctrine to any Israeli claims, while offering no precedent or argument for the application of *uti possidetis juris* to a compound comprised of a state created several decades earlier and a proposed new state yet to be created. Jean Salmon, *Declaration of the State of Palestine*, 5 PALESTINE Y.B. INT'L L. 48, 53 (1989). For his part, Gino Naldi notes that *uti possidetis juris* transforms "former boundaries [into] international frontiers protected by international law" before improbably concluding that, "[c]onsequently, a Palestinian state would correspond to all the Palestinian territories Israel has occupied since 1967, including East Jerusalem." Gino J. Naldi, *The Peaceful Settlement of Disputes in Africa and its Relevance to the Palestinian/Israeli Peace Process*, 10 PALESTINE. Y.B. INT'L L. 27, 40 (1998–1999). Naldi makes no reference to the borders of the Mandate and provides no explanation for rejecting the conclusion that the former boundaries of the Mandate would be Israel's international frontiers protected by international law. *Id.* Iain Scobbie acknowledges that the doctrine of *uti possidetis juris* would require transferring the borders of the Palestine Mandate to the independent state that emerged, but then strangely ignores that the independent state that emerged was Israel, and instead argues that a future state of Palestine would inherit the borders of the Mandate. Iain Scobbie & Sarah Hibbin, Research Paper, *The Israel-Palestine Conflict in International Law: Territorial Issues* (SOAS Sch. L., Research Paper No. 02/2010, 2009), http://ssrn.com/abstract=1621382; *see also*, Daniel Benoliel, *Israel and the Palestinian State: Reply to Quigley*, 1 U. BALT. J. INT'L L. 1, 19–20 (2012) (noting that an independent Palestinian state would have the borders of those areas under Palestinian Authority jurisdiction under the Oslo Accords). As we discuss in the Conclusion, the doctrine of *uti possidetis juris* may very well be relevant to potential Palestinian border discussions in the future, but such discussions are premature until the establishment of Palestine's independence as a state.

27. Another small amount of literature concerns the related, but rejected, legal principle of *uti possidetis facto*. *See infra* Part I (defining *uti possidetis facto*); Allan Gerson, *Trustee-Occupant: The Legal Status of Israel's Presence in the West Bank*, 14 HARV. INT'L L.J. 1, 6 n.15 (1973) (noting that "[t]he doctrine of *uti possidetis [facto]* according to which the governing factor is the respective positions achieved by the belligerents at the termination of a war is generally not accepted in international law"); Sanford R. Silverburg, Uti Possidetis *and a Pax Palistiniana: A Proposal*, 16 DUQ. L. REV. 757, 759 (1977–1978) (defining *uti possidetis* [*facto*] as sanctifying the territorial "*status quo post bellum*"—i.e., as granting sovereignty on the basis of actual post-war possession rather than pre-independence boundaries—and arguing for its application to the borders of Israel). In a spectacular non sequitur, John Quigley cites Silverburg disapprovingly in arguing that "the international community has not followed . . . [the doctrine of] *uti possidetis* [*facto*], which says that one owns what one possesses" and that *uti possidetis* cannot therefore be "posited to justify Israel's existence." JOHN B. QUIGLEY, THE CASE FOR PALESTINE: AN INTERNATIONAL LAW PERSPECTIVE 91–92 (2005).

28. Without addressing directly the effect of *uti possidetis juris*, Malcolm Shaw notes that the proposed partition of the Palestine Mandate in 1947 was an attempt to utilize the powers of the General Assembly towards the Mandate to mitigate the demands of *uti possidetis juris* in the interest of peace. *See* Shaw, *supra* note 5, at 148.

uti possidetis juris could be a powerful tool for resolving extant disputes about the borders of Israel. To be sure, Israel appears to be interested in drawing consensual new boundaries that differ from the borders established by *uti possidetis juris*.[29] *Uti possidetis juris* does not preclude later modifications of borders. Application of *uti possidetis juris*, as is customary in other boundary disputes, would nevertheless provide a clear baseline for future negotiated solutions.[30]

In this Article, we attempt to fill this notable gap in the scholarly literature. The Article explores the history and development of *uti possidetis juris* to see how it has been applied to previous disputes about states emerging from Mandatory territories, which are neither "classic decolonizations" nor the breakup of composite states. Likewise, this Article looks to the history of the Palestine Mandate (and to historic disputes about the Palestine borders) to see how it conforms to the patterns of the application of *uti possidetis juris*. We find that *uti possidetis juris* has been fully applied to the numerous border disputes regarding former Mandatory territories, notwithstanding the Mandates' odd juridical statuses as neither full-fledged states, nor colonial possessions, nor mere administrative units of the Mandatory power. We find that bitter controversies about the borders of the Palestine Mandate are far from particular to Palestine. Similar controversies emerged regarding the borders of many other Mandates because they often took little account of national self-determination interests and were in several instances illegally modified by the Mandatory. Numerous Mandates were plagued by international doubts about the wisdom of their borders and subjected to serious discussions of revision. Yet in all cases, the borders of the Mandate as they stood at independence became the borders of the new successor state.

We go on to examine the events surrounding the termination of the Palestine Mandate and declaration of independence by Israel to determine whether the application of *uti possidetis juris* was overridden by Israel's behavior at the time of independence. We fail to find any basis in that behavior for rejecting the application of *uti possidetis juris*.

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29. Since 1993, Israel has been engaged in negotiations with the Palestine Liberation Organization ("PLO") based on some unspecified future Israeli territorial concessions to be agreed upon in "permanent status" talks. *See* Declaration of Principles on Interim Self-Government Arrangements ("Oslo Agreement"), PLO–Isr., art. V, Sept. 13, 1993, http://www.refworld.org/docid/3de5e96e4.html%20[accessed%2017%20December%202015]; *see also* The Israeli-Palestinian Interim Agreement ("Oslo II"), Isr.–Palestine, ch. 2 art. XI ¶ 2(f), ch. 3 art. XVII ¶ 1(a), http://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/the%20israeli-palestinian%20interim%20agreement.aspx. Successive Israeli governments have made several "permanent status" offers to the PLO, which would have involved the waiver of Israeli claims of sovereignty to nearly all of the West Bank and Gaza. For a summary of Israeli offers, *see* Rick Richman, *The Thrice Offered Palestinian State*, COMMENT. MAGAZINE ¶ 1 (May 17, 2011), https://www.commentarymagazine.com/foreign-policy/middle-east/thrice-offered-palestinian-state/.

30. The territorial baseline for negotiations has proved an extremely contentious issue in the past.

In Part I, we explain the doctrine of *uti possidetis juris* generally and show how it has been used in other post-colonial territorial disputes. In Part II, we turn to the way *uti possidetis juris* has been used to determine the boundaries of states that emerged from Mandatory territories. In Part III, we explore the history of the emergence of the state of Israel from the British Mandate of Palestine, with particular attention to the boundaries of the Palestine Mandate. Finally, in Part IV, we examine whether there are any peculiar features of the Palestine Mandate or the independence of Israel that would preclude application of the doctrine of *uti possidetis juris.* A conclusion follows, in which we sketch out the implications of our findings.

I. THE DOCTRINE OF *UTI POSSIDETIS JURIS*

A. Development of the Doctrine

As the Latin name suggests, *uti possidetis juris* stems from Roman law, although the modern doctrine of international law has little to do with its Roman antecedent. The Roman *uti possidetis* concerned property, rather than territorial sovereignty. It granted a litigant with actual possession of a disputed item a presumptive right to continue in possession. It earned its name as a result of the phrase *uti possidetis, ita possideatis*, meaning "as you possess, so may you possess."[31]

The modern international law doctrine of *uti possidetis juris* is generally thought to have originated in nineteenth-century Latin America.[32] In many ways, the international law doctrine is the opposite of its Roman-law ancestor. The Roman version created only a presumptive right; the international law version vests absolute title. The Roman version concerned property rights; the international law version concerns territorial sovereignty. And most importantly, the Roman version rewarded actual possession with legal right; the international law version disregards actual possession and recognizes title on the basis of colonial administrative lines.[33]

The modern doctrine of *uti possidetis juris* is best understood by looking to its historic emergence nearly two centuries ago. At the time, the various new countries of Latin America were engaged in a series of boundary disputes following the withdrawal of Spain and Portugal—the colonial powers that had previously claimed territorial sovereignty of all territory south of the United States and Canada—and the emergence of a number of entirely new states. Neither Spain nor Portugal had clearly established the borders of the new states on their withdrawal. Additionally, the newly independent territories rapidly splintered into a large number of independent countries. Seeking to avoid endless conflicts about

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31. *See* John Bassett Moore, *Memorandum on Uti Possidetis: Costa Rica – Panama Arbitration, 1911*, *in* 3 THE COLLECTED PAPERS OF JOHN BASSETT MOORE 328, 330 (1944); Malcolm Shaw, *Peoples, Territorialism and Boundaries*, 8 EUR. J. INT'L L. 478, 492 (1997); Peters, *supra* note 8, at 97–98; Ratner, *supra* note 7, at 592–93.

32. Shaw, *supra* note 31, at 493.

33. Shaw, *supra* note 5, at 117; Shaw, *supra* note 31, at 492.

their borders, the new states soon adopted a rule of *uti possidetis* to establish their boundaries.[34]

At the time, two different versions of *uti possidetis* vied for supremacy. The rule of *uti possidetis facto* (or *uti possidetis de facto* or *uti possidetis facti*) would have awarded sovereignty to the actual possessor of territory. The doctrine of *uti possidetis juris* (or *uti possidetis iuris*), by contrast, ignored the actual land holdings of the new countries, and instead focused on the administrative boundaries created by the colonial powers prior to independence.[35] Importantly, the administrative lines used to fix the boundaries under *uti possidetis juris* generally were not international boundaries, and the administrative units they demarcated were not the sovereign predecessors of the new countries. Rather, *uti possidetis juris* utilized administrative lines of various kinds (some purely administrative, some international) to fashion the new sovereign borders. Succession to the legal personality of the colonial entity was thus not a requirement of the application of *uti possidetis juris*.[36]

International law writings in the seventeenth century suggested that *uti possidetis facto* was the preferred doctrine. For instance, in 1612, Alberico Gentili explained that international law held that "territories . . . remain the power of the [state] who holds them at the time when peace is made, unless it has been otherwise provided by a treaty."[37] As late as 1929, T.J. Lawrence wrote that the principle of *uti possidetis* "held that the conclusion of peace legalizes the state of possession existing at the moment, unless special stipulations are contained in the treaty."[38] By looking to possession as the key to the application of the doctrine, *uti possidetis facto* sanctified the *status quo post bellum*—the *de facto* borderlines created by war.[39]

But in time, *uti possidetis juris* (and not *uti possidetis facto*) became the dominant doctrine for determining post-colonial borders.[40] After being adopted in numerous agreements establishing borders in Latin America,[41] the principle was adopted in Africa in the Organization of African Unity's Resolution on Border Disputes among African States.[42] The International Court of Justice subsequently

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34. SUZANNE N. LALONDE, DETERMINING BOUNDARIES IN A CONFLICTED WORLD: THE ROLE OF *UTI POSSIDETIS* 31 (2002).

35. *Id.*

36. *Id.* at 33.

37. *See* ALBERICO GENTILI, DE JURE BELLI LIBRI TRES 381 (John C. Rolfe trans., 1933) (1612).

38. T.J. LAWRENCE, PRINCIPLES OF INTERNATIONAL LAW 562 (1923).

39. LALONDE, *supra* note 34, at 18.

40. *Id.* at 23.

41. *See, e.g.*, Boundary Treaty, Chile–Arg. July 23, 1881; Treaty Relating to the Demarcation of Frontiers, Bol.–Peru, Sept. 23, 1902; *see also* LALONDE, *supra* note 34, at 24–60.

