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THE LEGAL ENTITLEMENT OF A FUTURE PALESTINIAN STATE TO TERRITORY

by
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Introduction:

The status of the territories Israel occupied as a result of the Six-Day War in 1967 has been described as “disputed” or as territories under Israeli administration. Further, it has been claimed that, by virtue of the Mandate for Palestine, Israel is entitled to claim all the territory which was subject to the Mandate east of the River Jordan because this was the area reserved for “close settlement” in order that a Jewish national home could be established. Alternatively, some have claimed that, because the Arab population of Mandate Palestine rejected the United Nations’ Partition Plan embodied in General Assembly resolution 181 of 29 November 1947, it forfeited any entitlement it had to claim any of the territory of the former Mandate.

This paper[^] addresses these and other arguments from the standpoint of international law, emphasising the primordial importance of the legal doctrine of self-determination—both as an integral component of the Mandate and in its current manifestation—in determining the proper destination of the territory of Mandate Palestine. The legal status of the Palestinian territories occupied by Israel was recently considered by the International Court of Justice in the *Legal consequences of the construction of a wall in the occupied Palestinian territories* advisory opinion (2004). The reasoning employed by the Court is not as candid as one might wish: this is an inevitable result of the process of drafting a collegiate opinion by the Court as a whole. Some have sought to dismiss the relevance of this opinion, arguing that it may be ignored because advisory opinions are not binding. This is technically true: advisory opinions are not formally binding for the simple reason that there are no

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[^]Any references to ‘this paper’ or to ‘Sections’ is a reference to the full paper entitled: “The Israel-Palestine Conflict in International Law: *Territorial Issues*” (hereafter noted as “the Paper”).

parties in advisory proceedings to whom the Court might issue binding injunctions. In delivering an advisory opinion, the Court gives its legal advice to the United Nations organ which has requested the opinion and sets out the law applicable to the question posed. The *Legal consequences of a wall* advisory opinion was formally adopted by a near-unanimous Court: only one judge dissented from all of the Court's formal conclusions, and that was principally for procedural reasons. He nevertheless expressly agreed with the Court's rulings on the fundamental principles that frame the legal relationship between Israel and Palestine—namely, that international humanitarian law (also known as the law of war or the law of armed conflict), including 1949 Geneva Convention IV relative to the Protection of Civilian Persons in Time of War, and international human rights law are applicable in the Occupied Palestinian Territory; that the Palestinian people have a right of self-determination which must be fully protected; and that Israeli settlements in the Occupied Palestinian Territory are unlawful as they breach Geneva Convention IV, Article 49.6. The importance of this unanimity, which is extremely rare in the jurisprudence of the International Court, cannot be over-emphasised. The advisory opinion provides is an important and authoritative statement of the legal framework within which the relationship between Israel and Palestine should be located.

Self-determination:

Self-determination has been described by the International Court of Justice as an essential principle of contemporary international law: its core content is that it entitles peoples to determine their political status and freely pursue their economic, social and cultural development. The political outcome of the exercise of this right is the creation of a sovereign and independent State, or the association or integration of that people with an existing independent State. Although self-determination is seen as the primordial human right, it is closely bound up with sovereignty and title to territory. Accordingly, the implementation of self-determination is dependent on the identification of the territory over which that right may be exercised. All States have a duty to co-operate to promote the self-determination of non-self-governing territories, and to aid the United Nations carry out its responsibilities for the implementation of this principle. Both the International Court and Israel have recognised that the Palestinian Arab population possess the right to self-determination. (See Section III of the Paper.)

Self-determination is a peremptory norm of international law. States cannot disregard this principle in the conduct of their international relations, nor can they enter into agreements which conflict with it. Peremptory norms of international law embody aspects of international public policy. Other peremptory norms which are relevant to the relations between Israel and Palestine are the prohibition on the use of force in international relations and its corollary, the prohibition on the acquisition of territory through the use of force.

Self-determination and Mandate Palestine:

