

# Acquisition of Title to Territory in the Aftermath of the Use of Force in the United Nations Era: The case of the State of Israel

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Résumé de l'article

Le territoire auquel l'État d'Israël a eu le droit [juridique] en tant qu'État nouvellement créé, correspondait aux territoires attribués aux Juifs par la résolution 181 (II) de l'Assemblée générale de l'ONU en date du 29 novembre 1947. Celle-ci prévoyait le partage de la Palestine et la création d'un État arabe, un État juif et Jérusalem comme un corpus separatum. Ce régime territorial avait été modifié au cours de la première guerre israélo-arabe dans les années 1948-1949 et le gouvernement israélien a considéré les territoires occupés lors de la guerre comme une partie de son domaine territorial. C'est ainsi que le problème sur le droit d'Israël aux territoires supplémentaires situés entre les lignes de partage de 1947 et les lignes établies conformément aux accords de l'armistice de 1949 est survenu. En raison des caractéristiques particulières du statut juridique de la Palestine ex-mandataire et le fait qu'une grande partie de celle-ci est devenue des territoires occupés, le processus de consolidation du titre pour eux a exigé le consentement de la communauté internationale dans son ensemble. Ce consentement a été effectivement accordé par la communauté internationale et par les représentants des Arabes de Palestine, à l'égard d'une partie importante des territoires situés entre les lignes de partage de 1947 et les lignes de l'armistice de 1949. Il ne fait aucun doute que l'État d'Israël a un droit souverain et indiscutable à ces territoires. Vu que c'est une dérogation importante au principe généralement reconnu que l'usage de la force sous quelque forme ne peut pas constituer la base pour le droit au territoire, ce cas est particulièrement intéressant. En effet, le principe ne peut pas être analysé de façon isolée comme les situations exceptionnelles où la communauté internationale a décidé de déroger à son application rigoureuse pour assurer la stabilité des solutions territoriales.

# ACQUISITION OF TITLE TO TERRITORY IN THE AFTERMATH OF THE USE OF FORCE IN THE UNITED NATIONS ERA: THE CASE OF THE STATE OF ISRAEL

*Rafał Soroczyński\**

The territory to which the State of Israel had a title as a newly-created state corresponded to the areas allotted to Jews by the provisions of the resolution 181(II) adopted by the General Assembly of the United Nations on November 29, 1947, which had recommended the partition of Palestine and creation of the Arab state, the Jewish state and the City of Jerusalem as a corpus separatum. As this territorial regime had been modified during the Arab-Israeli war of 1948-1949 and Israel's government has recognized the areas seized by it during the war as part of its territorial domain, the problem arose as to Israel's title to those additional territories situated between the 1947 partition lines and the lines established in accordance with the armistice agreements of 1949. Due to important characteristics of the legal status of former mandatory Palestine and to the fact that considerable parts thereof became occupied territories, the process of consolidation of the title thereto required the consent of the international community as a whole. This consent has in fact been granted, both by the international community and by representatives of Palestinian Arabs, in respect of large parts of territories situated between the 1947 partition lines and the 1949 armistice lines. There are no doubts that the State of Israel has sovereign, uncontested rights to these areas. As it constitutes important departure from the generally accepted principle that the use of force in any form cannot serve as a root of title to territory, this situation is of particular interest, providing support for the view that this principle cannot be analyzed without due regard paid to those exceptional situations where the international community decided to depart from its strict application in order to safeguard stability of territorial solutions.

Le territoire auquel l'État d'Israël a eu le droit [juridique] en tant qu'État nouvellement-créé, correspondait aux territoires attribués aux Juifs par la résolution 181 (II) de l'Assemblée générale de l'ONU en date du 29 novembre 1947. Celle-ci prévoyait le partage de la Palestine et la création d'un État arabe, un État juif et Jérusalem comme un corpus separatum. Ce régime territorial avait été modifié au cours de la première guerre israélo-arabe dans les années 1948-1949 et le gouvernement israélien a considéré les territoires occupés lors de la guerre comme une partie de son domaine territorial. C'est ainsi que le problème sur le droit d'Israël aux territoires supplémentaires situés entre les lignes de partage de 1947 et les lignes établies conformément aux accords de l'armistice de 1949 est survenu. En raison des caractéristiques particulières du statut juridique de la Palestine ex-mandataire et le fait qu'une grande partie de celle-ci est devenue des territoires occupés, le processus de consolidation du titre pour eux a exigé le consentement de la communauté internationale dans son ensemble. Ce consentement a été effectivement accordé par la communauté internationale et par les représentants des Arabes de Palestine, à l'égard d'une partie importante des territoires situés entre les lignes de partage de 1947 et les lignes de l'armistice de 1949. Il ne fait aucun doute que l'État d'Israël a un droit souverain et indiscutable à ces territoires. Vu que c'est une dérogation importante au principe généralement reconnu que l'usage de la force sous quelque forme ne peut pas constituer la base pour le droit au territoire, ce cas est particulièrement intéressant. En effet, le principe ne peut pas être analysé de façon isolée comme les situations exceptionnelles où la communauté internationale a décidé de déroger à son application rigoureuse pour assurer la stabilité des solutions territoriales.

El territorio respecto al cual Israel tenía derechos de propiedad como un Estado de reciente creación correspondía a las zonas asignadas a los judíos mediante las disposiciones de la resolución 181(II) adoptada por la Asamblea General de las Naciones Unidas el 29 de noviembre de 1947, la cual recomendaba la partición de Palestina y la creación del Estado Árabe, el Estado Judío y la Ciudad de Jerusalén como un

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corpus separatum. Como este régimen territorial había sido modificado durante la guerra Árabe-Israelí de 1948-1949 y el gobierno de Israel ha reconocido las regiones que conquistó durante la guerra como parte de su dominio territorial, la problemática surgió en torno a los derechos de propiedad de aquellos territorios adicionales situados entre las líneas de partición de 1947 y las líneas establecidas de conformidad con los Acuerdos de Armisticio de 1949. Debido a las importantes características del estatus legal del antiguo Estado Palestino y al hecho de que gran parte de su territorio se convirtió en territorios ocupados, el proceso de consolidación de los derechos de propiedad requería del consenso de la comunidad internacional en su conjunto. Este consenso ha sido en efecto otorgado, tanto por la comunidad internacional como por los representantes de los árabes palestinos respecto a gran parte de los territorios situados entre las líneas partitorias de 1947 y las líneas de armisticio de 1949. Indudablemente el Estado de Israel tiene indiscutibles y soberanos derechos sobre estas zonas. Al constituir un caso importante de desviación del principio generalmente aceptado que sostiene que el uso de la fuerza en ninguna forma debe servir como punto de partida para la adquisición de derechos de propiedad de un territorio, esta situación resulta de particular interés ya que refuerza la noción de que tal principio no puede ser analizado sin tomar en cuenta aquellas situaciones excepcionales donde la comunidad internacional decide apartarse de su aplicación estricta, en aras de salvaguardar la estabilidad de resoluciones territoriales.

The present paper offers an in-depth examination of the circumstances regarding extension of sovereignty of the State of Israel over those territories which fell under its control during the first Arab-Israeli war of 1948-49. Accordingly, it describes in detail the surroundings of the situation which have constituted a departure from the principle that the use of force in any circumstances cannot serve as a root of the title to territory, which is the corollary of the more general principle of prohibition of the use of force in international relations.<sup>1</sup> The analysis presented below seems to be all the more interesting as it deals with the legal aspect of the Middle Eastern conflict which has been rarely referred to, especially when compared with abounding studies dedicated to the problem of international legal status of the West Bank of Jordan and the Gaza Strip, which have remained under Israeli occupation since 1967.

In the first part, as a point of departure, this paper addresses the spatial limits of the legal title to territory of Israel as a newly-created state. This is indispensable in order to define precisely the territorial scope of analysis contained in the second part, which is divided into three subsections. The first of them deals with the legal status of this particular part of Palestine, which was situated outside the original territory of the State of Israel after termination of the British mandate. The second is devoted to examination of the process of gradual consolidation of Israel's title to some portions of Palestine seized by its forces during the war of 1948-49. Finally, the last subsection of the second part defines the current legal character of the Green Line that separates Israel from the Occupied Palestinian Territories.

## **I. Title to territory of Israel as a newly-created state**

Unlike cases of acquisition of territory by states which already exist, the process of determination of rights to territory of a newly-created state must work on the assumption that it is not possible to examine this question as an entirely independent issue.<sup>2</sup> It constitutes a part of the broader problem of creation of states, and consequently it cannot be analyzed in isolation from the principles of international law that govern the process of emergence of new states. In such circumstances, an area must be defined where the generally accepted criteria of statehood has been fulfilled, in this particular case. In other words, a newly-created state possesses territory where it has been established in accordance with international law and has been recognized.<sup>3</sup>

From this point of view, the case of the State of Israel was particularly interesting. The declaration of independence had not contained any direct reference to

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<sup>1</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] ICJ Rep 136 at 171 [*Legal Consequences of the Construction of a Wall*].