42. *See* Org. of African Unity [OAU], *Border Disputes Among African States*, AHG/Res. 16(I), http://www.peaceau.org/uploads/ahg-res-16-i-en.pdf; *see also* LALONDE, *supra* note 34, at 103–37.

applied the doctrine of *uti possidetis juris* in several cases,[43] but its definitive pronouncement on the subject was in the Burkina Faso v. Mali case.[44] In that case, the court had to draw the border between Burkina Faso and Mali, both of which emerged from a single French colony called French West Africa. The court noted that the parties had requested a ruling on the basis of *uti possidetis juris*, but even if the parties had not so agreed, the court would have used the doctrine anyway.[45]

The court explained that *uti possidetis juris* was a doctrine of customary international law, applicable throughout the world.[46] The court also seized the opportunity to explain the scope of *uti possidetis juris*, stating that where the colonial administrative lines, and the exercise of colonial authority within those lines, were clear, the lines would serve as the boundaries of the new state even where the new state did not actually possess the territory.[47] Therefore, a state that acquired territorial sovereignty over territory through *uti possidetis juris* would not lose sovereignty simply because another state possessed and administered part of that territory. Additionally, the doctrine of *uti possidetis juris* would take precedence in establishing borders given the paramount importance of stable borders in maintaining the peace, notwithstanding the importance of the principle of self-determination in determining governing arrangements in the post-colonial world.[48]

Recent decades have demonstrated that *uti possidetis juris* applies more broadly to all new states, even when not the result of a process of decolonization. Thus, recent years have seen the application of the principle of *uti possidetis juris* to determine the borders of the new states created out of the former Yugoslavia, Czechoslovakia, and Soviet Union.[49] In the case of Yugoslavia, the universal application of *uti possidetis juris* was reaffirmed by the Robert Badinter-led Arbitration Commission. The Badinter Commission's declaration was clear and explicit: "[W]hatever the circumstances, except where the states concerned agree otherwise, the right to self-determination must not involve changes to existing frontiers existing at the time of independence (*uti possidetis juris*)."[50] Thus,

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43. *See, e.g.*, *In re* Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicar. v. Hond.), Judgment, 2007 I.C.J. 661, 706 (Oct. 8) (stating that "[i]t is beyond doubt that the *uti possidetis juris* principle is applicable to the question of territorial delimitation between Nicaragua and Honduras, both former Spanish colonial provinces" while finding no clear evidence on provincial boundaries, and therefore ruling that "the principle of *uti possidetis* affords inadequate assistance in determining sovereignty over these islands because nothing clearly indicates whether the islands were attributed to the colonial provinces of Nicaragua or of Honduras prior to or upon independence.").

44. *In re* Frontier Dispute (Burk. Faso/Mali), 1986 I.C.J. 554, 566 (Dec. 22).

45. *Id.* at 565.

46. *Id.*

47. *Id.* at 566.

48. *Id.*

49. *See supra* notes 7, 9, 11 and accompanying text; Shaw, *supra* note 5, at 106–11.

50. Conference on Yugoslavia Arbitration Commission, Opinion No. 2 (Jan. 11, 1992). The full text of the opinion is quoted in Alain Pellet, *The Opinions of the Badinter*

"except where otherwise agreed, former republican borders become international frontiers protected by international law."[51] Importantly, in all these cases, the absence of a colony preceding independence was no barrier to the application of *uti possidetis juris*. The doctrine applied as in all other cases of newly independent states, and it transformed the pre-independence administrative boundaries (in this case, between federal republics) into the boundaries of the new states.

Of course, states are free to rearrange their boundaries voluntarily, subject to the consent of neighbors or other relevant parties. The borders established by *uti possidetis juris* can be changed by treaty or by any of the other means recognized by international law, including, in exceptional cases, by acquiescence.[52] Nonetheless, cases like Yugoslavia make clear that in the absence of an agreed-upon redrawing of the borders, *uti possidetis juris* retains its primacy in determining the borders of newly independent states.

Uti possidetis juris is not without its critics. By transforming colonial and administrative lines into national borders, the doctrine repurposes the lines to a task they were not meant to fill. The administrative and colonial lines may have been drawn for purposes that served the former sovereign, without regard to topography or local needs.[53]

Nonetheless, there are strong reasons why *uti possidetis juris* has prevailed as a rule of customary international law. It is a strong force for stability of borders, and it serves to reduce conflict. While *uti possidetis juris* seemingly legitimizes arbitrary colonial decisions and undermines self-determination, empirical research suggests that "borders drawn along previously existing international or external administrative frontiers experience fewer future territorial disputes and have a much lower risk of militarized confrontation if a dispute emerges."[54]

The normative dispute about *uti possidetis juris* has been translated into a doctrinal dispute as well. Several scholars have argued against the conclusions of the Badinter Commissions and against the extension of *uti possidetis juris* into situations where a single state is broken apart by dissolution or secession.[55] However, there appears to be little doubt as a descriptive matter that *uti possidetis juris* applies to post-colonial and post-Mandate situations.

Arbitration Committee: A Second Breath for the Self-Determination of Peoples, 3 EUR. J. INT'L L. 178, 182–85 (1992).

51. Pellet, *supra* note 50, at 185.

52. Shaw, *supra* note 5, at 141–47.

53. *See* Enver Hasani, Uti Possidetis Juris*: From Rome to Kosovo*, 27 FLETCHER F. WORLD AFF. (ISSUE 2) 85, 90 (2003); LALONDE, *supra* note 34, at 31.

54. *See* David B. Carter & H.E. Goemans, *The Making of the Territorial Order: New Borders and the Emergence of Interstate Conflict*, 65 INT'L ORG. 275, 275 (2011).

55. Ratner, *supra* note 7, at 590; LALONDE, *supra* note 34, at 174.

B. Applying the Doctrine

Using the doctrine of *uti possidetis juris* to resolve borders is relatively straightforward. As the International Court of Justice explained in the Burkina Faso case, the doctrine ensures that:

> By becoming independent, [the] new State acquires sovereignty with the territorial base and boundaries left to it by the [administrative boundaries of the] colonial power. . . . [The principle of *uti possidetis juris*] applies to the State as it is [at that moment of independence], i.e., to the "photograph" of the territorial situation then existing. The principle of *uti possidetis* [*juris*] freezes the territorial title; it stops the clock . . . .[56]

As the International Court of Justice observed in the case of *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, *uti possidetis juris* is a "retrospective principle, investing as international boundaries administrative limits intended originally for quite other purposes."[57] In applying the doctrine, one does not ask whether the law at the time of the "photograph" viewed the administrative lines as international boundaries. Indeed, it is quite plain that the borderlines are not expected to have been international boundaries at the time of the "photograph." Thus, for instance, in the Burkina Faso case, the court did not have to inquire whether *uti possidetis juris* was a binding rule of international law at the time of decolonization. It was enough for the court that *uti possidetis juris* was a binding rule of international law at the time the court resolved the border dispute.

Uti possidetis juris thus constitutes an exception to what is known in international law as the intertemporal rule. Under the intertemporal rule, one judge judges the legal importance of acts affecting territorial sovereignty according to the law that prevailed at the time of the act. For instance, one of the determinations includes whether State A successfully acquired sovereignty over conquered territory of State B according to the legal treatment of conquest at the time of the capture, rather than under modern law, which looks skeptically at conquest.[58] By contrast, *uti possidetis juris* consciously and willingly reinterprets the legal significance of past acts. *Uti possidetis juris* transforms into international boundaries lines that in the past (just before the time of the "photograph") were not international boundaries.

The trick, of course, is determining the moment and the subject of the "photograph."

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56. *In re* Frontier Dispute (Burk. Faso/Mali), Judgment, 1986 I.C.J. 554, 568, ¶ 30 (Dec. 22).

57. *In re* Land, Island and Maritime Frontier Dispute (El Sal./Hond., Nicar. intervening), Judgment, 1992 I.C.J. 351, 388 (Sept. 11).

58. Malcolm Shaw, *Introduction: The International Law of Territory: An Overview*, *in* TITLE TO TERRITORY xi, xviii (Malcolm Shaw ed., 2005).

In *uti possidetis juris*, as in other doctrines of international law affecting border disputes, the outcome is strongly affected by "critical dates," defined by Malcolm Shaw as those "moment[s] at which the rights of the parties crystallize so that the acts after that date cannot alter the legal position."[59] As Shaw notes, in situations not involving *uti possidetis juris*, the identity of critical dates can be a matter of some contention. If parties have embodied an explicit understanding in a treaty, the treaty's date of effectiveness constitutes an obvious "critical date," but in many other situations, the identity of the critical date is unclear. *Uti possidetis juris* has no such ambiguity. As Shaw writes, it is "obvious that the moment of independence is the 'critical date."[60]

Generally, the date of independence is easy to identify. For instance, in the case of the border dispute between Eritrea and Ethiopia, the date of independence was plainly April 27, 1993—the date upon which Eritrea joined the United Nations, following the results of an independence referendum.[61] The independence referendum was the last of all the necessary steps for Eritrean independence. This is because Eritrea had already won functional possession of all of its territory in a long civil war, had maintained an independent government since 1991, and had secured Ethiopia's agreement to abide by the results of the referendum.[62]

Controversially, however, some have suggested earlier dates for independence. The Badinter Commission posited that the boundaries of the states that emerged out of the Federal Republic of Yugoslavia had their borders set by *uti possidetis juris* from the time when Yugoslavia dissolved, even though the component states had not yet fully established their independence.[63] Shaw suggests a potential date that may better mark "independence" for purposes of *uti possidetis juris*: the date of the last exercise of administrative jurisdiction by the former sovereign.[64] This alternative date appears to have been the one used by the Badinter Commission. Additionally, Shaw notes, there may be instances where several states achieve independence at roughly the same time; in such a case, the establishment of the border of one of the states may be the relevant date for establishing the border of another state.[65] Consider, for instance, the case of Czechoslovakia, which split into the states of Slovakia and the Czech Republic. If, hypothetically, the Czech Republic had achieved independence six months before Slovakia, then the critical date of the Slovak-Czech border would be the date of Czech independence, rather than the date of Slovak independence.

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59. *Id.* at xxii.
60. *Id.*
61. *Id.*
62. *See* Decision Regarding Delimitation of the Border between the State of Eritrea and the Federal Democratic Republic of Ethiopia, Eritrea–Ethiopia Boundary Commission, 12 ¶ 2.11 (Apr. 13, 2002).
63. Pellett, *supra* note 50, at 185.
64. Shaw, *supra* note 58, at xxii.
65. *Id.*

The subject of the "photograph" is far easier to identify. Where a single state emerges from a given territory, the application of *uti possidetis juris* is easy. As the International Court of Justice noted, one of the main purposes of using *uti possidetis juris* is to avoid a situation in which there is terra nullius, i.e., territory without a sovereign.[66] That means that *uti possidetis juris* requires that the entire territory become the sovereign territory of the newly independent state. A more difficult question is posed when several states become independent at the same time from a single territory, or when a state becomes independent in a part of territory without the rest becoming terra nullius (such as when the new state secedes from an existing colony, while the colonial power continues to retain sovereignty over the remaining territory). In such a case the application of *uti possidetis juris* can be more difficult. It is important to note that, as the International Court of Justice emphasized in the Benin/Niger case, for purposes of *uti possidetis juris*, what matters in a given territory is the governmental unit that exercised actual administrative control prior to independence.[67]

II. *UTI POSSIDETIS JURIS* AND MANDATORY BORDERS

Applying the doctrine of *uti possidetis juris* to new states created from League of Nations Mandate territories requires understanding the nature of Mandates. Mandates were a short-lived form of foreign rule of territory invented in the wake of World War I. They were created in order to dispose of the colonial and imperial possessions of the defeated German and Ottoman Empires.