The Mandate system was implemented after World War One by the League of Nations to make provision for the government of territories detached from the German and Ottoman Empires. Contrary to previous international practice, the victorious States decided that they should not annex territories belonging to the vanquished States but rather put them under a form of international administration. In the *Namibia* advisory opinion (1971), the International Court observed that the objective of the Mandate system was the self-determination and independence of those populations placed under Mandate. The Mandate for Palestine was granted to Great Britain, and originally encompassed the territory which now forms Israel, Jordan and the territories occupied by Israel in 1967. One of the objectives of the Mandate for Palestine was to provide for Jewish immigration and settlement in order that a Jewish national home could be established. In 1922, Britain gained the assent of the League Council to split the Mandate territory into Palestine and Transjordan so that these might be administered separately. In particular, the application of the provisions regarding Jewish immigration and settlement was restricted to the territory east of the River Jordan, that is, to Palestine. This had the consequence that, legally, Jordan ceased to have any direct interest in the application of self-determination within Palestine. In the past, this is a prescription which has not been observed, as Jordan maintained a claim to sovereignty over the West Bank until 1988. It is now clear that the only entities that may advance a legitimate claim to the territory which formed Mandate Palestine are Israel and the Palestinian Arab population. Under international law, title to territory is essentially a question of relative rather than absolute strength: in cases where title to given territory is disputed, international tribunals invariably award it to the entity which can advance the better claim. (See Section I of the Paper.)

Although the right to self-determination was vested in the populations of Mandated territories in 1922, its substantive content has developed since then: its contemporary expression falls to be applied today (see Section II of the Paper). The development of the substantive content of the principle of self-determination was at its zenith in the 1960s and 1970s, principally under the auspices of the United Nations. The principal focus of these activities was the process of decolonisation. This contributed to the right of Palestine's Arab population to self-determination gaining little attention in the United Nations in the formative years of self-determination. The West Bank and East Jerusalem were under Jordanian control, and had effectively been annexed in 1950, while Gaza was under Egyptian administration: neither fitted into the paradigm of colonial territory entitled to self-determination. (See Section I of the Paper, text to notes 23-27.)

The United Nations Partition Plan for Mandate Palestine:

When the League of Nations was dissolved in 1946, its supervisory functions over the Mandates was

not formally transferred to the United Nations although there was the expectation that existing Mandates would be placed under the United Nations Trusteeship System. Accordingly, when the United Kingdom indicated that it wished to terminate the Mandate and placed the question of the future government of Palestine on the agenda of the General Assembly in April 1947, the General Assembly's competence to deal with the issue was unclear and, indeed, was contested by Arab States. This issue was authoritatively resolved by the International Court of Justice in 1950 in the *International status of South West Africa* advisory opinion. It held that the terms of the League's dissolution resolution presupposed that its supervisory functions would be assumed by the United Nations, and that the General Assembly's competence to do so was derived from Article 10 of the United Nations Charter which authorised the General Assembly to discuss and make recommendations on any matters which fall within the scope of the Charter. Further, the dissolution of the League did not entail the termination of the Mandates and it held, in relation to the Mandate for South West Africa which was held by the Union of South Africa:

The authority which the Union Government exercises over the Territory is based on the Mandate. If the Mandate lapsed, as the Union Government contends, the latter's authority would equally have lapsed. To retain the rights derived from the Mandate and to deny the obligations thereunder could not be justified.

This ruling on the mutuality of rights and obligations arising under the Mandate is significant in addressing claims of title to the territory of Mandate Palestine. (See Section IV of the Paper.)

In addressing the question of the future governance of Mandate Palestine, the General Assembly adopted resolution 181 (II) (29 November 1947) which recommended the partition of Palestine into Jewish and Arab States, which would form an economic union, and that Jerusalem should be internationalised. This resolution was not mandatory: on the whole, the General Assembly possesses powers of recommendation only which member States are bound to consider in good faith, but which they are not obliged to implement. Resolution 181 requested the Security Council to take the necessary measures to implement the Partition Plan, but it failed to do so. Although the Jewish Agency accepted the terms of the Partition Plan, it was rejected by the Arab Higher Committee which represented the Arab population of Palestine and opposed by Arab States. By resolution 186 (S-2) (14 May 1948), the General Assembly effectively abandoned the Partition Plan: the Mandate terminated at midnight, and the Provisional Council of Government declared the independence of Israel. (See Sections V and VI of the Paper.)

Attitudes to resolution 181:

As the question of title to the territory of Mandate Palestine is one of the competing strength of titles of both Israel and the projected Arab State, initially this calls for an examination of the attitudes of both to resolution 181 in their public acts.

In the *Legal consequences of a wall* advisory opinion, the International Court commented that Israel proclaimed its independence on the basis of resolution 181. While the preamble to Israel's declaration of independence adverts to resolution 181, it did not rely on it as the ground for the creation of the State but saw it as a recognition of the right of the Jewish people to establish the State. In statements made before both the Security Council and General Assembly however, Israel's representatives consistently stated that Israel claimed and exercised jurisdiction within the areas assigned to the Jewish State by resolution 181, thus basing its claim to title to territory upon it. Israeli courts reaffirmed this position in various judgments. Further, both the Israeli government and courts repeatedly denied that the territory of the State of Israel was not coextensive with the territory of, and that it was not successor to the government of, Mandate Palestine. Accordingly, in the immediate post-independence period, Israeli public acts were predicated on the acceptance of some form of partition of the territory of Mandate Palestine. This precludes any claim that Israel possesses legal title to all of the territory of Mandate Palestine. (See Section VIIa of the Paper.)