<sup>2</sup> James Crawford, *The Creation of States in International Law*, 2nd ed (Oxford: Oxford University Press, 2007) at 664-65 [Crawford]; Robert Y Jennings, *The Acquisition of Territory in International Law* (Manchester: Manchester University Press, 1963) at 7-12 [Jennings]; Robert Jennings & Arthur Watts, *Oppenheim's International Law*, 9th ed (Oxford: Oxford University Press, 2008) at 677.

<sup>3</sup> *Ibid.*

Israel's territorial limits,<sup>4</sup> and this matter was not regulated by this state's early legislation.<sup>5</sup> On the other hand, no binding international instrument settled Israel's boundaries in their entirety.<sup>6</sup> However, despite these deficiencies, there is enough convincing evidence which makes it possible to precisely define the territory to which Israel had a title as a newly-established state.

This territory was described for the first time in Resolution 181 (II), adopted by the General Assembly on November 29th, 1947, which provided for the partition of Palestine and creation of the Arab state, the Jewish state and the City of Jerusalem under international regime, within precisely defined limits.<sup>7</sup> True, the wording of the Resolution and intentions of the British government, which requested the Assembly to consider the problem of the future of Palestine,<sup>8</sup> clearly reveals that it was a non-binding recommendation, opposed, or at least not supported, by a considerable number of states,<sup>9</sup> and therefore this instrument cannot be given equal weight as a treaty which, defining territory, defines its frontiers.<sup>10</sup> It is nevertheless believed that the real significance of the partition resolution laid elsewhere.

The practice of the early years of existence of the United Nations leave no doubts that there existed a broad consensus that legal status of territories under mandate could not have been modified without the consent of the United Nations. Apparently, this had been the prevailing opinion among the member-states of the League of Nations<sup>11</sup> and the practice of the United Nations in respect of those territories under mandate which were not transformed into trusteeships under the relevant provisions of Chapter XII of the *Charter of the United Nations (Charter)*<sup>12</sup> additionally confirms this view. Accordingly, keeping the conduct in conformity with the views of the United Nations was evident, with great care, in the practice of the United Kingdom, with respect to Transjordan and Palestine, as well as in the only case where the opposition to steps taken by the mandatory Power could have been expected. This is namely in the case of the planned annexation of South-West Africa

<sup>4</sup> Anis F Kassim (ed), "The Israeli Declaration of Independence: A Legislative History", (1987-1988) 4 Palestine YB of Intl L 265 at 283-284 (By narrow majority of five votes to four, reference to boundaries was excluded from the proposed text).

<sup>5</sup> *Attorney-General of Israel v El-Turani* (1951), 18 ILR 164 at 166 (Dist Ct Haifa) [*El-Turani*] (It was held that: "It is correct to state that the boundaries of Israel have not been explicitly defined in any legislative act of the State of Israel").

<sup>6</sup> To those sections of Israel's frontiers which coincided with the boundaries of Palestine under mandate the general principle of intangibility of frontiers applied. However, as far as the question of frontiers within Palestine is concerned, the only relevant international instrument was the non-binding resolution of the General Assembly 181(II) of November 29<sup>th</sup>, 1947 (see *infra*, text accompanying notes 7-10).

<sup>7</sup> *Future Government of Palestine: Plan of Partition with Economic Union*, GA Res 181 (II), UNGAOR, 2<sup>nd</sup> Sess, Resolutions 16 September – 29 November 1947 (UN Doc. A/519) at 131, UN Doc A/RES/181(II). See Annex 1, below.

<sup>8</sup> UNGA, *Question of Palestine*, UN Doc A/286, April 1947.

<sup>9</sup> UNGAOR, 2<sup>nd</sup> Sess, 128th Mtg, UN Doc. A/PV.128 (1947) at 1424-1425 (The resolution was adopted by thirty-three votes to thirteen, with ten abstentions).

<sup>10</sup> *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, [1994] ICJ Rep 6 at 26 [*Territorial Dispute*].

<sup>11</sup> *Resolution of the Assembly of the League of Nations*, 18 April 1946, "The Trusteeship Council" in *Yearbook of the United Nations 1946-47* (New York: UN, 1947) 573 at 575, para 4.

<sup>12</sup> *Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7.

by the Union of South Africa where the protest indeed was expressed.<sup>13</sup> It appears that the advisory opinion of the International Court of Justice on the status of South-West Africa,<sup>14</sup> which clarified the role of the United Nations within the framework of the residual system of mandates, confirmed the general conviction that had existed before.<sup>15</sup>

Bearing this in mind, it may be concluded that the partition resolution constituted expression of view as to the preferred mode of implementation of the decision to terminate the mandate and to grant independence to the inhabitants of Palestine by the organ widely recognized as competent in this respect.<sup>16</sup> In other words, the resolution authorized the creation of the State of Israel within recommended limits as one of the possible scenarios for the future of Palestine, and as such, it was understood and accepted by the Israeli government.

There is nothing to prevent a state which did not take part in adopting of a resolution of the General Assembly to choose to commit to it or to do it in advance.<sup>17</sup> The partition resolution was mentioned in the text of the *Declaration of Independence of the State of Israel* as an act of “recognition by the United Nations of the right of the Jewish people to establish its State”.<sup>18</sup> Also, in the international arena the Israeli representatives emphasized that the document constituted adjudication on the question of the future government of Palestine<sup>19</sup> and reflected the permission given by the United Nations for the creation of the Jewish state in Palestine.<sup>20</sup> What is even more important, in addition to such general opinions, references precisely to territorial provisions of the partition resolution abounded as well.

<sup>13</sup> *Future Status of South West Africa*, GA Res 65(I), UNGAOR, Resolutions Adopted by the General Assembly During the Second Part of Its First Session From 23 October to 15 December 1946 (UN Doc. A/64/Add. 1) at 123, UN Doc. A/RES/65(I).

<sup>14</sup> *International Status of South-West Africa*, Advisory Opinion, [1950] ICJ Rep 128 [*International Status of South-West Africa*].

<sup>15</sup> *Ibid* at 144 (The Court decided unanimously that the competence to determine and modify the international legal status of the territory rested with South Africa acting with the consent of the United Nations).

<sup>16</sup> “First special session” in *Yearbook of the United Nations 1946-47* (New York: UN, 1947) at 276-277 (Forty states replied to the Acting Secretary-General’s notification of the request of the government of the United Kingdom to refer the problem of Palestine to the General Assembly. All with the exception of Ethiopia agreed to the holding of the special session devoted to this matter).

<sup>17</sup> *Case Concerning the Administration of Certain Properties of the State in Libya, Decision of 31 January 1953* (1953), 12 RIAA 357 at 369 (United Nations Tribunal in Libya). For the reference to an act of commitment in advance to the expected recommendation of the General Assembly, see *Territorial Dispute*, *supra* note 10 at 19.

<sup>18</sup> Nathan Feinberg and J. Stoyanovsky (eds), “Israel’s Declaration of Independence” (1948) 1 Jewish YB Int’l L IX at XIII; *Ziv v Gubernik* (1948), 15 Annual Digest of Public Intl L 7 at 7 (SC Israel) (It was held that although it was not a constitutional law in the light of which the validity of other laws could be examined, the object of the Declaration was to determine the fact of the establishment of the State for the purpose of recognition by international law). See also *Ahmed Shauki el Kharbutli v Minister of Defence* (1949), 15 Annual Digest of Public Intl L 7 at 7 (SC Israel).

<sup>19</sup> UNSC, *Letter Dated 7 July 1948 From the Representative of the Provisional Government of Israel to the Secretary-General Containing Israel’s Reply to the United Nations Mediator’s Suggestions (Document S/863)*, UN Doc S/870, July 1948 [UN Doc S/870].

<sup>20</sup> UNSCOR, 3rd Sess, 340th Mtg, UN Doc S/PV.340 (1948) 30. See also UNGAOR, 3rd Sess, 45th Mtg, UN Doc A/AC.24/SR.45 (1949) 227 (Israel created “in accordance with the explicit instructions of the General Assembly itself”).

Careful analysis of the practice of the Israeli authorities reveals not only approval of the 1947 partition lines,<sup>21</sup> but also the distinction made between territories accepted as the state's original territory and areas which fell under Israel's control as a result of the first Arab-Israeli war.<sup>22</sup> It is also well-evidenced that the Israeli government invoked the partition resolution in defending its rights to territories assigned therein to Jews. This may be clearly seen in respect of the Negev Desert<sup>23</sup> as well as in rejection of the proposals of the United Nations Mediator, Count Folke Bernadotte, suggesting modifications of the partition plan.<sup>24</sup> In his report, the Mediator himself recalled that, initially, Israel had made no claims to territories situated beyond the boundaries depicted in Resolution 181 (II).<sup>25</sup> The conclusions flowing inevitably from the Israeli practice presented above find additional support in the fact that there is documentary evidence suggesting that the creation of the State of Israel was regarded as connected with the territorial provisions of the partition resolution by some members of the international community. It is most important that this belief may be found in the opinions of some of those states that have quickly recognized the Jewish state, the Soviet Union<sup>26</sup> and the United States.<sup>27</sup>

Eventually, it is to be noted that the situation sketched above was not affected by any other state's overlapping territorial claim. It should be admitted that creation of a new state *per se* neither nullifies other states' claims nor affects pre-existing territorial disputes over parts of its territory.<sup>28</sup> However, the principle of non-

<sup>21</sup> UNSCOR, 3rd Sess, 294th Mtg, UN Doc S/PV. 294 (1948) 6; UNSCOR, 3rd Sess, 301st Mtg, UN Doc S/PV. 301 (1948) 9-10.