The Mandate system implemented what was then a new principle in international affairs—the self-determination of peoples.[68] At the same time, the European powers were not yet completely ready to surrender their traditional domination of international affairs,[69] or the perceived benefits that accompanied colonialism. The resulting compromise was a new form of quasi-colonial rule, defined by Article 22 of the Covenant of the new League of Nations. Borrowing from the domestic laws of trust and of guardianship, the Covenant described Mandates as a "sacred trust of civilization," and it committed the right to control the territories to the Mandatory powers (Britain and France, in most cases), subject to the supervision of the League of Nations. The Covenant did not describe the locus of sovereignty during the Mandatory period, and it did not fully describe the relationship between the new legal form and older and more familiar ones, leading to some confusion among legal scholars.[70]

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66. *In re* Land, Island and Maritime Frontier Dispute (El Sal./Hond., Nicar. intervening), Judgment, 1992 I.C.J. 351, 386–87 (Sept. 11).

67. *In re* Frontier Dispute (Benin/Niger), Judgment, 2005 I.C.J. 90 (July 12).

68. *See* CAMPBELL L. UPTHEGROVE, EMPIRE BY MANDATE: A HISTORY OF THE RELATIONS OF GREAT BRITAIN WITH THE PERMANENT MANDATES COMMISSION OF THE LEAGUE OF NATIONS 12 (1954).

69. *See* LASSA OPPENHEIM, INTERNATIONAL LAW: A TREATISE 36–37 (3d ed. 1920–21).

70. *See* QUINCY WRIGHT, MANDATES UNDER THE LEAGUE OF NATIONS 70 (1930).

Fourteen non-self-governing territories were placed under the Mandatory system: three from the Ottoman Empire, and the others from Germany. The Mandates that emerged from the Ottoman Empire were Syria and the Lebanon, Mesopotamia, and Palestine. The Mandates that emerged from Germany were British Cameroons, British Togoland, French Cameroons, French Togoland, Nauru, Ruanda-Urundi, South Pacific Mandate, South-West Africa, Tanganyika, the Territory of New Guinea, and Western Samoa.[71] All of the territories were governed by a trustee state (called a Mandatory), subject to the supervision of the League of Nations and under a regime defined by a League of Nations charter (called a Mandate). The powers of the Mandatory differed by type of Mandate; in some cases, the Mandatory was entitled to govern the territory in a manner indistinguishable from a traditional colony, while in others, the powers of the Mandatory were more circumscribed and the territory close to a protectorate state. The Mandates were classified as A-, B-, or C-type Mandates, depending on the degree of authority of the Mandatory (greatest in the case of type C, lowest for type A).[72]

Mandates were eventually eased out of the international system. Some of the Mandates became independent states before World War II. After World War II and the dissolution of the League of Nations, most of the remaining Mandates were transformed into United Nations trust territories, and the others were eventually dissolved. The sole controversial exception was South-West Africa, which South Africa initially attempted to annex, but which eventually became the independent state of Namibia.[73]

In the context of Mandates, one of the perennial problems in applying *uti possidetis juris* is the history of instability of pre-independence administrative lines. In some cases, the Mandates were granted without clear borders ever having been determined. As we will see,[74] the borders of Mandatory Palestine generated intense interest during the Mandatory period. The boundaries were set only after several years, and border demarcation was followed by numerous suggestions to redraw the Mandatory borders. In addition, the Palestine Mandate was divided in two. But the Palestine Mandate was not unique in the degree or nature of controversy it generated regarding boundaries. This is not surprising, in that—as with all Mandates—the border-drawing process involved myriad geographic questions and trade-offs in great-power politics, as well as incompatible promises to various ethnic groups.[75]

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71. *Mandate*, ENCYCLOPÆDIA BRITANNICA ONLINE, http://www.britannica.com/topic/mandate-League-of-Nations. (last visited July 21, 2016).

72. For a history and explanation of Mandates in international law, see generally H. DUNCAN HALL, MANDATES DEPENDENCIES AND TRUSTEESHIP 44–52 (1948); UPTHEGROVE, *supra* note 68, at 17–18; WRIGHT, *supra* note 70, at 43–48.

73. *See* MICHAEL DENNIS CALLAHAN, A SACRED TRUST: THE LEAGUE OF NATIONS AND AFRICA, 1929–1946, at 42–43 (2004).

74. *Infra* Part III.

75. *See* UPTHEGROVE, *supra* note 68, at 70–71.

In numerous situations, Mandatory borders created controversies regarding territorial sovereignty with neighboring nations, ethnic self-determination, coherence and independence, and resource allocation. These controversies, which often involved considerable equities on both sides, resulted in proposals for cession, partition, and joinder of Mandatory territories that were entertained by the Mandatories, the League, and various commissions of inquiry during the Mandatory period. In most cases, the original Mandatory borders did not change as a result of these controversies.

Notably, even in the most heated of these disputes, the Mandatory borders as they existed at the moment of independence have been universally regarded as the final, settled borders of the successor nations. Such now-arcane matters as the Mosul Question (1920s),[76] the Alexandretta controversy (1930s),[77] and the Ewe Question (1950s)[78] once preoccupied the League and then its successor United Nations Trusteeship Council. These matters centered on the validity of Mandatory boundaries for successor states. Yet once the Mandatory regime expired, the borders as they stood at the moment of independence have universally been taken as givens, and the prior controversies relegated to historical curiosities. This remains the case even when neighboring states or internal ethnic groups continued to dispute the Mandatory dispensation after independence.

A. The Mandate of Mesopotamia

The British Mandate for Mesopotamia was a "Class A" Mandate, and it was the first Mandate to receive independence. The Mandate experienced almost immediate upheaval. After the proposed award of the Mandate, and prior to its approval by the League of Nations, the British faced unrest throughout the country, and they eventually redubbed the territory the Kingdom of Iraq.[79] The Mandate generated two major border disputes that attracted international attention: one in the north, and one in the south. The northern dispute concerned sovereignty over the oil-rich Mosul region, with competing territorial claims by neighboring nations, as well as self-determination claims by the Kurds, a nonstate group.[80] The southern dispute concerned the border with the Gulf States, which focused on strategic and economic viability concerns.[81] At various times, these disputes each resulted in both open hostilities and appeals to international organs. And the end result was the same—the confirmation of the borders as eventually established by the Mandatory.

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76. *See infra* Section II.A.1.

77. *See infra* Section II.B.2.

78. *See infra* Section II.C.

79. THE ROUTLEDGE HANDBOOK OF THE HISTORY OF THE MIDDLE EAST MANDATES 5 (Cyrus Schayegh & Andrew Arsan, eds.) (2015).

80. PETER SLUGLETT, BRITAIN IN IRAQ: CONTRIVING KING AND COUNTRY 65–93 (2007); H.I. Loyd, *The Geography of the Mosul Boundary*, 68 GEOGRAPHIC J. 104, 104–05, 113 (1926).

81. *See* SLUGLETT, *supra* note 80, at 65–93.

1. The Mosul Question

Sovereignty over the Mosul Vilayet, an oil-rich area in northern Iraq, was one of the most serious controversies about Mandatory borders.[82] The "Mosul Question" led to significant tension and occasional border skirmishes between Turkey, which claimed the area, and Britain, the Mandatory power.

The Mesopotamian Mandate was first agreed upon among the Allied Powers in the San Remo conference in Italy,[83] and then between the Allied Powers and Turkey (formerly the Ottoman Empire) in the ill-fated Treaty of Sèvres in 1920.[84] Turkey failed to ratify the treaty,[85] and it would take until 1923 for the Allied Powers and Turkey to agree on a replacement peace treaty—the Treaty of Lausanne.[86] In the meantime, the British moved forward to create the governing structure of a Mandate without Turkish agreement. In 1920, the British unilaterally began implementing the draft Mandate for "Mesopotamia including Mosul"[87] it had submitted to the League of Nations for approval. The Anglo-Iraqi Treaty of Alliance of 1922,[88] reached two years later, ratified most of the draft terms of the Mandate, and in 1924, the League finally retroactively approved the Mandate, and the Anglo-Iraqi Treaty as an implementation thereof.[89]

The question of the Iraqi-Turkish frontier was reopened during negotiations in Lausanne in November 1922.[90] The British agreed that a peace treaty with Turkey would need to determine the "southern frontier of the Turkish

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82. *See generally* Nevin Coşar & Sevtap Demirci, *The Mosul Question and the Turkish Republic: Before and after the Frontier Treaty, 1926*, 42 MIDDLE EASTERN STUD. 123, 126–27 (2006); Quincy Wright, *The Mosul Dispute*, 20 AM. J. INT'L L. 453, 453–64 (1926).

83. San Remo Resolution, Fr.-Ger. Gr. Brit.-It.-Japan, § (b), Apr. 25, 1920, http://www.cfr.org/israel/san-remo-resolution/p15248.

84. Treaty of Peace Between the British Empire and Allied Powers, Croat–Fr.–Greece–Ger.–Gr. Brit.–It.–Japan–Rom.–Serb–Slovene State–Turk., Aug. 10, 1920, 113 Brit. & Foreign St. Papers 652 [hereinafter Treaty of Sèvres].

85. HANS-LUKAS KIESER, TURKEY BEYOND NATIONALISM: TOWARDS POST-NATIONALIST IDENTITIES 58 (2006).

86. Treaty of Peace, Fr.– Greece–Gr. Brit.– It.–Japan–Rom.–Serb-Croat-Slovene State–Turk., July 24, 1923, 28 L.N.T.S. 11 [hereinafter Treaty of Lausanne].

87. Draft Mandates for Mesopotamia and Palestine: As Submitted for the Approval of the League of Nations, Dec. 1, 1920, http://www.archive.org/stream/draftmandatesfor00leagrich/draftmandatesfor00leagrich_djvu.txt.

88. Treaty of Alliance Between Great Britain and Irak, Gr. Brit.–Irak, Oct. 10, 1922, 35 L.N.T.S. 13, http://www.galeuk.com/iraq/pdfs/Treaty%20of%20alliance%20btw%20GB%20&%20Iraq%2010%20Oct%201922%20CO%20730%20167%201.pdf.

89. *See Request of the Kingdom of Iraq for Admission to the League of Nations: Memorandum from the Iraqi Government*, League of Nations Doc. A.171932.VII, §1 ¶ 2 (1932), http://www.ringnebula.com/Oil/Iraq_1932_LeagueofNations.htm.

90. For a history of the convoluted diplomatic chain of events, see generally DAVID FROMKIN, A PEACE TO END ALL PEACE: CREATING THE MODERN MIDDLE EAST, 1914–1922, at 559–60 (1989).

dominions in Asia."[91] Nonetheless, negotiations went poorly, with Turkey firmly insisting on its title to the region. In the 1923 Treaty of Lausanne, the parties agreed to negotiate the frontier for another year and then to submit the matter to the League Council.[92] The Council, for its part, appointed an investigative commission to examine the matter.[93] After obtaining an opinion from the Permanent International Court of Justice to confirm the Council's power to make a "definitive determination of the frontier,"[94] the Council accepted the commission's report, which fixed the border at the status quo line of control, thus giving Mosul to the Mandate of Iraq (as Mesopotamia was then called).[95]

The region was predominantly Kurdish, and the wishes of the local population were nominally considered by the commission of inquiry, though only through loose consultations with representatives of various ethnic groups.[96] These discussions were weighted by the presumed population share of that ethnic group, with the assumption that all ethnic groups had homogenous preferences. (Turkish suggestions to hold a plebiscite were repeatedly rejected.)[97] The only options posed to the Kurds were Turkish sovereignty or a British-administered Mandate. A separate Kurdish state was not considered, though the British had entertained the possibility of one in the years immediately after the war.[98]

After Iraqi independence in 1932, the border decisions of the League were treated as conclusively settling both Turkish claims to territorial sovereignty as well as any potential Kurdish claims to territory for the exercise of self-determination. Despite the extreme discord over Mosul—which included sporadic British hostilities with both Kurds and Turks during the period when the frontiers were being negotiated—the League's determination is considered to have conclusively settled the matter. The Mandatory borders have become the modern borders of Iraq and Turkey, to the disappointment of the area's Kurdish majority.