While the Palestinian Arab population and Arab States rejected the Partition Plan contained in resolution 181, they maintained a claim to self-determination and thus entitlement to the territory of Mandate Palestine. Both the Palestinian National Council and the League of Arab States now consider resolution 181 to provide legitimacy for the creation of a Palestinian State and accept the division of the Mandate territory. (See Section VIIb of the Paper.)

The 1949 General Armistice Agreements:

Between the conclusion of the General Armistice Agreements with Egypt, Lebanon, Jordan and Syria in February-July 1949, and the conclusion of the Six-Day War in June 1967, the land area under Israeli jurisdiction was defined by the demarcation lines (the Green Lines) set out in the 1949 General Armistice Agreements. The parties' contemporary understanding of the demarcation lines was that they were provisional and constituted temporary *de facto* international frontiers, as the Armistice Agreements, except for the Israel-Lebanon Agreement which followed the Mandate boundary between Lebanon and Israel, expressly stated that they did not create permanent or *de jure* borders. In 1951, however, Rosenne, then legal adviser to Israel's foreign ministry, concluded that it was possible that "the juridical function of these lines is far greater, and that they are indistinguishable from international frontiers proper". This view has consolidated, especially given the recognition by the PLO of Israel's right to exist within its pre-1967 borders and the principle of the relativity of territorial claims. It may be argued that the armistice lines delineating the West Bank and Gaza are,

presumptively, the international boundaries between Israel and any future Palestinian State. (See Section VIII of the Paper.)

The Six-Day War and Security Council resolution 242 (1967):

As a result of the Six-Day War in June 1967, Israel gained control over and occupied East Jerusalem, Gaza, the Golan Heights, Sinai and the West Bank. Sinai was subsequently returned to Egypt, but Israel retains control of the other territories and, in June 1967, Israel effectively annexed East Jerusalem. Security Council resolution 242 (22 November 1967) was adopted in an attempt to provide a framework for peace negotiations after the Six-Day War. This resolution was adopted under Chapter VI of the United Nations Charter and thus only has the force of a recommendation. The Palestinian Arab population was consciously excluded from the post-war attempts to secure peace. Resolution 242 affirms the inadmissibility of the acquisition of territory through the use of force and stated that the establishment of peace in the Middle East required the termination of all claims to belligerency and “Withdrawal of Israeli armed forces from territories occupied in the recent conflict”.

In the immediate aftermath of the Six-Day War, Israel denied that it had any intention of acquiring territory as a result of the war, but before the adoption of resolution 242 in November 1967, this had changed. Israel rejected any suggestion that it should withdraw to its 4 June 1967 borders—the armistice lines—but instead sought territorial changes which would provide it with secure frontiers. This was contrary to the views of other States, not parties to the conflict, such as the United Kingdom, the Soviet Union, India, and Latin American States, which demanded a complete withdrawal to the armistice lines. The United States’ policy was that Israel should withdraw from the territory it had occupied to slightly modified frontiers which would ensure its security, but rejected claims which would expand Israel’s territory. (See Section IX of the Paper.)

The withdrawal clause of resolution 242 is ambiguously drafted. Because “territories” is not preceded by “the” or “all”, some—including Israel—argue Israel was not expected to withdraw from the entirety of the territories it had occupied during the Six-Day War. The debates within the Security Council, however, demonstrated that Israel’s claim that it need not withdraw to the armistice lines was not a view shared by the majority of the voting members. Ten of the fifteen voting members expressly stated that resolution 242 provided that Israel had no right to acquire any of the territories it occupied during the Six Days War, and thus it had to withdraw from all these territories: two of the non-voting participants, the United Arab Republic and Jordan, also expressed this understanding. The principles governing the interpretation of Security Council resolutions require that any perceived ambiguities should be judged in the light of interpretative declarations made by members of the Security Council during the process of adopting the resolution. Accordingly, the broad consensus of

those States involved in the drafting and adoption of resolution 242 is against the interpretation favoured by Israel. (See Section IXa of the Paper.)