<sup>22</sup> UNSC, *Letter Dated 18 May 1948 from the Assistant Secretary-General for Security Council Affairs Addressed to the Jewish Agency for Palestine, and Reply Dated 22 May 1948 Addressed to the Secretary-General Concerning the Questions Submitted by the Security Council*, UN Doc S/766, May 1948 [UN Doc S/766]. See also *El-Turani*, *supra* note 5 at 166-167 (The court took the view that, in enacting the Area of Jurisdiction and Powers Ordinance of 1948 the legislator certainly had in mind the resolution of the General Assembly, to which were added the occupied areas, thereby creating a new territorial unit, namely, the territory in which the law of the State of Israel applied); *Steinberg v Attorney-General* (1951), 18 ILR 10 at 10-11 (SC Israel) [Steinberg]; *Wahib Saleh Kalil v Attorney-General* (1950), 16 Annual Digest of Public Intl L 70 at 70-71 (SC Israel).

<sup>23</sup> Herbert A Fine in *Foreign Relations of the United States 1949*, vol VI (Washington: Government Printing Office, 1977) at 600 [Fine, 1977]; UNGAOR, 3rd Sess, 200th Mtg, UN Doc A/C.1/SR.200 (1948) 644.

<sup>24</sup> UN Doc S/870, *supra* note 19.

<sup>25</sup> *Progress Report of the United Nations Mediator on Palestine Submitted to the Secretary-General for Transmission to the Members of the United Nations*, UNGAOR, 3rd Sess, Supp No 11, UN Doc A/648 (1948) 15 [UN Doc A/648].

<sup>26</sup> UNSCOR, 3rd Sess, 384th Mtg, UN Doc S/PV.384 (1948) 20 (It was officially expressed view of the Soviet government that the partition resolution had definitively determined Israel's boundaries); UNSCOR, 3rd Sess, 383rd Mtg, UN Doc S/PV.383 (1948) 22.

<sup>27</sup> Herbert A Fine and Paul Claussen, "The Secretary of State to Mr. Eliahu Epstein, at Washington", in *Foreign Relations of the United States 1948*, vol V, part II (Washington: Government Printing Office, 1976) 992 [Fine and Claussen, 1976]. Although the note from the government of the United States informing about the recognition granted to the provisional government of Israel made no reference to the question of frontiers, the request for that recognition mentioned the partition lines: "The Agent of the Provisional Government of Israel (Epstein) to President Truman" (*Ibid* at 989). It was the President Truman's view that Israel was entitled to areas described in the partition resolution: Harry S. Truman, *Memoirs by Harry S. Truman*, vol II (Garden City, NY: Doubleday & Company Inc, 1956) at 166.

<sup>28</sup> Authority for this view may be derived from Crawford, *supra* note 2 at 665.

annexation applicable to areas under mandate,<sup>29</sup> reflected in Article 5 of the Mandate for Palestine,<sup>30</sup> rendered such potential claims in principle untenable. In fact, neither governments of neighbouring states nor representatives of Palestinian Arabs set them forth. Instead, the view that Palestine should be recognized as a unitary state was consistently supported by Arab governments<sup>31</sup> and organs representing Palestinian Arabs,<sup>32</sup> but division of territory under mandate was not contrary to Article 22 of the *Covenant*<sup>33</sup> as Jews and Arabs of Palestine were beneficiaries on equal terms thereof. This general conclusion is clearly supported by the fact that the situation envisaged in Resolution 181 (II) was not unprecedented, as Article 25 of *Mandate for Palestine* at the outset provided for the possibility, with the consent of the Council of the League of Nations, to exclude the application of those provisions of the *Mandate* that had aimed at creation of Jewish national home from part of territory under mandate. Memorandum of the British government to this effect, initializing the process of separation of Transjordan from the Palestine proper, was accepted by the Council in 1922.<sup>34</sup> In any case, it appears that effective existence of the State of Israel within precisely defined limits inevitably destroyed any claims to the whole of its territory.<sup>35</sup>

<sup>29</sup> *Legal Consequences of the Construction of a Wall*, *supra* note 1 at 165; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, [1971] ICJ Rep 16 at 28 [*Legal Consequences for States of the Continued Presence of South Africa in Namibia*]; *International Status of South-West Africa*, *supra* note 14 at 131.

<sup>30</sup> *British Mandate for Palestine*, 24 July 1922, 3 LNOJ 1007 (entered into force 29 September 1923). (The article stated: "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").

<sup>31</sup> UNSC, *Cablegram Dated 15 May 1948 Addressed to the Secretary-General by the Secretary-General of the League of Arab States*, UN Doc S/745, May 1948; UNSC, *Report of the United Nations Mediator on Palestine to the Security Council*, UN Doc S/888, July 1948. For the opinions of some individual Arab states, see also UNSC, *Cablegram Dated 18 May 1948 From the President of the Security Council Addressed to the Foreign Minister of Syria, and Reply Thereto Submitted by the Representative of Syria at the 301st Meeting of the Security Council*, UN Doc S/768, May 1948; UNSC, *Cablegram Dated 18 May 1948 From the President of the Security Council Addressed to the Foreign Minister of Egypt, and Reply Thereto Submitted by the Representative of Egypt at the Three Hundred and First Meeting of the Security Council*, UN Doc S/767, May 1948; UNSC, *Cablegram Dated 18 May 1948 From the President of the Security Council Addressed to the Foreign Minister of Iraq, and Reply Thereto Submitted by the Representative of Iraq at the 301st Meeting of the Security Council*, UN Doc S/769, May 1948; UNSC, *Cablegram Dated 18 May 1948 From the President of the Security Council Addressed to the Foreign Minister of Lebanon, and Reply Thereto Submitted by the Representative of Lebanon at the 301st Meeting of the Security Council*, UN Doc S/770, May 1948.

<sup>32</sup> UNSC, *Letter Dated 18 May 1948 from the Assistant Secretary-General for Security Council Affairs Addressed to the Arab Higher Committee, and Reply Dated 24 May 1948 Addressed to the Secretary-General Concerning the Questions Submitted by the Security-Council*, UN Doc S/775, May 1948; UNSCOR, 3rd Sess, 283rd Mtg, UN Doc S/PV.283 (1948) 19; UNSCOR, 3rd Sess, 297th Mtg, UN Doc S/PV.297 (1948) 11. See also UNGA, *Progress Report of the United Nations Mediator on Palestine: Cablegram Dated 28 September 1948 From the Premier and Acting Foreign Secretary of All-Palestine Government to the Secretary-General Concerning Constitution of All-Palestine Government*, UN Doc A/C.1/330, October 1948.

<sup>33</sup> *Covenant of the League of Nations*, 28 June 1919, 225 CTS 195 (entered into force 10 January 1920) [*Covenant*].

<sup>34</sup> "Article 25 of the Palestine Mandate: Territory Known as Trans-Jordan; Note by the Secretary-General" (1923) 17 Am J Intl L (Supp) 171-172.

<sup>35</sup> For the authority that this is the general principle, see Jennings, *supra* note 2 at 38; Crawford, *supra* note 2 at 665-666.



To sum up, although precise frontiers of the newly-created State of Israel were not formally confirmed, it was established within territory claimed by its government<sup>36</sup> in absence of overlapping reasonable territorial counterclaims and in conformity with the authorization given by the General Assembly.<sup>37</sup> It must therefore be concluded that when the Israeli authorities took effective control over its entirety,<sup>38</sup> any doubts as to legal basis and scope of Israel's territorial domain have been dispersed.

## II. Acquisition of territory by Israel outside its original territorial domain

### A. Status of territories of former mandatory Palestine situated outside the State of Israel

The state of affairs described in the preceding section was disturbed very soon, because the partition plan failed to crystallize as the permanent territorial regime in Palestine. In result of the Arab-Israeli war of 1948-49, the *de facto* division of the country took place,<sup>39</sup> sealed by the armistice agreements concluded by Israel and the Arab states between February and July 1949.<sup>40</sup> Demarcation lines specified in these arrangements<sup>41</sup> left under the Israeli control vast areas of the Negev Desert and of central and northern Palestine, not assigned by the General Assembly to Jews. Consequently, Israel reached far beyond the partition lines, extending its control to large parts of Palestine where the Arab state and the Jerusalem enclave under international supervision should have been created in accordance with the partition resolution.