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91. Article 3, Paragraph 2, of the Treaty of Lausanne, Advisory Opinion, 1925 I.C.J. (ser. B) No. 12, at 10 (Nov. 21).

92. *Id*. at 13.

93. *See* FROMKIN, *supra* note 90.

94. Article 3, Paragraph 2, of the Treaty of Lausanne, *supra* note 91, at 33.

95. Question of the Frontier Between Turkey and Iraq: Report Submitted to the Council of the League of Nations by the Commission Instituted by the Council Resolution, League of Nations, September 30th, 1924; *see also* Wright, *supra* note 82, at 453.

96. Fuat Dunbar, "STATISQUO": BRITISH USE OF STATISTICS IN THE IRAQI KURDISH QUESTION (1919–1932) 23 (2012), http://www.brandeis.edu/crown/publications/cp/CP7.pdf.

97. 1 ANTHONY D'AMATO, INTERNATIONAL LAW AND POLITICAL REALITY COLLECTED PAPERS 346 (1995).

98. *See* ZEYNEP ARIKANL, BRITISH LEGACY AND EVOLUTION OF KURDISH NATIONALISM IN IRAQ (1918–1926): WHAT SIGNIFICANCE THE 'MOSUL QUESTION'? 9–17 (Centro Argentino de Estudios Internacionales, Working Paper No. 16), http://www.caei.com.ar/sites/default/files/16_1.pdf. The Treaty of Sèvres provided that in the event Turkey created an independent state of Kurdistan and renounced sovereignty, "no objection will be raised by the Principal Allied Powers to the voluntary adhesion to such an independent Kurdish State of the Kurds inhabiting that part of Kurdistan which has hitherto been included in the Mosul Vilayet." Treaty of Sèvres, *supra* note 84, at art. 64.

Today, significant ongoing Kurdish demands for independence in Iraq (and Syria)—sounding in self-determination—have failed to overcome the *uti possidetis juris* presumption of the Mandatory borders.[99] Indeed, numerous autonomous governments in the area that have subsequently arisen, such as the present-day Kurdish Regional Government, have failed to win recognition as states because of the legal inertial force of the Mandatory border.

2. Iraqi-Kuwaiti Border

Upon the establishment of the Iraqi Mandate in May 1920, the southern border of the Mandate was no more defined than the northern border. Indeed, all of Iraq's borders were undefined,[100] including the boundary between southern Mesopotamia and the countries and protectorates in the Arabian Peninsula. At the time, borders within the Arabian Peninsula were also in flux. The Saudis were rapidly consolidating their power, and creating what would eventually become known as Saudi Arabia. In May 1922, in the Treaty of Mohammara,[101] and then in more detail in December 1922, in the Uqaair Protocol,[102] the British defined a border between Iraq and the Najd (later Saudi Arabia). The Uqaair Protocol also addressed the border with Kuwait, which was then a British protectorate.[103] The boundary delimitation was the first ever in the Arabian Desert. The boundary between Iraq and Kuwait was entirely artificial, and intended to serve the needs of British policy.[104] It was resented by the Kuwaitis, as it greatly reduced the size of the emirate.[105]

Upon the end of the Mandate in 1932, the newly independent state of Iraq opposed British proposals to demarcate the border with Kuwait more precisely. Iraq thought the Mandatory border gave it far too little access to the sea and

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99. *See generally* LIONEL BEEHNER, "THE IRAQI KURDISH QUESTION" (Council Foreign Rel. 2007), http://www.cfr.org/turkey/iraqi-kurdish-question/p13136.

100. STEPHEN MANSFIELD, THE MIRACLE OF THE KURDS: A REMARKABLE STORY OF HOPE REBORN IN NORTHERN IRAQ 74–76 (2014). The borders between Iraq and Syria were also undefined, and ultimately were created by a series of treaties between Britain and France. *Franco-British Convention on Certain Points Connected with the Mandates for Syria and the Lebanon, Palestine and Mesopotamia*, 16 AM. J. OF INT'L L. (SUPPLEMENT) 122, 122–26 (1922); *see also* 1 LAWRENCE MARTIN AND JOHN REED, THE TREATIES OF PEACE, 1919–1923 (2006).

101. *See* U.S. DEP'T ST., INTERNATIONAL BOUNDARY STUDY NO. 111 IRAQ-SAUDI ARABIA BOUNDARY 10 (1971) [hereinafter Iraq-Saudi Arabia Boundary Study].

102. Agreement Concerning the Boundary Between Nejd and Kuwait, Kuwait–Nejd, Dec. 2, 1922, 1750 U.N.T.S. 531, 533, https://treaties.un.org/pages/showDetails.aspx?objid=08000002800b3b06. The northern part of Kuwait's border with Iraq follows the Anglo-Turkish Agreement of July 29, 1913.

103. The border was established through a Protocol to the Treaty of Muhammarah of 1922. *See supra* note 102, at 533; Iraq-Saudi Arabia Boundary Study, *supra* note 101, at 10.

104. Iraq-Saudi Arabia Boundary Study, *supra* note 101, at 13.

105. *See* H.R.P. DICKSON, KUWAIT AND HER NEIGHBOURS (1956) ("At the Uqair Conference . . . Sir Percy drew border of Iraq and Gulf States, giving territory claimed by Saudis to Iraq, and clamed by Kuwait to Saudis, and creating two neutral zones.").

unjustly assigned two strategic Gulf islands to Kuwait.[106] Thereafter, successive Iraqi governments refused to recognize the British-drawn border. At a minimum, they claimed the two islands. More broadly, they argued that Kuwait was an integral part of Iraq, unjustly detached by the British.[107] When Kuwait became independent in 1961, Iraq mobilized troops and threatened to annex the new country, a move forestalled by the deployment of British troops.[108] In 1990, Iraq did invade Kuwait, and claimed to acquire sovereignty over the "nineteenth province."[109]

The Iraqi position never generated any international support. The 1990 Iraqi capture of Kuwait was forcibly reversed in 1991.[110] In the aftermath of the 1991 Gulf War, the U.N. Security Council created a border demarcation commission that established the Iraqi-Kuwaiti border along the Mandatory lines.[111]

The Mandatory border with Saudi Arabia also created an unusual and anomalous feature: a diamond-shaped "neutral zone" between the countries.[112] This feature of the Mandatory borders persisted into independence, until it was eliminated through an agreed-upon partition between the two countries.[113]

B. The Mandate of Syria

The French Mandate for Syria and the Lebanon was subject to a series of violent and protracted disputes over borders. During the Mandate, France at various times partitioned, ceded, and reapportioned parts of the mandated territory. The borders it established were all contested on territorial-sovereignty and ethnic-self-determination grounds. Some of the border actions by the Mandatory were manifestly illegal at the time they were taken. Nonetheless, the borders of both Lebanon and Syria followed the territorial arrangement at the end of their respective Mandates.

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106. E. LAUTERPACHT ET AL., THE KUWAIT CRISIS: BASIC DOCUMENTS 80 (1990). Kuwait enjoyed 310 miles of coastline, and Iraq, only 36. *See* Bishara A. Bahbah, *The Crisis in the Gulf—Why Iran invaded Kuwait*, *in* BEYOND THE STORM: A GULF CRISIS READER 50–51 (Phyllis Bennis & Michael Moushabeck eds., 1991).

107. *Id.*

108. Iraq complained to the Security Council that Kuwait was "part of its territory." U.N. SCOR, 16th Sess., 960th mtg. at 2, U.N. Doc. S/PV.960 (July 7, 1961), http://www.un.org/en/ga/search/view_doc.asp?symbol=S/PV.960.

109. See EYAL BENVENISTI, THE LAW OF OCCUPATION 150 (2004).

110. *See generally* RICHARD LOWRY, THE GULF WAR CHRONICLES: A MILITARY HISTORY OF THE FIRST WAR WITH IRAQ (2008).

111. *See* S.C. Res. 773, ¶¶ 2–4 (Aug. 26, 1992); U.N. Secretary-General, Letter dated May 21, 1993 from the Secretary-General to the President of the Security Council, app. at ¶¶ 27–40, U.N. Doc S/25811 (May 21, 1993).

112. *See* PHEBE MARR, THE MODERN HISTORY OF IRAQ 2 (1985).

113. *See Saudis and Iraq Sign Pact Ending Border Dispute*, N.Y. TIMES (Dec. 28 1981), http://www.nytimes.com/1981/12/28/world/saudis-and-iraq-sign-pact-ending-border-dispute.html.

1. Lebanon

At the San Remo Conference in 1920, the Allied Powers agreed to bestow upon France the "Mandate for Syria."[114] The Mandate was also included in the ill-fated Treaty of Sèvres in 1920.[115] Because Turkey failed to ratify the Treaty of Sèvres, France unilaterally began implementation of what was then called the Mandate for Syria and the Lebanon in 1920, before later receiving League approval in 1922.[116]

As its name suggests, the Mandate was actually comprised of several distinct territories, though their boundaries were not defined by the Mandate. France eventually divided the Mandate into six states. On September 1, 1920, General Gouraud proclaimed the establishment of the "State of Greater Lebanon."[117] (The "State of Damascus" was established two days later.)[118] In 1926, the French established the Lebanese Republic, transforming Greater Lebanon into a state with a constitution and democratically elected government.[119] In 1943, the Free French government held elections and ended the Mandate in November, with Lebanon becoming an independent state. Syria would become independent on April 17, 1946, at the end of the war.[120]

Geographically, Lebanon was based on the Mutasarrifia of Mount Lebanon, an autonomous Maronite Christian area that had been detached from Syria in 1861 under European pressure. However, in 1920, France also seized predominantly Muslim regions of Syria (formerly the Ottoman vilayet of Damascus), including the port of Tripoli and the Bekka hinterland, and annexed them to the new Lebanon.[121] The creation of the larger Lebanese state was widely seen as a move to strengthen France's Christian allies and punish Syria for its 1920 rebellion against French rule.[122]

The borders established and reestablished by the Mandatory were strongly opposed by Arab nationalist supporters of a "Greater Syria." They also received a hostile reception from the Muslim population of the reassigned areas, as the move effectively put them under Christian rule.[123] In addition to raising historic

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114. San Remo Resolution, *supra* note 83, at § (c).

115. Treaty of Sèvres, *supra* note 84, at art. 94 § 7.

116. *French Mandate for Syria and Lebanon*, 17 AM. J. INT'L L. (SUPPLEMENT) 177, 177–82 (1923); *see generally* PHILIP SHUKRY KHOURY, SYRIA AND THE FRENCH MANDATE: THE POLITICS OF ARAB NATIONALISM, 1920-1945, at 77–82 (2014).

117. *See* KAIS FIRRO, INVENTING LEBANON: NATIONALISM AND THE STATE UNDER THE MANDATE 15–30 (2003).

118. *See* EMMA JORUM, BEYOND SYRIA'S BORDERS: A HISTORY OF TERRITORIAL DISPUTES IN THE MIDDLE EAST 19 (2014).

119. *See* LEBANESE CONSTITUTION, May 23, 1926. The Lebanese Constitution, promulgated in 1926, is still in force (with amendments) today.

120. *See* FIRRO, *supra* note 117, at 21.

121. *See* JORUM, *supra* note 118, at 53; FIRRO, *supra* note 117, at 79.