Although representatives of the Palestinian Arab population were not involved in the process that led to the adoption of resolution 242 which, moreover, is merely a recommendation, the Palestine National Council and Palestine Liberation Organisation have subsequently expressly affirmed that it should be the basis for a peace settlement. Further, both the 1993 Declaration of Principles on Interim Self-Government Arrangements and the 1995 Israel-Palestine Interim Agreement on the West Bank and the Gaza Strip affirmed the parties' understanding that negotiations on permanent status will lead to the implementation of resolution 242. (See Section IXb of the Paper.)

The prohibition of the acquisition of territory through the use of force:

Although resolution 242 is merely a recommendation, the prohibition of the acquisition of territory through the use of force to which it adverts is a peremptory norm of international law. Further, it is an established principle of international law that a State may not annex territory it occupies as the result of an armed conflict. The prohibition on the acquisition of territory through the use of force must be employed in the interpretation of the withdrawal clause in resolution 242: the Security Council could not disregard this peremptory prohibition when it adopted the resolution. Accordingly, as a matter of law, Israel is under an obligation to withdraw to the armistice demarcation lines. (See Section X of the Paper.)

Some argue that a State may retain territory which it has gained as the result of a lawful use of force in self-defence. This is known as the doctrine of defensive conquest. This claim cannot be reconciled with the strict parameters placed on the use of force in self-defence. Even if territory were gained by virtue of a lawful use of force, it would become an illegal use of that force to attempt to change the status of that territory as this would go beyond the ambit of self-defence. Nor may a State unilaterally annex territory in order to acquire more "secure" or strategic borders. As the principal protagonist of the "secure borders" claim admits, notions of what constitutes secure or strategic boundaries change with changes in military concepts and technology. Accordingly, this is an illusory basis on which to base a claim that territory may be lawfully annexed. (See Section XI of the Paper.)

"Disputed" or "occupied" territories:

The Government of Israel has challenged the status of the Palestinian territories as occupied, referring to them instead as "administered" or "disputed" territories. The "missing reversioner" argument has been employed to justify this assertion. In essence, this contends that Israel does not have the status of belligerent occupant in the West Bank, East Jerusalem and Gaza because neither Jordan nor Egypt had sovereignty over these territories when their administrations were displaced during the Six-Day

War. Accordingly, as the purpose of the law of belligerent occupation is to recognise the occupant's rights of governance while safeguarding the revisionary rights of the ousted sovereign, where the latter did not exist, only those rules intended to safeguard the humanitarian rights of the population applied. In particular, Israel claimed that because the West Bank, East Jerusalem and Gaza did not constitute the territory of a High Contracting Party to 1949 Geneva Convention IV, the Convention was inapplicable.

The missing reversioner argument was rejected by the International Court in the *Legal consequences of a wall* advisory opinion. This was a unanimous finding by the Court, as the sole dissenting judge, Judge Buergenthal, expressly concurred in this ruling. This conclusion had also been foreshadowed in a 14 September 1967 memorandum of the then Israeli legal advisor to the Foreign Ministry, Theodore Meron, which noted that the international community had rejected Israel's claim that the territories were not occupied. Further, Israel sought to conclude a peace treaty with Jordan after the Six-Day War which would have returned the West Bank to Jordanian control. This constitutes an implicit recognition by Israel that Jordan possessed title to the West Bank, that thus negates the premise of the missing reversioner argument. (See Section XII of the Paper.)

Further, in the *Legal consequences of a wall* advisory opinion, the International Court unanimously rejected Israel's claim that Geneva Convention IV is not applicable to the Palestinian territories. This is an authoritative recognition that Israel has the status of occupant in the West Bank, and by extension East Jerusalem and Gaza. Consequently the Court held, again unanimously, that Israeli settlements in these territories contravene Article 49.6 of Geneva Convention IV. This had been foreshadowed by the 1967 memorandum by Meron, the legal adviser to the Israeli foreign ministry, which concluded that "civilian settlement in the administered territories contravenes explicit provisions of the Fourth Geneva Convention". Meron stated that this prohibition was "categorical and is not conditional upon the motives for the transfer or its objectives. Its purpose is to prevent settlement in occupied territory of citizens of the occupying state". (See Section XIII and Annex of the Paper.)

Conclusion:

To the extent that the creation of Israel rests on the partition of the territory of Mandate Palestine as this was envisaged in resolution 181, Israel cannot accept rights, or title, to part of Mandate Palestine while denying the obligation partition imposed on itself, namely, the creation of an Arab State in the remainder of the Mandate territory. Even if resolution 181 is legally irrelevant to the creation of Israel, it is nevertheless precluded from laying claim to all of the territory of Mandate Palestine by virtue of its own actions, namely its avowal that it was only created on part of that territory and thus it was not the successor to Mandate Palestine. Moreover, by virtue of the peremptory principle of self-determination:

Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle.

The End