Although it soon became the view of the Israeli authorities that in the face of developments resulting from the war regime as established by Resolution 181 (II)

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<sup>36</sup> It is worth to add that this view was adopted in 1978 by Legal Adviser of the Department of State of the United States and in 2009 by Advocate General of the Court of Justice of the European Union (Marian L Nash, "Contemporary Practice of the United States Relating to International Law" (1978) 72 Am J Intl L 879 at 908 [Nash]; *Firma Brita GmbH v Hauptzollamt Hamburg-Hafen*, C-386/08, [2010] 2 ECR I-1289, Opinion of Advocate General Bot 1292, at 1311).

<sup>37</sup> See Annex I, below.

<sup>38</sup> However, it seems reasonable to argue that, as territory claimed by Israel constituted a precisely defined whole and there was no valid counterclaim, effective possession of the whole of the area was not indispensable. Some authority for this view may be derived from relevant passage of *The Guiana Boundary Case* (1904), 11 RIAA 11 at 21-22 (Arbitrator: Victor-Emmanuel, King of Italy).

<sup>39</sup> See Annex I, below.

<sup>40</sup> Texts were published in 42 UNTS 252, 288, 304 and 328.

<sup>41</sup> *Egyptian-Israeli General Armistice Agreement*, 24 February 1949, 42 UNTS 252 art 6(1) (entered into force 24 February 1949) [*Egyptian-Israeli General Armistice Agreement*]; *Israeli-Lebanese General Armistice Agreement*, 23 March 1949, 42 UNTS 288 art 5(1) (entered into force 23 March 1949) [*Israeli-Lebanese General Armistice Agreement*]; *Hashemite Jordan Kingdom-Israel General Armistice Agreement*, 3 April 1949, 42 UNTS 304 arts 5-6 (entered into force 3 April 1949) [*Hashemite Jordan Kingdom-Israel General Armistice Agreement*].

should be subject to substantial corrections, the analysis already made leads to the conclusion that the Jewish state could not claim the areas situated outside the partition lines on the same grounds as those described in the resolution, namely as parts of Israel's original territorial domain. Inevitably, from certain moments the act of creation and effective existence of a new state ceases to be decisive as far as title to territory is concerned, and reference must be made to traditional rules regulating the process of acquisition of territory by existing states. True, sometimes the precise point separating these two issues may be difficult to determine, but in this case this problem does not arise. Territorial claims of the government of Israel were secured but at the same time frozen by the commitment to the accepted partition lines. In addition, peculiarities of international legal status of parts of Palestine outside the partition lines after termination of the mandate substantially affected admissibility of territorial claims thereto.

First of all, there are no doubts that parts of Palestine between partition lines and armistice lines fell into Israel's hands as a result of military activities.<sup>42</sup> Therefore, the Israeli authorities properly recognized them as occupied territories,<sup>43</sup> to which they had no valid pre-existing title. This entailed further important legal consequences.

In accordance with the well-established traditional principle, conquest and military occupation, if not accompanied by subsequent acts of transferring sovereignty, could not create a valid title to territory.<sup>44</sup> Without analyzing the question whether the prohibition of use of force in international relations constituted a part of general international law immediately after the World War II, it is to be noted that in the United Nations era, the status of territory under belligerent occupation—such a situation being a result of use of force prohibited by Article 2 (4) of the *Charter*—has constituted substantial obstacles for a territorial title to consolidate.<sup>45</sup> This is an

<sup>42</sup> For the distinction between “riots and commotions of the pre-war period” and “warlike character” of the developments after proclamation of the State of Israel, see *Diab v Attorney-General* (1952), 19 ILR 550, at 553 (SC of Israel). See also in this context *Abramovitz v Attorney-General* (1950), 19 ILR 554 at note I (Dist Ct of Jerusalem); *Yudsin v Estate of Shanti* (1953), 19 ILR 555 at note II (Dist Ct of Tel Aviv). For the view of the Jordanian court, see also *Ottoman Bank v Jabaji* (1954), 21 ILR 457 at 459 (SC of Cassation).

<sup>43</sup> UN Doc S/766, *supra* note 22; Fine and Claussen, 1976, *supra* note 27 at 1562-1563; Fine, 1977, *supra* note 23 at 1170-1171; *El-Turani*, *supra* note 5 at 166-167; *Sabu v Military Governor of Jaffa* (1949), 16 Annual Digest of Public Intl L 464 (SC Israel) [*Sabu*]. For the particular legislation concerning occupied part of Jerusalem, see Ruth Lapidoth & Moshe Hirsch, *The Jerusalem Question and Its Resolution: Selected Documents* (Dordrecht: Martinus Nijhof Publishers, 1994) at 27-29.

<sup>44</sup> Lord McNair & Arthur D. Watts, *The Legal Effects of War*, 4th ed (Cambridge: Cambridge University Press, 1966) at 368-69; Hersch Lauterpacht, *International Law: A Treatise by L. Oppenheim*, 8th ed, vol I (New York: David McKay Company Inc, 1963) at 566-567.

<sup>45</sup> The principle of inadmissibility of acquisition of territory by force has been confirmed in *Declaration on Principles of International Law* (UNGAOR, 25<sup>th</sup> Sess, Supp No 28, UN Doc A/8028 at 121, UN Doc. A/RES/2625(XXV)) and in *Legal Consequences of the Construction of a Wall*, *supra* note 1 at 171. In particular, it was endorsed in resolutions of the General Assembly and the Security Council concerning territories occupied by Israel since 1967 (*The Syrian Golan*, GA Res 71/24, UNGAOR 71<sup>st</sup> Sess, Supp No 49, UN Doc A/71/49 (Vol I) at 74, UN Doc. A/RES/71/24; *Israeli Practices Affecting the Human Rights of the Palestinian People in the Occupied Palestinian Territory, Including East Jerusalem*, GA Res 71/98, *ibid* at 415, UN Doc A/RES/71/98; *Resolution 242(1967)*, SC Res

inevitable consequence of the *ex injuria jus non oritur* principle, confirmed by the Permanent Court of International Justice before creation of the State of Israel,<sup>46</sup> and of the principle of inadmissibility of acquisition of territory by force, irrespective of reasons of its use. As far as Israel itself is concerned, at the latest on the day of its admission to the UN and in accordance with the declaration of acceptance of the obligations of the *Charter*,<sup>47</sup> it became bound by the principles declared in its provisions. By that time, Israel did not make a formal act of annexation of the areas under occupation<sup>48</sup> (as did the government of Jordan) and there is therefore no need to examine potential effects of such an act. To the contrary, the unsettled final status of the areas seized by Israel seems to have been reflected in some judgments of the Israeli courts,<sup>49</sup> in the Protocol of Lausanne of May 12th, 1949, signed by Israel and Arab states<sup>50</sup> and in the content of the armistice agreements, closely related in terms of time with Israel's admission to the UN. Open to modifications at any time with the consent of the signatory states, armistice agreements were dictated not by political, but by military considerations, and expressly excluded possibility of their interpretation as instruments settling definitely any existing territorial claims.<sup>51</sup> Similar reservation may be found in those provisions which related specifically to the armistice lines, where they did not coincide with the external boundary of the mandatory Palestine.<sup>52</sup> It appears that in the period in question, the Israeli authorities,

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242(1967), UNSCOR, 22<sup>nd</sup> Sess, Resolutions and Decisions of the Security Council 1967, UN Doc S/INF/22/Rev. 2 at 8, UN Doc S/RES/242(1967)).

<sup>46</sup> *Legal Status of Eastern Greenland* (Denmark v Norway) (1933), Judgment, PCIJ (Ser A/B) No 53 at 75; *Jurisdiction of the Courts of Danzig* (Pecuniary Claims of Danzig Railway Officials who have Passed into the Polish Service, against the Polish Railways Administration)(1928), Advisory Opinion, PCIJ (Ser B) No 15 at 26-27.

<sup>47</sup> UNSC, *Letter Dated 29 November 1948 From Israel's Foreign Minister to the Secretary-General Concerning Israel's Application for Admission to Membership of the United Nations and Declaration Accepting Obligations Under the Charter*, UN Doc S/1093, November 1948; UNSC, *Letter Dated 24 February 1949 From the Representative of Israel to the Secretary-General Concerning the Application of Israel for Membership in the United Nations*, UN Doc S/1267, February 1949.

<sup>48</sup> This appears to have been impliedly acknowledged by the British government announcing that it had decided to grant recognition to Israel and Jordan (London, House of Lords, *Parliamentary Debates*, Vol 166 (27 April 1950) at cc 1211-1213). Also Mr. Rockwell of the Department of State noted that such proclamation of sovereignty over areas held by Israel could have been expected in case of annexation of the West Bank by Jordan (Herbert A. Fine in *Foreign Relations of the United States 1950*, vol V (Washington: Government Printing Office, 1978) at 845). For the view of the American government that territories held by Israel outside the partition lines were occupied, see Fine, 1977, *supra* note 23 at 1174-1176.

<sup>49</sup> Steinberg, *supra* note 22; Sabu, *supra* note 43.

<sup>50</sup> The map with lines corresponding to the partition plan was annexed to the Protocol as a basis for further discussion (see Fine, 1977, *supra* note 23 at 998-999).