122. *See* FIRRO, *supra* note 117, at 84

123. MEIR ZAMIR, LEBANON'S QUEST FOR NATIONAL IDENTITY 1926–1939 5 (2d ed. 2000).

and ethnic claims, Syrians pointed out that the annexation of Syrian areas to Lebanon put Damascus within easy reach of the Lebanese border and gave Beirut control of vital rail and shipping routes.[124] Throughout the 1920s, Syrian leaders continued to demand the return of the detached regions, or at least the port of Tripoli.[125]

Arab nationalists regarded Lebanon as an "artificial creation" that destroyed the territorial integrity of Syria.[126] These claims were pressed during the 1926 Syrian revolt, which led the French to suggest revising the 1920 division by "surrendering" Tripoli back to Syria.[127] Tripolitan Sunnis petitioned the League of Nations, arguing that they had been incorporated into the Lebanese state "without their agreement or consent."[128] The Syrians also continued to argue that Syrian territory could not be prescribed by the Mandatory and that the doctrine of national self-determination further undermined the legitimacy of the Lebanese annexation.[129] However, the plan to "surrender" Tripoli was not implemented. Since the termination of the Mandate and the independence of Lebanon, the country has been regarded as having the borders as modified by the French annexation of the four Syrian districts.[130]

2. Alexandretta/Hatay

During its administration of Syria, France created a number of administrative units. The Sanjak of Alexandretta was an autonomous subunit of Aleppo. The Sanjak consisted of 1800 square miles of land on the Mediterranean coast of Syria, bordered on the west by the Gulf of Iskendrun and Turkey to the north, and including the cities of Antioch and Alexandretta. The area has a highly heterogeneous population, composed of Turks, Sunni Arabs, Alawites, Armenians, and many other groups.[131]

France, the Mandatory for Syria and the Lebanon, concluded a separate peace agreement with Turkey in 1921, which guaranteed a special regime for Alexandretta with rights for the Turkish population.[132] Pursuant to this, Turkey renounced all claims to the territory and France guaranteed linguistic and other minority rights to the Turkish population in the territories under its control.[133]

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124. *Id*.

125. *See id*. at 7–17.

126. *See* JORUM, *supra* note 118, at 54–57.

127. *See generally* MICHAEL PROVENCE, THE GREAT SYRIAN REVOLT AND THE RISE OF ARAB NATIONALISM (2009).

128. DANIEL PIPES, GREATER SYRIA: THE HISTORY OF AN AMBITION 63 (1992).

129. *See generally* JORUM, *supra* note 118.

130. *See* S. C. Res. 1559, ¶ 1 (Sep. 2, 2004).

131. *See generally* YÜCEL GÜÇLÜ, THE QUESTION OF THE SANJAK OF ALEXANDRETTA (2001).

132. Treaty of Ankara, Fr.–Turk., art. 7–8, Oct. 20, 1921, 54 L.N.T.S. 178–93.

133. *See generally* Robert B. Satloff, *Prelude to Conflict: Communal Interdependence in the Sanjak of Alexandretta 1920-1936*, 22 MIDDLE E. STUD. 147 (1986).

These arrangements were affirmed in the next few years in the Treaty of Lausanne, as well as other agreements.[134]

Thus, Hatay was a part of Syria, and Turkey had renounced any sovereignty claims there.[135] In 1936, France announced it would give Syria—including Alexandretta—independence in a few years. This led Turkey to doubt the continued validity of the minority protections it had secured for Alexandretta, and, consequently, led a reenergized Turkish Republic to reopen claims to the area. Istanbul's legal grounds for title were quite obscure, and relied mostly on the special administrative arrangements for Alexandretta that France had guaranteed. The next several years were marked by riots and sectarian violence, apparently instigated, at least in part, by Kemalist forces. While Turks were a plurality of the population in the territory, they constituted perhaps only 39% of the population.[136] Ankara appealed to the League's Mandates Commission, which responded on May 29, 1937, by requiring even greater autonomy for the territory, with a separate legislature for internal matters, but nonetheless keeping it under Syrian sovereignty and external control.[137]

Turkey continued to press for control over the territory, and eventually France was willing to comply, apparently seeking to secure Ankara as an ally against German expansion.[138] Between 1937 and 1938, France agreed to at least four different "solutions" to the Alexandretta issue "in an attempt to appease escalating Kemalist claims."[139] In 1938, Paris ignored the results of the local assembly elections that opposed Turkish control, while allowing Ankara to send troops to police the area. Growing concern about Germany led to an ever more accommodating French policy. The transfer of Alexandretta to Turkey was completed with a formal cession by France on June 23, 1939, without any approval

134. *See generally* OFF. REPS. & ESTIMATES, U.S. CENT. INTELLIGENCE AGENCY, THE HATAY QUESTION 15 (1947) [hereinafter CIA, HATAY QUESTION], http://www.foia.cia.gov/sites/default/files/document_conversions/89801/DOC_0000256977.pdf. A final demarcation of the Turkish-Syrian border by a commission took place in 1926. *See* Majid Khadduri, *The Alexandretta Dispute*, 39 AM. J. INT'L L. 406, 408 (1946).

135. *See* Elizabeth Picard, *Retour au Sandjak*, *in* MAGHREB-MACHREK 49 (1983); *see also* Avedis K. Sanjian, *The Sanjak of Alexandretta (Hatay): Its Impact on Turkish-Syrian Relations (1939-1956)*,10 MIDDLE E. J. 379, 383 (1956) (noting Turkey had ceded sovereignty claims in Alexandretta in favor of Syria, not France).

136. *See* Satloff, *supra* note 133, at 154.

137. *See generally Collection of Texts Concerning the Sanjak of Alexandretta*, League of Nations Doc. C.282.M.183 (1937).

138. *See* Sanjian, *supra* note 135, at 381.

139. *See* Satloff, *supra* note 133, at 175. These arrangements ranged from ever greater degrees of autonomy to a Franko-Turkish condominium.

by the League.[140] The territory was incorporated into Turkey as the vilayet of Hatay,[141] and most of its non-Turkish inhabitants fled in the following years.

The transfer of Alexendretta to Turkey clearly violated the League's Mandate, which provided in Article 4 that "the Mandatory shall be responsible for seeing that no party of the territory of Syria and the Lebanon is ceded or leased or in any way placed under the control of a foreign power," as well as the 1937 League decision about the status of the territory.[142] The legality of the French action was criticized in a June 1938 meeting of the League Mandates Commission, but the coming of World War II prevented the League from convening and taking any action.[143]

The Syrian Mandate was terminated and Syria emerged as an independent state on April 17, 1946.[144] Syria did not recognize the cession of Hatay, and upon independence planned to pursue the issue at the International Court of Justice or the Security Council.[145] However, chronic Syrian instability and a series of coups in the first decade of independence prevented any vigorous response from Damascus.[146] Syria never recognized Turkish sovereignty over the area, and it continues to be a major obstacle to relations between the two countries in recent times.[147] Syria's position is that the French cession was illegal and that Turkey is an occupying power. Nonetheless, it appears that the entire international community recognizes Hatay as being under Turkish sovereignty, and has since 1939.[148]

The Alexandretta/Hatay episode is quite significant for understanding the application of *uti possidetis juris* to Mandates. The territory was severed from Syria in gross contravention of the Mandate and the directives of the League, and in serious tension with expressions of local democracy and self-determination. Yet Turkish sovereignty is entirely undisputed by the international community, and there is no evidence of protest since 1939.

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140. J.C. HUREWITZ, THE MIDDLE EAST AND NORTH AFRICA IN WORLD POLITICS: A DOCUMENTARY RECORD-BRITISH-FRENCH SUPREMACY, 1914–1945, at 545 (J.C. Hurewitz ed., 1979).

141. D.H. Miller, *My Diary at the Conference of Paris* (1919), *reprinted in* THE MIDDLE EAST AND NORTH AFRICA IN WORLD POLITICS 175 (J.C. Hurewitz ed., 1979); *see generally* CIA, HATAY QUESTION, *supra* note 134.

142. Khadduri, *supra* note 134 at 424; *see also* Sanjian, *supra* note 135, at 381–82.

143. *See* Khadduri, *supra* note 134 at 425; CIA, HATAY QUESTION, *supra* note 134.

144. SAMI M. MOUBAYED, DAMASCUS BETWEEN DEMOCRACY AND DICTATORSHIP xxii (2000).

145. Sanjian, *supra* note 135, at 382–83.

146. *See* KARL D. ROUEN, DEFENSE AND SECURITY: A COMPENDIUM OF NATIONAL ARMED FORCES AND SECURITY POLICY 793 (2005).

147. Emma Lundgren Jorum, *Syria's Lost Province: The Hatay Question Returns*, THE CARNEGIE ENDOWMENT FOR INT'L PEACE (Jan. 28, 2014), http://carnegieendowment.org/syriaincrisis/?fa=54340.

148. *See id.*

The apparent paradox of international equanimity in the face of rampant illegality can be easily understood once one considers the principle of *uti possidetis juris*. While legally flawed, the transfer of Alexandretta to Turkey was consummated while the Mandate was still in effect. When Syria became independent, Alexandretta was no longer included in the Mandatory borders, and the prior sovereign (the French Mandatory) no longer considered Alexandretta to be within the boundaries of the Syrian Mandate. While the transfer may have been illegitimate and was opposed by Syrian officials, it did change the Mandatory boundaries as administered by the French. And *uti possidetis juris* applies to administrative borders as they existed at the moment of independence; Syria came into being without Hatay. Thus while France's action may have violated its international obligations, this does not weaken Turkish sovereignty or establish a territorial claim for the independent Syrian republic. It is also important to note that the various French partitions and cessions of Syrian territory themselves proceeded along the lines of preexisting administrative units.

C. Togoland

Togoland had been a German protectorate on the coast of West Africa since 1884. The Germans were ousted by a joint Anglo-French operation in 1914. The territory was provisionally divided into British and French administrative zones. The 1919 Milner-Simon agreement between Britain and France established the boundaries, with only slight regard to ethnic considerations.[149] This partition became the Mandatory borderline when the League confirmed Mandates for British and French Togolands in 1922,[150] covering respectively about two-thirds and one-third of Togoland's territory.

British and French Togolands, like all the former German African territories, were designated as "Class B" Mandates.[151] The borders of the "Class B" Mandates were often drawn largely for the convenience of the Mandatory power, as part of deals and global horse-trading among European states,[152] rather than based on self-determination, or other interests, of the local people. Thus, Mandatory lines both split single ethnic groups and conjoined disparate ones.[153] Indeed, Lloyd George noted that under the League plan, "the country was cut into

149. *See generally* PAUL NUGENT, SMUGGLERS, SECESSIONISTS AND LOYAL CITIZENS ON THE GHANA-TOGO FRONTIER: THE LIFE OF THE BORDERLANDS SINCE 1914 (2002).

150. France had hoped to keep the German West African territories out of the Mandates system. *See* WILLIAM ROGER LOUIS, ENDS OF BRITISH IMPERIALISM: THE SCRAMBLE FOR EMPIRE, SUEZ, AND DECOLONIZATION 281 (2006).

151. JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 742 (2d ed. 2006).

152. *See* LOUIS, *supra* note 150, at 281 (describing British and French cross-Mandate trading of territory).

153. *See* Brian Digre, *French Colonial Expansion at the Paris Peace Conference: The Partition of Togo and Cameroon,* 13/14 PROC. MTG. FRENCH COLONIAL HIST. SOC. 219, 221 (1990).

Mandate (following the partition between western and Transjordanian Palestine), the district government boundaries played, at best, a minor role.