<sup>51</sup> *Egyptian-Israeli General Armistice Agreement*, *supra* note 41, arts 4(3), 11-12(3); *Hashemite Jordan Kingdom-Israel General Armistice Agreement*, *supra* note 41, arts 2(2), 6(8), 6(9), 9; *Israeli-Lebanese General Armistice Agreement*, *supra* note 41, arts 2(2), 8; *Israeli-Syrian General Armistice Agreement*, 20 July 1949, 42 UNTS 328 arts 2(2), 8 (entered into force 20 July 1949) [*Israeli-Syrian General Armistice Agreement*]. The American delegation at Lausanne noted that Israel's demands had disregarded the clauses in the agreements safeguarding parties' territorial claims (Fine, 1977, *supra* note 23 at 1354-1355). For the view that the armistice lines "were de facto boundaries until June 1967", see Nash, *supra* note 36 at 908.

<sup>52</sup> *Egyptian-Israeli General Armistice Agreement*, *supra* note 41, art 5(2); *Hashemite Jordan Kingdom-Israel General Armistice Agreement*, *supra* note 41, arts 6(8), 6(9); *Israeli-Syrian General Armistice*

though certainly wished the areas seized during the war to become a permanent part of its territorial domain,<sup>53</sup> in principle accepted the provisional character of belligerent occupation<sup>54</sup> and the fact that the final fate of the territories outside the partition lines should be formally decided in the process of negotiations, inter alia through the UN Conciliation Commission for Palestine.<sup>55</sup> The negotiations had full approval of the United Nations.<sup>56</sup>

After all the armistice agreements had been concluded, certainly an element of stability was introduced into complex relations between Israel and its Arab neighbours. This made it possible for the Israeli authorities to make the following proposition:

In addition to the territory indicated on the working document annexed to the Protocol of May 12 all other areas falling *within the control and jurisdiction* of Israel under the terms of the armistice agreements concluded by Israel with Egypt, the Lebanon, the Hashemite Kingdom of Jordan and Syria should be formally recognized as Israel territory. The adjustment of the frontiers so created will be subject to negotiation and agreement between Israel and the Arab Government in each case concerned.<sup>57</sup>[Emphasis added.]

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*Agreement, supra* note 51, art 5. It was a basic purpose of the armistice lines “to delineate the line beyond which the armed forces of the respective Parties shall not move” (*Hashemite Jordan Kingdom-Israel General Armistice Agreement, supra* note 41, art 4(2); *Egyptian-Israeli General Armistice Agreement, supra* note 41, art 5(3)).

<sup>53</sup> Mr. Ethridge, American representative in the Conciliation Commission, reported that “Eytan virtually withdrew Israeli demand re withdrawal of Arab forces when faced with possibility of counter demand re withdrawal Israeli forces” from the Arab part of Palestine (Fine, 1977, *supra* note 23 at 1019–1020. See also *ibid* at 1122–1123, 1148–1149, 1178–1179).

<sup>54</sup> Though not bound by The Hague Regulations of 1907, Israel accepted its provisions governing status of occupied territory as part of general international law (*Attorney-General for Israel v Sylvester* (1949) 15 Annual Digest of Public Intl L 573 at 575 (SC Israel)).

<sup>55</sup> UNCCP, *Summary Record of a Meeting Between the General Committee and the Delegation of Israel*, UN Doc A/AC.25/Com.Gen/SR.10, May 1949; UNCCP, *Summary Record of a Meeting Between the Conciliation Commission and the Delegation of Israel*, UN Doc A/AC.25/SR/LM/15, May 1949; UNCCP, *Summary Record of a Meeting Between the Conciliation Commission and His Excellency Mr Shertok Minister for Foreign Affairs of Israel*, UN Doc A/AC.25/SR/G/1, February 1949. See also Fine, 1977, *supra* note 23 at 1036.

<sup>56</sup> *Resolution of 11 August 1949*, SC Res 73(1949), UNSCOR, 4<sup>th</sup> Sess, Resolutions and Decisions of the Security Council 1949, UN Doc S/INF/3/Rev.1 at 8, UN Doc S/RES/73 (1949) (The fact of conclusion of the armistice agreements was “noted with satisfaction” by the Security Council); *Palestine – Progress Report of the United Nations Mediator*, GA Res 194(III), UNGAOR, 3<sup>rd</sup> Sess, Resolutions 21 September – 12 December 1948, UN Doc A/810 at 21, UN Doc A/RES/194 (III); *Report of the United Nations Conciliation Commission for Palestine*, GA Res 512 (VI), UNGAOR, 6<sup>th</sup> Sess, Supp No 20, UN Doc A/2119 at 11, UN Doc A/RES/512 (VI) [UN Doc A/RES/512 (VI)]; *Resolution of 17 November 1950*, SC Res 89 (1950), UNSCOR, 5<sup>th</sup> Sess, Resolutions and Decisions of the Security Council 1950, UN Doc S/INF/4/Rev.1 at 9, UN Doc S/RES/89 (1950); *Resolution of 1 September 1951*, SC Res 95 (1951), UNSCOR, 6<sup>th</sup> Sess, Resolutions and Decisions of the Security Council 1951, UN Doc S/INF/6/Rev.1 at 10, UN Doc S/RES/95 (1951). It was the view expressed in resolutions of both the Council and the General Assembly that it was for the interested states to settle the questions outstanding between them.

<sup>57</sup> UNCCP, *Letter Dated 31 August 1949 Addressed to the Chairman of the Conciliation Commission by Mr Reuven Shiloah, Head of the Delegation of Israel, and Containing Replies to the Commission's Questionnaire of 15 August 1949*, UN Doc A/AC.25/IS.36, September 1949, para 3.

That the question of Israeli sovereignty there was the matter of future finds additional confirmation in the cautious dictum by Landau J. in *El-Turani* case who, still in August 1951, stated that “[t]he State of Israel includes, therefore, *at least* the territories allocated to it under the United Nations decision.”<sup>58</sup>[Emphasis added.]

In summary, although the process of consolidation of Israel’s title probably had its roots already in developments that took place in 1948, it did not enter into its final stage before May 1949. This suffices to arrive at the conclusion that this process must not be examined otherwise than in the light of the principles of the *Charter*, even without answering the question whether or not in the late forties of the previous century the prohibition of territorial acquisition through the use of force constituted an established part of the customary international law.

Nevertheless, there was another important aspect of legal status of territories outside the partition lines that must be duly taken into account. Accordingly, even bearing in mind that the legal status of Palestine in the light of developments after termination of the mandate was probably not entirely clear for every member of the international community,<sup>59</sup> it is to be accepted that the most fundamental principles of the system of mandates must be held to have survived the termination of the very mandate.<sup>60</sup> These principles were of continued applicability to the areas of Palestine situated outside the newly-created State of Israel. Any other conclusion would contradict the purpose and character of the institution of international mandates, created not only for the benefit of the inhabitants but also of humanity in general and which involved an important public interest alongside the responsibility of the international community.<sup>61</sup> This observation relates especially to the principle of non-

<sup>58</sup> *El-Turani*, *supra* note 5 at 167.

<sup>59</sup> This seems to be suggested by the large support given to abortive proposals to refer the question of Palestine to the International Court of Justice; UNSCOR, 3rd Sess, 340th Mtg, UN Doc S/PV.340 (1948) 33-34 (six states voted in favor, one against and four abstained, and the resolution was not adopted having failed to obtain the affirmative votes of seven members. The references to ratios of votes shall be presented in the following form: “6-1-4”); “Action of the General Assembly at its Third Session” 167 at 172 in *Yearbook of the United Nations 1948-49* (New York: UN, 1950) (ratio of votes in the First Committee: 21-21-4). See also UNSCOR, 3rd Sess, 302nd Mtg, UN Doc S/PV.302 (1948) 40 (The rejected British amendment voted on May 22<sup>nd</sup>, 1948, in the Security Council, stressing the necessity of further clarification of the status of Palestine after termination of mandate, with a ratio of votes 6-0-5).

<sup>60</sup> This conclusion finds support in some judicial pronouncements concerning both Namibia and the Palestinian territories. For a view of the continuity of the obligations of South Africa in respect of Namibia in general, see *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, *supra* note 29 at 119 (separate opinion of Judge Padilla Nervo). For opinions on the continuity of application to the Palestinian territories of the principles of non-annexation and that the well-being and development of peoples under mandate form a sacred trust of civilization, see *Legal Consequences of the Construction of a Wall*, *supra* note 1 at 237, 250-251 (separate opinions of Judges Al-Khasawneh and Elaraby). See also “Résolutions votées par l’Institut au cours de sa 37<sup>e</sup> Session: Les Mandats internationaux” in *Annuaire de l’Institut de Droit International: Session de Cambridge Juillet 1931*, vol II (Bad Feilnbach: Schmidt Periodicals GMBH, 1994 (Réimpression)) at 234 (Institute of International Law, during its session at Cambridge, in its resolution on the system of mandates adopted principle 8 which stated that “[l]es droits et obligations des collectivités sous mandat ne sont pas affectés par la cessation du mandat ou le changement de Mandataire”. For commentaries of members of the Institute on this principle, see *ibid* at 60-61).

<sup>61</sup> *Covenant*, *supra* note 33 (“A sacred trust of civilization”, art 22).

annexation, confirmed before World War II by Municipal Courts of mandatory powers<sup>62</sup> and, later, by the International Court of Justice.<sup>63</sup> The emergence of the Jewish state in part of the former mandatory Palestine did not alter the status of the remaining portions thereof, and the Israeli authorities had no capacity to modify it by their unilateral conduct. To the contrary, having accepted the partition lines as the limits of the state and having declared readiness to provide assistance in implementing the resolution,<sup>64</sup> the government of the State of Israel precluded itself from going back on this commitment.

To sum up, the question of admissibility of Israel's territorial claim was extremely complex, as it related to occupied territories of former mandatory Palestine, independently protected by the principle of non-annexation, applicable to every territory under mandate. Consequently, while the incorporation by Israel of the areas situated outside the partition lines in terms of law was not entirely excluded, it was not possible without fulfilling strict requirements.

It is hard to deny that the international community is the primary source of rules and principles of international law and *de facto* the ultimate judge of every situation involving their application. It must be accepted that, in the same manner as parliaments in the sphere of municipal legislation, the international community is capable of making exceptions of a more or less general character from those rules and principles. Therefore, it cannot be denied that illegal or at least legally doubtful acts affecting the community as a whole, if generally recognized, may produce full legal effects, such as creating valid titles to territory. This concept, accepted by many eminent scholars,<sup>65</sup> may modify usual consequences of the *ex injuria jus non oritur*

<sup>62</sup> The Supreme Court of New Zealand described the mandatory administering the affairs of Samoa as "a mere servant bound to obey the directions of its master the Council of the League of Nations" (*In re Tamasese, A Prisoner* [1929] NZLR 209, 210). Other courts had no doubts that under the system of mandates no transfer of sovereignty had taken place and territories in question remained entities separate from the administering states: see *The King v Ketter* (1939), 9 Annual Digest of Public Intl L 46 at 48 (Crim App England); *Frost v Stevenson* (1937), 8 Annual Digest of Public Intl L 98 at 104-106, 108-109 (HC Australia); *Jerusalem-Jaffa District Governor v Suleiman Murra* (1926), JW Garner, "Decisions of National Tribunals Involving Points of International Law" (1927) 8 British YB Intl L 187 at 192-193 (Privy Council). See also to the same effect *Attorney-General v Goralschwili* (1925-26), 3 Annual Digest of Public Intl L 47 at 48 (HC Palestine); *Klausner v Levy* (1949), 16 Annual Digest of Public Intl L 37 at 38 (Dist Ct Eastern Dist Virginia). It should also not pass unnoticed that some judicial authorities treated Palestine for the purposes of the proceedings as a separate state (*Affaire de la Dette Publique Ottomane* (1925), 1 RIAA 529 at 609-610 (Arbitrator Borel); *Saikaly v Saikaly* (1925), 3 Annual Digest of Public Intl L 48 at 48 (Mixed Courts Egypt)).

<sup>63</sup> *Legal Consequences of the Construction of a Wall*, *supra* note 1; *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, *supra* note 29; *International Status of South-West Africa*, *supra* note 14.

<sup>64</sup> UNSC, *Cablegram Dated 15 May 1948 Addressed to the Secretary-General by Foreign Secretary of the Provisional Government of Israel*, UN Doc S/747, May 1948.

<sup>65</sup> Hersch Lauterpacht, *Recognition in International Law* (Cambridge: Cambridge University Press, 2013) at 429; Hersch Lauterpacht, *International Law: Being the Collected Papers of Hersch Lauterpacht*, vol I, Elihu Lauterpacht ed (Cambridge: Cambridge University Press, 2009) at 345. For application of this concept to territorial questions, see also Malcolm Shaw, *Title to Territory in Africa: International Legal Issues* (Oxford: Oxford University Press, 2011) at 22-23; Ian Brownlie, *International Law and the Use of Force by States* (Oxford: Oxford University Press, 1963) at 422; Jennings, *supra* note 2 at 61-64, 67-68.

principle. It seems desirable to adopt the view that in cases like the one analyzed in this paper, involving fundamental principles of international law, the fact of subsequent general acquiescence should be considered as the most important factor in the process of creation of the title – such an approach would permit to safeguard the validity of the very principle of illegality of acts of acquisition of territory by use of force. Nevertheless, one cannot escape the conclusion that, in fact, in such cases the act of military conquest will be found at the very beginning of the chain of developments leading to consolidation of the title.

Accordingly, the crystallization of Israel's title to the occupied territories situated outside its original territorial domain, themselves additionally protected by the most fundamental principles of the system of mandates and in contradiction to its government's official standpoint, must be recognized as entirely dependent upon the consent of the international community as a whole. The community's central role in this case is indisputable. It was the guardian of the rights of inhabitants of the mandated territories, the apparent addressee of the Israeli declarations of acceptance of the provisions of the partition resolution, and it was obviously affected by territorial modifications involving the use of force in the territory of former mandatory Palestine.

As will be presented below, such a consent, in fact, has been granted not only by the international community as a whole, but also by the Palestinians, whose right to self-determination and independence has eventually been universally recognized. The forthcoming considerations relate generally to the areas situated between the 1947 partition lines and the demarcation lines established in accordance with armistice agreements, as they existed before the war of 1967. However, the question of opinion of the international community as to status of West Jerusalem remains outside the scope of the present article.

#### **B. Consolidation of Israel's title to areas situated between the 1947 partition lines and the pre-1967 armistice lines**

As already noted, there is sufficient evidence to arrive at the conclusion that Israel's title to areas seized during the 1948-49 war did not consolidate by the time of its admission to the UN. On the other hand, it is difficult to determine precisely the point in time where the process of consolidation came to an end, but it is not rare in cases where legal status of territory crystallizes in effect of a more or less long-lasting process. What is most important, this process has been completed, and therefore it would be interesting to look through its different phases.

The uninterrupted chain of developments that eventually led to universal acceptance of Israel's sovereign rule in the areas in question began already in the very early period of existence of the State of Israel, when many states adopted the view that the provisions of the partition resolution, in large part without chances to be implemented, should no longer serve as a basis for territorial solution of conflict in Palestine. Accordingly, on May 14th, 1948, the General Assembly adopted a

resolution that relieved from further exercise of its responsibilities the Palestine Commission, established by Resolution 181 (II) to assist in the process of reaching independence by Palestinian states during the preparatory period, and simultaneously empowered United Nations Mediator to use his good offices inter alia to “[p]romote a peaceful adjustment of the future situation of Palestine.”<sup>66</sup> The Mediator, Count Folke Bernadotte, prepared two subsequent sets of suggestions in June and September, both departing from the territorial regime of the partition resolution. The September proposals assumed Israeli borders to be not defined; they had to be determined either “by formal agreement between the parties concerned or failing that, by the United Nations”, but not necessarily rigidly according to provisions of Resolution 181 (II).<sup>67</sup> In the Security Council, Count Bernadotte said: “If I should, as a Mediator, have been one hundred per cent bound by the decision taken by the General Assembly on 29 November 1947, I think that the Security Council should not have had a Mediator, because then no mediation would have been necessary.”<sup>68</sup>

During deliberations in the First Committee of the General Assembly upon Count Bernadotte’s proposals, many states supported some flexibility as far as territorial regime of Palestine was considered. Admittedly reference to a possibility of territorial modifications taking into account Mediator’s report was not included in the draft resolution proposed by the First Committee for General Assembly, but a considerable number of states voted in favour of such a paragraph.<sup>69</sup> In the Security Council some governments emphasized not only legal, but also political aspect of the case<sup>70</sup> and expressed the view that the partition resolution was in fact abandoned or at least that it did not constitute essential basis for territorial settlement.<sup>71</sup> Eventually, some of the governments expressly adhered to the opinion that Israel’s frontiers awaited final determination, presumably by the expected agreements between Israel and its neighbours.<sup>72</sup>

In consequence, facing developments clearly diverging from the partition scheme, neither the United Nations nor, in general, its member-states, insisted upon its full implementation, and Israel was not called by the United Nations to withdraw

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<sup>66</sup> *Appointment and Terms of Reference of a United Nations Mediator in Palestine*, GA Res 186 (S-2), UNGAOR, 2<sup>nd</sup> Spec Sess, Supp No 2, Resolutions 16 April – 14 May 1948, UN Doc A/555 at 5, UN Doc A/RES/186 (S-2).

<sup>67</sup> UN Doc A/648, *supra* note 25 at 17-18. For the June proposal, see UNSC, *Text of Suggestions Presented by the United Nations Mediator on Palestine to the Two Parties on 28 June 1948*, UN Doc S/863, July 1948.

<sup>68</sup> UNSCOR, 3rd Sess, 333rd Mtg, UN Doc S/PV.333 (1948) 13.

<sup>69</sup> UNGA, *Palestine: Progress Report of the United Nations Mediator; Report of the First Committee*, UN Doc A/776 at para 20 (December 1948) (The relevant operative paragraph 4 of the United Kingdom second revised draft resolution was rejected by twenty-five votes to twenty-two, with five abstentions).