D. Proposals for Altering Palestine's Boundaries

The Palestine Mandate was controversial from its very onset. Other Mandates honored, in their own fashion, the rights of self-determination of local populations. The Palestine Mandate, by contrast, elevated the rights of self-determination of a local minority population that was expected to be joined by substantial immigration. Unsurprisingly, this led to clashes between the minority Jewish and the majority Arab populations. With some notable exceptions, Arab efforts were aimed from the start at foiling the emergence of a Jewish polity of any kind—both by blocking immigration of Jews and, more generally, by denying expressions of Jewish self-determination.[274] Over time, and after repeated bouts of anti-Jewish violence, some Jewish leaders came to embrace the concept of dividing the Palestine Mandate in order to assuage the conflict, or at least to pass through an interim period when Jewish immigration was insufficient to create a Jewish majority in all of Palestine.[275]

The earliest formal second partition proposal originated in the late 1930s, in the wake of what was known as the "Arab Revolt." In 1936, the British appointed a royal commission of inquiry, headed by Lord Peel to investigate the causes of violence and suggest solutions. Jewish Agency chairman David Ben-Gurion proposed a division of Palestine utilizing subdistrict lines,[276] but the Peel Commission ultimately adopted a different proposal, which encompassed both western Palestine and Transjordan, dividing them along entirely new lines between proposed Jewish and Arab states.[277] The Peel Commission report was initially accepted by the British government, but controversy followed and the report was shelved.[278]

In 1938, a new commission—the Woodhead Commission—was appointed to propose a different partition of Palestine. The Commission heard and rejected a new Jewish Agency proposal for partition,[279] and the Commission Report itself offered two new partition proposals,[280] but none won over a majority of the Commission.[281] Thereafter, the British abandoned the idea of partition. Instead the British favored the geographic unity of (western) Palestine, together with strict limitations on Jewish immigration and legal restrictions on Jewish

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274. SAMI ADWAN ET AL., SIDE BY SIDE: PARALLEL HISTORIES OF ISRAEL-PALESTINE 27–109 (2012).

275. U.N. DEP'T OF PUB. INFO., THE QUESTION OF PALESTINE AND THE UNITED NATIONS, at 9, U.N. Doc. DPI/2499 (2008), https://unispal.un.org/pdfs/DPI2499.pdf.

276. *See* BIGER, *supra* note 271, at 198.

277. *Id*. at 193.

278. *Id*.

279. *Id*. at 206.

280. *See* PALESTINE PARTITION COMMISSION, REPORT 1938 (UK), https://archive.org/stream/WoodheadCommission/Woodhead-abbyy_djvu.txt.

281. BIGER, *supra* note 271, at 206.

property rights in order to prevent the emergence of a Jewish state.[282] This was a clear violation of the terms of the Mandate, but Britain implemented its new policy anyway, beginning in 1939.

After World War II, once the dimensions of the Holocaust had become clear, British opposition to a proposed Jewish state became an increasing source of embarrassment, and partition returned to public deliberations. A new partition map was offered by a British-American committee appointed to consider implementation of a 1946 Anglo-American Commission of Inquiry report. The map, which was known as the Morrison-Grady proposal,[283] won no official approval.[284]

In 1947, the British turned to the newly created United Nations for suggestions on the fate of the Palestine Mandate, and the UN General Assembly appointed a Special Committee on Palestine ("UNSCOP") with representatives from 11 states. UNSCOP adopted a plan for partition that it recommended to the General Assembly.[285] The General Assembly then slightly modified the plan and, in General Assembly resolution 181 of November 1947, recommended it to the Security Council and to Britain.[286] As shown in Figure 3,[287] the plan would have divided (western) Palestine into a patchwork of eight pieces, with three pieces going to a Jewish state, four to an Arab state (three large chunks and a small enclave in Jaffa), and one to continued British trusteeship (greater Jerusalem).[288] The Security Council, however, took no action on the plan and Britain rejected it.[289] A provisional UN authority for Palestine, which was to facilitate implementation of the partition and governance of Jerusalem, was denied entry by Britain, and was ultimately never dispatched.[290]

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282. SEC'Y OF STATE FOR THE COLONIES, BRITISH WHITE PAPER OF 1939, Yale L. Sch.: The Avalon Project, Cmd. 6019 (UK), http://avalon.law.yale.edu/20th_century/brwh1939.asp.

283. ANGLO-AMERICAN COMM. OF INQUIRY, U.S. DEP'T OF STATE, REPORT TO THE UNITED STATES GOVERNMENT AND HIS MAJESTY'S GOVERNMENT, THE UNITED KINGDOM (1946), http://avalon.law.yale.edu/20th_century/angcov.asp.

284. *See* BIGER, *supra* note 271, at 212.

285. ITZHAK GALNOOR, PARTITION OF PALESTINE: THE DECISION CROSSROADS IN THE ZIONIST MOVEMENT 285 (1995).

286. *See* G.A. Res. 181 (II), Future Government of Palestine (Nov. 29, 1947), https://unispal.un.org/DPA/DPR/unispal.nsf/5ba47a5c6cef541b802563e000493b8c/7f0af2bd897689b785256c330061d253?OpenDocument.

287. *United Nations Partition Plan for Palestine*, WIKIPEDIA.ORG, https://en.wikipedia.org/wiki/United_Nations_Partition_Plan_for_Palestine (last visited July 25, 2016).

288. General Assembly II, *supra* note 286; BIGER, *supra* note 271, at 15, 84.

289. *See* BIGER, *supra* note 271, at 15, 84.

290. *See* Stefan Brooks, *British Mandate for Palestine*, *in* THE ENCYCLOPEDIA OF THE ARAB-ISRAELI CONFLICT: A POLITICAL, SOCIAL, AND MILITARY HISTORY 770 (Spencer C. Tucker ed., 2008).

Figure 3

Given the fact that this was the last partition proposal of any note before the dissolution of the Mandate in 1948, as well as the endorsement of the General Assembly, elements of the proposed 1947 partition continued to play a role in both legal and political discussions about Palestine for decades thereafter. However, the Mandatory government never adopted any of the divisions proposed within the 1947 resolution.[291]

While General Assembly Resolution 181 failed to effect any legal change in Palestine, it had profound real-world effects. Arab irregulars launched attacks on the day the plan was adopted by the General Assembly as part of a larger effort to prevent the creation of a Jewish state, and soon all of Palestine was engulfed in war.[292] The Jewish leadership in Palestine had accepted the proposed partition, and in the initial months of the war, fighting concentrated in the areas allotted to a proposed Jewish state by Resolution 181, as well as Jerusalem, with Arab forces attempting to isolate Jewish communities while Jewish forces attempted to keep

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291. There are writings that argue that Resolution 181 actually accomplished a partition of Palestine. *See, e.g.*, Anthony D'Amato, *Israel's Borders Under International Law* (NW U. PUB. L. RES. PAPER No.06-34, 2007), http://anthonydamato.law.northwestern.edu/Adobefiles/israels-borders-under-international-law.pdf. These works appear to be based upon a misapprehension of the facts. *See id.* For instance, D'Amato's work presents the resolution as a ratification of a British proposal for partition that the British simultaneously accepted and implemented. *See id.*

292. *See* MORRIS, *supra* note 14, at ch. 5.

lines of transport open among the communities.[293] The British, who had agreed to withdraw by November 29, 1948, accelerated their departure from Palestine, ultimately exiting on May 15, 1948, while closing down all of the machinery of the Mandate.[294] As the British exited on May 15, all the neighboring Arab states, including Transjordan (which had received independence from Britain in 1946), as well as some Arab states not neighboring Palestine, invaded in order to prevent the emergence of a Jewish state.[295] On the eve of the British withdrawal, on May 14, Jewish authorities declared the independence of the Jewish state in Palestine, called Israel.[296] Local Arab authorities, on the other hand, while rejecting the Jewish state, did not declare or otherwise move to create an Arab state in Palestine.[297] Shortly thereafter, the Arab states that had conquered parts of Palestine imposed a military administration on the areas they had seized.[298] In September, fearing Transjordanian annexation of parts of Mandatory Palestine, Egypt initiated the creation of an Arab government of "all Palestine," which, on October 1, declared an independent Arab state in all of Palestine. While six Arab states recognized the new "government" of Palestine, it never exercised any authority anywhere, and it quietly retired to anonymous offices in Cairo and then dissolution.[299]

The war ended by late 1948, with Israel controlling roughly three-quarters of the territory of the Palestine Mandate. The remaining territory was conquered by Syria, Egypt, and Jordan (the new name of Transjordan). Egypt ruled the conquered parts of Palestine (the Gaza Strip) by military administration, while Transjordan and Syria treated the conquered areas as part of their municipal territories.[300] No other Arab state claimed sovereignty within the area. Syria,[301] Egypt,[302] and Jordan[303] all signed armistice agreements with Israel, marking the lines between the territory controlled by Israel and the lands conquered by the Arab states. However, the armistice agreements were clear in stating that the armistice lines were not boundaries and that the parties retained their claims to territorial sovereignty.

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293. *Id.*

294. *Id.* at 178–79.

295. *Id.* at ch. 5.

296. DECLARATION OF ESTABLISHMENT OF STATE OF ISRAEL (May 14, 1948), http://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/declaration%20of%20establishment%20of%20state%20of%20israel.aspx.

297. MORRIS, *supra* note 14, at 178.

298. *Id.*

299. Avi Shlaim, *The Rise and Fall of the All-Palestine Government in Gaza*, 20 J. PALESTINE STUD. 37, 37–53 (1990).

300. MORRIS, *supra* note 14, at 178.

301. *See* Armistice Agreement between Israel and Syria, Isr.–Syria, July 20, 1949, UN Doc S/1353.

302. General Armistice Agreement between Egypt and Israel, Egypt–Isr., Dec. 13, 1949, U.N. doc. S/1264/Rev. 1.

303. *See* Armistice Agreement between the Hashemite Kingdom of Jordan and Israel, Isr.–Jordan, Apr. 3, 1949, UN Doc S/1302.

A fourth armistice agreement was signed with Israel's last neighboring state—Lebanon.[304] Because Lebanon had not succeeded in conquering and holding any of the territory of the Palestine Mandate, the armistice line with Lebanon coincided with the prior boundary of the Mandate. Nonetheless, the armistice line had an interesting feature. Like the armistice lines with Israel's other neighbors, the armistice line with Lebanon was established as a military line, without prejudice to the parties' claims to territorial sovereignty.[305] Nonetheless, the armistice line was not delineated in relation to the actual military positions of the parties or geographic features. Rather, the line was described as "follow[ing] the international boundary between Lebanon and [the Mandate of] Palestine."[306] This is particularly interesting since the Palestine Mandate-Lebanon border would not have been maintained under the proposed partition in General Resolution 181. The map of the armistice lines is shown in Figure 4.[307]

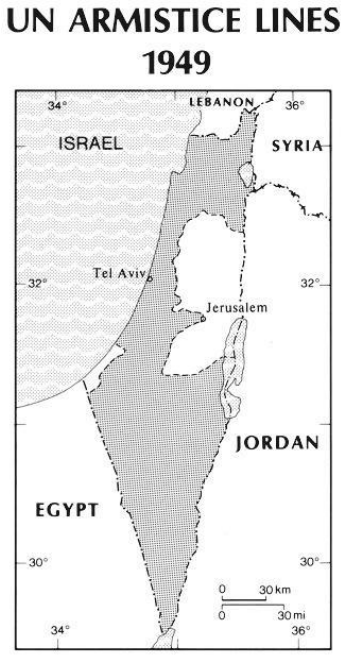

Figure 4

304. *See* Lebanese-Israeli General Armistice Agreement, Isr.–Leb., March 23, 1949, U.N. Doc. S/1296/Rev. 1.

305. *Id.* at art. II–III, V.

306. *Id.* at art. V.

307. U.N. Armistice Lines 1949, WIKIPEDIA, https://upload.wikimedia.org/wikipedia/commons/0/0b/UN_armistice_lines_1949.jpg (last visited July 26, 2016).