<sup>70</sup> UNSCOR, 3rd Sess, 336th Mtg, UN Doc S/PV.336 (1948) 24; UNSCOR, 3rd Sess, 339th Mtg, UN Doc S/PV.339 (1948) 14.

<sup>71</sup> UNSCOR, 3rd Sess, 376th Mtg, UN Doc S/PV.376 (1948) 36; UNSCOR, 3rd Sess, 335th Mtg, UN Doc S/PV.335 (1948) 3; UNSCOR, 3rd Sess, 386th Mtg, UN Doc S/PV.386 (1948) 24.

<sup>72</sup> UNSCOR, 3rd Sess, 383rd Mtg, UN Doc S/PV.383 (1948) 11, 16; UNSCOR, 3rd Sess, 385th Mtg, UN Doc S/PV.385 (1948) 14; UNSCOR, 4th Sess, 414th Mtg, UN Doc S/PV.414 (1949) 3 (statements of representatives of the United States, the United Kingdom, Argentina and Norway).



from the areas situated outside the 1947 partition lines. Instead, it was widely accepted that it was for the interested governments finally to arrive at an agreement resolving the outstanding questions between them. Therefore, the General Assembly Resolution 512 (VI) of January 26th, 1952, adopted with large majority of votes,<sup>73</sup> took note that Conciliation Commission for Palestine had been unable to fulfill its mandate, emphasized the prime responsibility of governments concerned for reaching the solution and urged parties “to seek agreement with a view to an early settlement of their outstanding differences in conformity with the resolutions of the General Assembly on Palestine [...]”

This approach had generally dominated until Palestinians were recognized as a party in the Middle Eastern peace process in the seventies of the twentieth century, and it is therefore not surprising that since the early fifties until the June war of 1967 the United Nations did not deal with the problem of legal status of Palestine as such, limiting debates to particular questions arising, mostly those concerning Palestinian refugees and infringements of provisions of the armistice agreements.

The situation became even clearer after 1967. In result of the short conflict of 5-10 June, Israel took control over remaining parts of former mandatory Palestine, that is, the West Bank of Jordan with East Jerusalem and the Gaza Strip. But it was generally recognized that the results of the June war did not affect the territorial regime of Palestine based on the armistice lines. On November 22nd, 1967, the Security Council adopted the well-known Resolution 242 (1967) which, among others, called Israel to withdraw its armed forces to the armistice lines, and soon this postulate had become the internationally recognized standard and accepted territorial condition of the peaceful settlement of the Middle Eastern conflict, clearly seen in individual states’ opinions<sup>74</sup> and resolutions of the General Assembly.<sup>75</sup> With the general recognition of the right to self-determination of the Palestinian people as its

<sup>73</sup> UN Doc A/RES/512 (VI), *supra* note 56; UNGAOR, 6th Sess, 365th Mtg, UN Doc A/PV. 365 (1952) 404 (The resolution was adopted by forty-eight votes to five, with one abstention).

<sup>74</sup> Jean JA Salmon & Michel Vincineau, “La Pratique du Pouvoir Exécutif et le Contrôle des Chambres Législatives en Matière de Droit International (1973-1974)” (1976) 12 Rev Belge D Intl 172 at 220-221; ALC deMestral, “Canadian Practice in International Law During 1976 as Reflected in Resolutions of the House of Commons and in Government Statements in the House of Commons” (1977) 15 Can YB Intl L 337 at 345-346; Karl A Lamers, “Völkerrechtliche Praxis der Bundesrepublik Deutschland im Jahre 1975” (1977) 37 Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht 711 at 719; Giandonato Caggiano, “Diplomatic and Parliamentary Practice” (1978-1979) 4 Italian YB Intl L 212 at 224; Geoffrey Marston, “United Kingdom Materials on International Law 1982” (1982) 53 Brit YB Intl L 337 at 366-367; John A Boyd, “Contemporary Practice of the United States Relating to International Law” (1978) 72 Am J Intl L 119 at 140.

<sup>75</sup> *The Situation in the Middle East*, GA Res 2628 (XXV), UNGAOR, 25<sup>th</sup> Sess, Supp No 28, UN Doc A/8028 at 5, UN Doc A/RES/2628 (XXV); *The Situation in the Middle East*, GA Res 2799 (XXVI), UNGAOR, 26<sup>th</sup> Sess, Supp No 29, UN Doc A/8429 at 3, UN Doc A/RES/2799 (XXVI); *The Situation in the Middle East*, GA Res 2949 (XXVII), UNGAOR, 27<sup>th</sup> Sess, Supp No 30, UN Doc A/8730 at 6, UN Doc A/RES/2949 (XXVII); *The Situation in the Middle East*, GA Res 3414 (XXX), UNGAOR, 30<sup>th</sup> Sess, Supp No 34, UN Doc A/10034 at 6, UN Doc A/RES/3414 (XXX); *The Situation in the Middle East*, GA Res 31/61, UNGAOR, 31<sup>st</sup> Sess, Supp No 39, UN Doc A/31/39 at 22, UN Doc A/RES/31/61; *The Situation in the Middle East*, GA Res 32/20, UNGAOR, 32<sup>nd</sup> Sess, Supp No 45, UN Doc A/32/45 at 23, UN Doc A/RES/32/20; *The Situation in the Middle East*, GA Res 35/207, UNGAOR, 35<sup>th</sup> Sess, Supp No 48, UN Doc A/35/48 at 39, UN Doc A/RES/35/207.

inherent right, the postulate of implementation of this right has been naturally linked with the framework of the Resolution 242 (1967), giving eventually birth to the widely accepted vision of two states co-existing in Palestine on the basis of the pre-1967 lines. This idea has been endorsed in many widely-supported General Assembly resolutions<sup>76</sup> and recent peace proposals.<sup>77</sup>

Furthermore, the boundaries formally established between Israel on one hand and Egypt and Jordan on the other under relevant provisions of the peace treaties have been generally recognized and have not been challenged, even though the Egyptian-Israeli frontier has separated Egypt not only from the territories to which Israel had a title as a newly-created state, but also from the areas allotted by the partition resolution to Palestinian Arabs.<sup>78</sup> Of evidentiary value in this respect may also be regarded that Israel and Lebanon in general agree that it is the boundary between the former mandatory Palestine and Lebanon, which after 1949 served as the Israeli-Lebanese armistice line,<sup>79</sup> that has separated territorial domains of both states.<sup>80</sup> Again, this fact is not challenged, although this line separates Lebanon from territories allotted in 1947 to Palestinian Arabs.

Eventually, the uniform and constant treatment as the occupied territories by the international community of the areas that fell under Israeli control in 1967 remains in strong contrast with the practice concerning the areas situated between the partition lines and the pre-1967 armistice lines. This differentiation was *de facto* confirmed in its advisory opinion by the International Court of Justice, which for the purpose of examination of legality of the wall construed by Israel clearly distinguished between territory of the State of Israel and Palestinian occupied territories, separated by the Green Line.<sup>81</sup> Therefore, it may be recognized as additional argument supporting the view presented here.

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<sup>76</sup> *Peaceful Settlement of the Question of Palestine*, GA Res 69/23, UNGAOR, 69th Sess, Supp No 49, Resolutions 16 September – 29 December 2014, UN Doc A/69/49 (Vol I) at 78, UN Doc A/RES/69/23 (2014); *Peaceful Settlement of the Question of Palestine*, GA Res 68/15, UNGAOR, 68th Sess, Supp No 49, Resolutions 17 September – 27 December 2013, UN Doc A/68/49 (Vol I) at 43, UN Doc A/RES/68/15 (2013) [UN Doc A/RES/68/15]; *Peaceful Settlement of the Question of Palestine*, GA Res 67/23, UNGAOR, 67th Sess, Supp No 49, Resolutions 18 September – 24 December 2012, UN Doc A/67/49 (Vol I) at 58, UN Doc A/RES/67/23 (2012); *Peaceful Settlement of the Question of Palestine*, GA Res 66/17, UNGAOR, 66th Sess, Supp No 49, Resolutions 13 September – 24 December 2011, UN Doc A/66/49 (Vol I) at 34, UN Doc A/RES/66/17 (2011).

<sup>77</sup> *The Beirut Declaration*, 28 March 2002, 41 ILM 1000; UNSC, *Letter Dated 7 May 2003 From the Secretary-General Addressed to the President of the Security Council, Annex: A Performance-Based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict*, UN Doc S/2003/529, May 2003.

<sup>78</sup> *Treaty of Peace* (Israel, Egypt), 26 March 1979, 1138 UNTS 59 art 2 (entered into force 25 April 1979); *Treaty of Peace Between the State of Israel and the Hashemite Kingdom of Jordan*, 26 October 1994, 2042 UNTS 351 art 3 (entered into force 10 November 1994).

<sup>79</sup> *Israeli-Lebanese General Armistice Agreement*, *supra* note 41, art 5(1).