Similarly, none of the armistice agreements attempted to utilize the proposed partition lines of Resolution 181 in any fashion. Interestingly, while neither Israel nor any of its neighboring states treated the partition lines as the borders of Israel, and while there were never any moves to create a Palestinian Arab state along the proposed partition lines, there were states outside the region that attempted to hold on to a single feature of the proposed partition that they found genial—the temporary internationalization of Jerusalem. After the war, the General Assembly passed several resolutions calling for Jerusalem to be internationalized.[308] Many states refused to recognize Jordanian and Israeli sovereignty over the parts of the city that each controlled,[309] and Israel's establishment of Jerusalem as its capital in 1949[310] was widely dismissed.[311] However, international pique about Jerusalem never translated into any change in administration on the ground, or legal acceptance by Jordan or Israel.

The armistice lines, as established in 1949 and modified by minor adjustments in military lines between 1949 and 1967, are often referred to as the "1967 boundaries."[312] As we have seen and will now discuss, the implication that the 1949 armistice lines became Israel's legal borders is difficult to square with the doctrine of *uti possidetis juris*.

IV. APPLYING *UTI POSSIDETIS JURIS* TO THE BORDERS OF ISRAEL

On May 14, 1948, when Israel declared its statehood, its forces controlled only a small part of Palestine. While Israel's geographic scope of authority expanded by the end of the war, the armistice agreements that ended the war in 1949 left large parts of Palestine in the hands of Syria, Egypt, and Jordan.

The doctrine of *uti possidetis juris*, however, rejects possession as grounds for establishing title, favoring instead legal entitlement based upon prior administrative borders. And it is clear that the relevant administrative borders of Palestine at the time of Israel's independence were the boundaries of the Mandate as they had been set in 1923. Israel was the only state that emerged from Mandatory Palestine, and it was a state whose identity matched the contemplated Jewish homeland required of the Mandate and that fulfilled a legal Jewish claim to self-determination in the Mandatory territories. There was therefore no rival state

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308. *See, e.g.*, G.A. Res. 303 (IV), Palestine: Question of an International Regime for Jerusalem and the Holy Places (Dec. 9, 1949); G.A. Res. 356 (IV), Budget Appropriations for the Financial Year 1950 (Dec. 10, 1949).

309. *See, e.g.*, C.K. Johnson, *U.S. Policy on Jerusalem: Memorandum Discouraging Nations from Recognizing Jerusalem as the Capital of Israel* (May 31, 1962), http://www.jewishvirtuallibrary.org/jsource/US-Israel/FRUS5_31_62a.html.

310. *See* Ben-Gurion, Isr. Prime Minister, Statement to the Knesset by Prime Minister Ben-Gurion, ¶ 5 (Dec. 13, 1949), http://www.mfa.gov.il/mfa/foreignpolicy/mfadocuments/yearbook1/pages/7%20statement%20to%20the%20knesset%20by%20prime%20minister%20ben-g.aspx.

311. *See* G.A. Res. 303 (IV), *supra* note 308.

312. *See, e.g.*, Ethan Bronner, *Netanyahu Responds Icily to Obama Remarks*, N.Y. TIMES, May 19, 2011, at A9; Tim Lister, *Maps, Land and History: Why 1967 Still Matters*, CNN, May 24, 2011, at IV.

Decisions

At its 1373rd meeting, on 9 November 1967, the Council decided to invite the representatives of the United Arab Republic, Israel and Jordan to participate, without vote, in the discussion of the item entitled "The situation in the Middle East: Letter dated 7 November 1967 from the Permanent Representative of the United Arab Republic addressed to the President of the Security Council (S/8226)".[11]

At its 1375th meeting, on 13 November 1967, the Council decided to invite the representative of Syria to participate, without vote, in the discussion of the question.

Resolution 242 (1967)

of 22 November 1967

The Security Council,

Expressing its continuing concern with the grave situation in the Middle East,

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,

Emphasizing further that all Member States in their acceptance of the Charter of the United Nations have undertaken a commitment to act in accordance with Article 2 of the Charter,

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;

2. *Affirms further* the necessity

(*a*) For guaranteeing freedom of navigation through international waterways in the area;

(*b*) For achieving a just settlement of the refugee problem;

(*c*) For guaranteeing the territorial inviolability and political independence of every State in the area,

[11] *Ibid.*

Décisions

A sa 1373e séance, le 9 novembre 1967, le Conseil a décidé d'inviter les représentants de la République arabe unie, d'Israël et de la Jordanie à participer, sans droit de vote, à la discussion de la question intitulée "La situation au Moyen-Orient : Lettre, en date du 7 novembre 1967, adressée au Président du Conseil de sécurité par le représentant permanent de la République arabe unie (S/8226[11])".

A sa 1375e séance, le 13 novembre 1967, le Conseil a décidé d'inviter le représentant de la Syrie à participer, sans droit de vote, à la discussion de la question.

Résolution 242 (1967)

du 22 novembre 1967

Le Conseil de sécurité,

Exprimant l'inquiétude que continue de lui causer la grave situation au Moyen-Orient,

Soulignant l'inadmissibilité de l'acquisition de territoire par la guerre et la nécessité d'œuvrer pour une paix juste et durable permettant à chaque Etat de la région de vivre en sécurité,

Soulignant en outre que tous les Etats Membres, en acceptant la Charte des Nations Unies, ont contracté l'engagement d'agir conformément à l'Article 2 de la Charte,

1. *Affirme* que l'accomplissement des principes de la Charte exige l'instauration d'une paix juste et durable au Moyen-Orient qui devrait comprendre l'application des deux principes suivants :

i) Retrait des forces armées israéliennes des territoires occupés lors du récent conflit;

ii) Cessation de toutes assertions de belligérance ou de tous états de belligérance et respect et reconnaissance de la souveraineté, de l'intégrité territoriale et de l'indépendance politique de chaque Etat de la région et de leur droit de vivre en paix à l'intérieur de frontières sûres et reconnues à l'abri de menaces ou d'actes de force;

2. *Affirme en outre* la nécessité

a) De garantir la liberté de navigation sur les voies d'eau internationales de la région;

b) De réaliser un juste règlement du problème des réfugiés;

c) De garantir l'inviolabilité territoriale et l'indépendance politique de chaque Etat de la région, par

[11] *Ibid.*

through measures including the establishment of demilitarized zones;

3. *Requests* the Secretary-General to designate a Special Representative to proceed to the Middle East to establish and maintain contacts with the States concerned in order to promote agreement and assist efforts to achieve a peaceful and accepted settlement in accordance with the provisions and principles in this resolution;

4. *Requests* the Secretary-General to report to the Security Council on the progress of the efforts of the Special Representative as soon as possible.

Adopted unanimously at the 1382nd meeting.

Decision

On 8 December 1967, the following statement which reflected the view of the members of the Council was circulated by the President as a Security Council document (S/8289) :[12]

"As regards document S/8053/Add.3,[12] brought to the attention of the Security Council, the members, recalling the consensus reached at its 1366th meeting on 9 July 1967, recognize the necessity of the enlargement by the Secretary-General of the number of observers in the Suez Canal zone and the provision of additional technical material and means of transportation."

des mesures comprenant la création de zones démilitarisées;

3. *Prie* le Secrétaire général de désigner un représentant spécial pour se rendre au Moyen-Orient afin d'y établir et d'y maintenir des rapports avec les Etats intéressés en vue de favoriser un accord et de seconder les efforts tendant à aboutir à un règlement pacifique et accepté, conformément aux dispositions et aux principes de la présente résolution;

4. *Prie* le Secrétaire général de présenter aussitôt que possible au Conseil de sécurité un rapport d'activité sur les efforts du représentant spécial.

Adoptée à l'unanimité à la 1382e séance.

Décision

Le 8 décembre 1967, le Président a fait distribuer, en tant que document du Conseil (S/8289[12]), la déclaration ci-après qui reflétait l'avis des membres du Conseil :

"En ce qui concerne le document S/8053/Add.3[12], soumis à l'attention du Conseil de sécurité, les membres de celui-ci, rappelant le consensus intervenu à sa 1366e séance, le 9 juillet 1967, reconnaissent la nécessité de l'accroissement, par le Secrétaire général, du nombre des observateurs dans le secteur du canal de Suez et de la mise à la disposition de ceux-ci de matériel technique et de moyens de transport supplémentaires."

THE CYPRUS QUESTION[13]

Decision

At its 1362nd meeting, on 19 June 1967, the Council decided to invite the representatives of Cyprus, Turkey and Greece to participate, without vote, in the discussion of the item entitled "Letter dated 26 December 1963 from the Permanent Representative of Cyprus addressed to the President of the Security Council (S/5488) :[14] report of the Secretary-General on the United Nations Operation in Cyprus (S/7969)".[15]

[12] *Ibid.*

[13] Resolutions or decisions on this question were also adopted in 1963, 1964, 1965 and 1966.

[14] See *Official Records of the Security Council, Eighteenth Year, Supplement for October, November and December 1963.*

[15] *Ibid., Twenty-second Year, Supplement for April, May and June 1967.*

LA QUESTION DE CHYPRE[13]

Décision

A sa 1362e séance, le 19 juin 1967, le Conseil a décidé d'inviter les représentant de Chypre, de la Turquie et de la Grèce à participer, sans droit de vote, à la discussion de la question intitulée "Lettre, en date du 26 décembre 1963, adressée au Président du Conseil de sécurité par le représentant permanent de Chypre (S/5488[14]) : rapport du Secrétaire général sur l'Opération des Nations Unies à Chypre (S/7969[15])".

[12] *Ibid.*

[13] Question ayant fait l'objet de résolutions ou décisions de la part du Conseil en 1963, 1964, 1965 et 1966.

[14] Voir *Documents officiels du Conseil de sécurité, dix-huitième année, Supplément d'octobre, novembre et décembre 1963.*

[15] *Ibid., vingt-deuxième année, Supplément d'avril, mai et juin 1967.*

Resolution 242 Revisited: New Evidence on the Required Scope of Israeli Withdrawal

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proposition about usage, it can be tested by examining how bodies calling for territorial withdrawal provisions actually frame their demands. In this grammatical approach, post-1967 resolutions are also relevant, as the English language has not changed substantially in this time.

III. EVIDENCE FROM PRIOR AND SUBSEQUENT SECURITY COUNCIL RESOLUTION WITHDRAWAL PROVISIONS

Territorial withdrawal demands occur in at least eighteen other Security Council resolutions, ranging from the first days of the U.N. to the present, and in a variety of geopolitical contexts. Among all the resolutions, there are certain common patterns of language and phrasing. However, Resolution 242's phrase "withdrawal . . . from territories" is entirely unique in Security Council practice. Instead, resolutions before and after demand total withdrawal either by using the definite article or by explicitly referring to the antebellum status quo (thus clearly defining a complete withdrawal). Thus resolutions that demand full territorial withdrawal say so unambiguously, unlike Resolution 242. Indeed, some of the other resolutions resemble the proposed Soviet draft for Resolution 242, which specified a return to the antebellum lines.[25] Moreover, several resolutions use comprehensive modifiers like "all" or "whole" to describe the extent of the territorial withdrawal. Those modifiers were explicitly rejected in the negotiations over the drafting of Resolution 242.[26] Similarly, General Assembly resolutions calling for territorial withdrawal in other contexts clearly specify the extent of the withdrawal.[27]

The most probative sources for interpreting Resolution 242 are the Security Council's pre-1967 resolutions, as the meaning of legal texts is fixed at the time of their adoption. By using unambiguous wording, the five withdrawal resolutions adopted before 1967 reveal obvious differences from the hazier language of Resolution 242.[28] While these differences may not conclusively

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25 *See* U.N. SCOR, 22d Sess., 1381st mtg., ¶ 7, U.N. Doc. S/PV.1381 (Nov. 20, 1967) ("The parties to the conflict should immediately withdraw their forces to the positions they held before 5 June 1967 in accordance with the principle that the seizure of territories as a result of war is inadmissible."); *see also* Ruth Lapidoth, *Security Council Resolution 242: An Analysis of its Main Provisions*, JERUSALEM CTR. FOR PUB. AFF. 13, 14 (June 4, 2007), http://jcpa.org/text/resolution242-lapidoth.pdf (noting that the Soviet draft was not voted on).

26 *See* Lapidoth, *supra* note 25, at 19.

27 *See, for example*, G.A. Res. 62/243, ¶ 2, U.N. Doc. A/RES/62/243 (Mar. 14, 2008) (calling for "immediate, complete and unconditional withdrawal of all Armenian forces from *all the occupied territories"* in Azerbaijan) (emphasis added).

28 This collection of withdrawal provisions was compiled by searching an electronic database of Security Council resolutions for the term "withdrawal," as well as examining all resolutions related to military incursions. I excluded repetitive and iterative withdrawal resolutions using the same

prove the significance of the missing "the," they unequivocally demonstrate that Resolution 242's language does not "naturally" mean total withdrawal, especially when considered in the context of Security Council practice. The past resolutions are particularly important because Security Council resolutions can have their own linguistic habits and conventions,[29] and thus departing from an established pattern may suggest a different meaning.

An examination of the relevant provisions highlights the uniqueness of 242's missing article. The bold emphasis has been added to highlight phrases that connote a complete withdrawal, while italicization reflects the style of the resolutions themselves.

A. Pre-1967 Territorial Withdrawal Provisions

1. SC Res. 3 (1946): Calls for "the withdrawal of all USSR troops from **the whole** of Iran"[30]

2. SC Res. 61 (1948): "*Calls upon* the interested Governments, without prejudice to their rights . . . with regard to a peaceful adjustment of the future situation of Palestine . . . to withdraw those of their forces which have advanced beyond **the positions held on 14 October**"[31]

3. SC Res. 82 (1950): "*Calls upon* the authorities in North Korea to withdraw forthwith their armed forces **to the 38th parallel**"[32]

4. SC Res. 143 (1960): "*Calls upon* the Government of Belgium to withdraw its troops from **the** territory of the Republic of Congo"[33]

5. SC Res. 210 (1965): "*Calls upon* the parties [India & Pakistan] to . . . promptly withdraw **all** armed personnel to the **positions held by them before 5 August 1965**"[34]

Not all of the resolutions require withdrawal to pre-war lines. In particular, Resolution 61, which concerns a situation most analogous to that of Resolution 242, did not require a withdrawal to the status quo ante. Responding to the 1948-49 Israeli-Arab War (Israel's War of Independence), the Council required parties to return to "positions held on 14 October." However, interstate hostilities had begun immediately upon Israel's creation in *May 1948* (though

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language in successive versions dealing with the same situation. Some other withdrawal resolutions may not have been successfully identified by this methodology.

29 *See, for example*, Wood, *supra* note 20, at 82 (citing the practice of using the phrase "acting under Chapter VII" in relevant resolutions, while noting that this and other "drafting practices" are not always well known or consistently applied).

30 S.C. Res. 3, U.N. SCOR, 1st Year, U.N. Doc. S/INF/2/Rev.1(I), at 2–3 (Apr. 4, 1946).

31 S.C. Res. 61, U.N. SCOR, 3d Year, U.N. Doc. S/INF/2/Rev.1(III), at 28 (Nov. 4, 1948).

32 S.C. Res. 82, U.N. SCOR, 5th Year, U.N. Doc. S/INF/4/Rev.1, at 4 (June 25, 1950).

33 S.C. Res. 143, U.N. SCOR, 15th Year, U.N. Doc. S/INF/15/Rev.1, at 5 (July 14, 1960).

34 S.C. Res. 210, U.N. SCOR, 20th Year, U.N. Doc. S/INF/20/Rev.1, at 14 (Sept. 6, 1965).

combat between Jewish and Arab units had begun the prior year), with two truces between then and November,[35] when the withdrawal resolution was adopted. In the next five months of fighting, Arab forces had taken control of significant portions of Palestine. The Council's withdrawal provision would have allowed them to keep control of most of these territories, including the West Bank, Gaza, and the Negev.[36]

B. Post-1967 Territorial Withdrawal Resolutions

As discussed in Section II, resolutions adopted after Resolution 242 have less evidentiary value. Subsequent resolutions may have been colored by its unique semantic dispute, though what the effect of this bias would be is not clear. The subsequent resolutions cannot be ignored because of their quantity and consistency. Again, none adopts the general "territories" formulation. Instead, they require withdrawal either from "the" territory or to specified antebellum lines.

1. SC Res. 264 (1969): Calls on South Africa to "withdraw immediately its administration from **the** Territory [of Southwest Africa]"[37]

2. SC Res. 353 (1974): "*Requests* the withdrawal without delay from **the** Republic of Cyprus of foreign [Turkish] military personnel present"[38]

3. SC Res. 380 (1975): Calls on Morocco to "immediately [] withdraw from **the Territory** of Western Sahara"[39]

4. SC Res. 384 (1975): Calls on Indonesia to "withdraw without delay **all** its forces from **the** Territory [East Timor]"[40]

5. SC Res. 425 (1978): Calls on Israel to "withdraw forthwith its forces from **all** Lebanese territory"[41]

6. SC Res. 466 (1980): "*Demands* that South Africa withdraw forthwith **all** its military forces from **the** territory of the Republic of Zambia"[42]

7. SC Res. 502 (1982): "*Demands* an immediate withdrawal of **all** Argentine forces from the Falkland Islands (Islas Malvinas)"[43]

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35 *See, for example*, U.N. S.C. Res. 50 & 54 (dealing with truce of June-July 1948).

36 *See* GILBERT, *supra* note 11, at 45-46 (10th ed. 2012).

37 S.C. Res. 264, U.N. SCOR, 24th Year, U.N. Doc. S/INF/24/Rev.1, at 1 (Mar. 20, 1969).

38 S.C. Res. 353, U.N. SCOR, 29th Year, U.N. Doc. S/INF/30, at 7 (July 20, 1974).

39 S.C. Res. 380, U.N. SCOR, 30th Year, U.N. Doc. S/INF/31, at 9 (Nov. 6, 1975).

40 S.C. Res. 384, U.N. SCOR, 30th Year, U.N. Doc. S/INF/31, at 10 (Dec. 22, 1975).

41 S.C. Res. 425, U.N. SCOR, 33rd Year, U.N. Doc. S/INF/34, at 5 (Mar. 19, 1978).

42 S.C. Res. 466, U.N. SCOR, 35th Year, U.N. Doc. S/INF/36, at 17 (Apr. 11, 1980).

43 S.C. Res. 502, U.N. SCOR, 37th Year, U.N. Doc. S/INF/38, at 15 (Apr. 3, 1982).

8. SC Res. 546 (1984): "*Demands* that South Africa . . . unconditionally withdraw forthwith **all** its military forces occupying Angolan territory"[44]

9. SC Res. 660 (1990): "*Demands* that Iraq withdraw immediately . . . **all** its forces **to positions in which they were located** on 1 August 1990" (before the invasion of Kuwait)[45]

10. SC Res. 1304 (2000): "*Demands* . . . [t]hat Uganda and Rwanda, which have violated the sovereignty and territorial integrity of the Democratic Republic of the Congo, withdraw **all** their forces from **the territory** of the Democratic Republic of the Congo without further delay"[46]

11. SC Res. 1559 (2004): "*Calls upon* **all** remaining foreign [Syrian] forces to withdraw from Lebanon"[47]

12. SC Res. 1862 (2009): "*Demands* that Eritrea . . . [w]ithdraw its forces and all their equipment to the positions of **the status quo ante**"[48]

13. SC Res. 2046 (2012): Decides that Sudan and South Sudan must "[u]nconditionally withdraw **all** of their armed forces to **their side of the border**, in accordance with previously adopted agreements"[49]

It is not surprising that most Security Council withdrawal resolutions postdate Resolution 242; many more resolutions have been passed since 1967 than before. But the "the" dispute broke out almost immediately after the passage of Resolution 242,[50] and it remains a major point of contention. That is, the Security Council has known about the problem of the missing "the" since 1967. If a missing "the" means nothing—if the words mean the same with or without a "the" before "territories"—one would expect to see at least one other withdrawal resolution using the same language as Resolution 242.

The consistency of subsequent practice is particularly notable in light of the politics of the situation. Many nations claim that Resolution 242 requires a complete and total withdrawal.[51] One might expect that these nations would, going forward, purposefully omit a "the" before the geographic term in any resolution contemplating complete withdrawal—if only to drive home the point about the meaning of Resolution 242. That they have repeatedly not reverted to Resolution 242's formulation suggests its language is simply not what one would

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44 S.C. Res. 546, U.N. SCOR, 39th Year, U.N. Doc. S/INF/40, at 1 (Jan. 6, 1984).

45 S.C. Res. 660, U.N. SCOR, 45th Year, U.N. Doc. S/INF/46, at 19 (Aug. 2, 1990).

46 S.C. Res. 1304, U.N. SCOR, 55th Year, U.N. Doc. S/INF/56, at 62 (June 16, 2000).

47 S.C. Res. 1559, U.N. SCOR, U.N. Doc. S/INF/60, at 34 (Sept. 2, 2004).

48 S.C. Res. 1862, U.N. SCOR, U.N. Doc. S/INF/64, at 288 (Jan. 14, 2009).

49 S.C. Res. 2046, U.N. SCOR, U.N. Doc. S/INF/67, at 223 (May 2, 2012).

50 *See* Shabtai Rosenne, *Directions for a Middle East Settlement—Some Underlying Legal Problems*, 33 LAW & CONTEMP. PROBS. 44, 60–61 (1968); *see also* Wright, *supra* note 9, at 275–76.

51 *See* Lapidoth, *supra* note 25, at 25 n.23.

use to require a complete withdrawal, which was the goal sought in all the subsequent resolutions examined here.

One might object that it was the interpretive trouble caused by Resolution 242's alleged ambiguity that prevented the use of the same language in subsequent resolutions regarding other situations. But Resolution 242 has been politically more important than any other resolution. Moreover, in the years after its passage, the notion that Resolution 242 is at least unclear has not been admitted by most states. So if states maintain that there is no doubt that "territories" means "all the territories," one would expect them to have no compunction in using the terms at least interchangeably. Indeed, given the U.N.'s extraordinary interest in the Israeli-Palestinian issue, one might think they would risk confusion elsewhere to clarify that Resolution 242 required complete withdrawal. In any event, the risk of confusion about the scope of withdrawal with other resolutions elsewhere would be negligible, as the other situations lack the drafting history and other particular circumstances of Resolution 242.

One might also object that Israel's situation in 1967 was somehow unique, and thus the language is different on that account. One of the more coherent distinctions is that Resolution 242 used "territories" because Israel took several noncontiguous territories from several different states. This does explain the plural territories, but it is not clear why that eliminates a need for a definite article. Moreover, resolutions related to other situations involving noncontiguous territories have used a "the," such as Resolution 380, which concerned Indonesia's invasion of East Timor.[52]

Another notable difference between Resolution 242 and almost all subsequent withdrawal resolutions is its lack of an immediacy provision. This accords with the interpretation that the resolution calls for a negotiated solution, which would necessarily require additional time to conclude. If the resolution had called for an "immediate withdrawal of Israel . . . from territories," it would be harder to square with the partial withdrawal interpretation or with an endorsement of negotiated boundaries as opposed to defaulting to Armistice Lines.[53]

IV. "INADMISSIBILITY OF THE ACQUISITION OF TERRITORY"

Some commentators argue that the preamble's reference to "the inadmissibility of the acquisition of territory by war" helps to contextualize the

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52 *See* S.C. Res. 380, *supra* note 39.

53 Security Council Resolution 338, passed in the wake of the Yom Kippur War, added an immediacy requirement to Resolution 242. *See* S.C. Res. 338, *supra* note 3, ¶ 2 (calling on "the parties concerned to start immediately . . . the implementation of Security Council resolution 242").