<sup>80</sup> The treaty signed by both states in 1983 declared “the existing international boundary between Israel and Lebanon inviolable” (*Agreement on Withdrawal of Troops From Lebanon*, 17 May 1983, 22 ILM 708 art 1(1)). See also UNSC, *Report of the Secretary-General on the Implementation of Security Council Resolutions 425(1978) and 426 (1978)*, UN Doc S/2000/460, May 2000.

<sup>81</sup> *Legal Consequences of the Construction of a Wall*, *supra* note 1 at 164.

There is no discrepancy between the international community's approach and the one adopted by the recognized Palestinian authorities. Initially opposed to the idea of the partition of Palestine and the creation of the Jewish state there,<sup>82</sup> eventually they have recognized the pre-1967 lines as the basis of national aspirations of the Palestinian people. In consequence, applying on behalf of Palestine for membership in the United Nations in September 2011, in his statement before the General Assembly, President Abbas informed the delegates that he had "submitted to Secretary-General Ban Ki-Moon an application for the admission of Palestine as a full Member of the United Nations on the basis of the 4 June 1967 borders, with Al-Quds Al-Sharif as its capital."<sup>83</sup> As this initiative had failed, the following year Palestine successfully attempted to obtain the non-member observer state status in the UN, and in his speech preceding the voting on the matter President Abbas stressed again that "[w]e will accept no less than the independence of the State of Palestine, with East Jerusalem as its capital, on all the Palestinian territory occupied in 1967."<sup>84</sup>

A similar standpoint, emphasising the role of the Security Council Resolutions 242 (1967) and 338 (1973), has also been reflected in the Israeli-Palestinian agreements.<sup>85</sup>

In the light of the analysis presented above no serious doubts seem to rise from the fact that that Israel's sovereignty over the areas situated between the partition lines and the pre-1967 lines has been universally accepted. The only problem involved and calling for an additional analysis is the legal character of the line separating Israel from the Palestinian territories. As will be presented below, it does not seem justified to recognize it as a fully-fledged frontier within the meaning attributed to this term by international law.

### C. Legal character of the Green Line

As to the proposition that the pre-1967 lines should be treated as a fully crystallized international frontier, this possibility was suggested as early as 1951 by Shabtai Rosenne who, as then-legal adviser to the Israeli Ministry for Foreign Affairs, stated in reference to the 1949 armistice agreements that "[i]t is possible [...] that the juridical function of these lines is far greater, and that they are indistinguishable from

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<sup>82</sup> UNSCOR, 3rd Sess, 311th Mtg, UN Doc S/PV.311 (1948) 14 (statement of representative of the Arab Higher Committee). Palestine was recognized as indivisible territorial unit in Article 2 of the *Palestinian National Charter*, according to its versions of 1964 and 1968.

<sup>83</sup> UNGAOR, 66th Sess, 19th Mtg, UN Doc A/66/PV.19 (2011) 30. See also UNGA, UNSC, *Application of Palestine for Admission to Membership in the United Nations*, UN Doc A/66/371-S/2011/592 (2011) Annex II.

<sup>84</sup> UNGAOR, 67th Sess, 44th Mtg, UN Doc A/67/PV.44 (2012) 4.

<sup>85</sup> *Declaration of Principles on Interim Self-Government Arrangements*, 13 September 1993, 32 ILM 1525 art 1 (entered into force 13 October 1993) [*Declaration of Principles on Interim Self-Government Arrangements*]; *Interim Agreement on the West Bank and the Gaza Strip*, 28 September 1995, 36 ILM 551 Preamble (entered into force 28 September 1995); *The Sharm El-Sheikh Memorandum*, 4 September 1999, 38 ILM 1465 art 1(b) (entered into force 11 September 1999).

international frontiers proper”.<sup>86</sup> Such an approach to the character of the pre-1967 lines, even nowadays, seems to be nevertheless open to very serious discussion.

It goes without saying that establishment of an international boundary must involve either the element of consent of the interested parties or action by a competent authority, such as an international court endowed with the appropriate jurisdiction. So far, no formal agreement has been concluded concerning the boundaries, and no decision of an international court or other international authority has bound the Israeli government and the Palestinian authorities in this respect. On the other hand, there is no tacit agreement between the parties as to the role of the pre-1967 lines in general.

The Israeli annexation of East Jerusalem and large areas of the West Bank, settlement activities in the occupied territories and opinions expressed as to the character of the Green Line<sup>87</sup> disperse any possible doubts in this respect.

Furthermore, the principle that the object of establishing of a frontier is to achieve stability and permanence is well-established in the jurisprudence of the International Court of Justice<sup>88</sup> and of other international tribunals.<sup>89</sup> In this case, the parties agree that the Israeli-Palestinian boundary is yet to be determined in the course of permanent status negotiations,<sup>90</sup> so acceptance must be presumed of the temporary character of the pre-1967 lines. That the frontiers should be negotiated in this case is also generally accepted by the international community. Bearing this in mind, it is difficult to accept that the line recognized as permanent and final neither by the interested parties nor by the third states has crystallized as a definitive frontier. True, owing to the existence of the Green Line it is not difficult to determine where the territory of the State of Israel ends and the occupied Palestinian territories begin. Yet, this is not due to the fact that the line is an international boundary, but because it separates territories whose status is well-defined, and this need not necessarily entail the conclusion that the frontiers are also finally settled.<sup>91</sup>

The reasoning presented above finds additional support in the opinion of the International Court of Justice of 2004 and in the practice of the General Assembly.

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<sup>86</sup> Shabtai Rosenne, *Israel's Armistice Agreements with the Arab States* (Tel Aviv: Blumstein's Bookstore Ltd, 1951) at 47. For a more recent proposition to similar effect, see Sarah Hibbin & Iain Scobbie, *The Israel-Palestine Conflict in International Law: Territorial Issues* (Research Paper No 2/2010, University of London, School of Oriental and African Studies) at 62 [unpublished].

<sup>87</sup> *Written Statement of the Government of Israel on Jurisdiction and Propriety*, 11 para 2.9 (2004), online: International Court of Justice <<http://www.icj-cij.org/files/case-related/131/1579.pdf>>.

<sup>88</sup> *Territorial Dispute*, *supra* note 10 at 37; *Aegean Sea Continental Shelf* (Greece v Turkey), Judgment, [1978] ICJ Rep 3 at 35-36; *Case Concerning the Temple of Preah Vihear (Cambodia v Thailand)*, Merits, [1962] ICJ Rep 6 at 34.

<sup>89</sup> *Case Concerning the Location of Boundary Markers in Taba Between Egypt and Israel* (1988), 20 RIAA 1 at 57; *Dubai-Sharjah Border Arbitration* (1981), 91 ILR 543 at 578; *Dispute Between Argentina and Chile Concerning the Beagle Channel* (1977), 21 RIAA 53 at 89.

<sup>90</sup> *Declaration of Principles on Interim Self-Government Arrangements*, *supra* note 85, art 5(3).

<sup>91</sup> That this view is reasonable seems to find some general support in dictum of the International Court of Justice in the context of continental shelf: “[t]he appurtenance of a given area, considered as an entity, in no way governs the precise delimitation of its boundaries, any more than uncertainty as to boundaries can affect territorial rights” (*North Sea Continental Shelf* (Germany/Denmark, Germany/Netherlands), Judgment, [1969] ICJ Rep 3 at 32).

The Court appears to have very carefully distinguished the concept of boundaries *sensu stricto* from the problem of the line separating Israel and the Palestinian territories. It has made references to the Israeli-Jordanian boundary fixed by the terms of the 1994 peace treaty,<sup>92</sup> to “the former eastern boundary of Palestine under the Mandate”<sup>93</sup> and to “the future frontier between Israel and Palestine”,<sup>94</sup> but has constantly used the term “Green Line” as originating from the Israeli-Jordanian armistice agreement in order to describe the line currently separating Israel from the Palestinian territories.<sup>95</sup> On the other hand, careful analysis of the wording of recent General Assembly resolutions reveals that references to the “pre-1967 borders” have been made in the context of negotiations to achieve the two-state solution. In the context of the Israeli wall its route has been described as departing from the “Armistice Line of 1949”.<sup>96</sup> This seems to suggest a distinction between the current *de facto* situation and the desired effect of a future agreement between the parties. Moreover, it is of considerable importance that the Roadmap, the spirit of which still remains the widely-accepted guide for the Middle Eastern peace process,<sup>97</sup> contains an interesting reference to the problem of frontiers. Dividing the peace process into three phases, the document envisaged the creation of a Palestinian state with “provisional borders” in the second phase and their final determination during permanent status negotiations in the third phase.<sup>98</sup>

It remains to be analyzed whether the fact of recognition of the Palestinian state within the pre-1967 borders by a considerable number of governments should be regarded as having any effect on the reasoning consistently presented in the preceding paragraphs. The author offers that it should not. *Prima facie*, the discussed recognitions would indeed suggest that the states in question have accepted the status of the pre-1967 lines as definitively settled. However, this conclusion seems to be unjustified. The process of recognition of the Palestinian state has been in progress since 1988 and it cannot therefore be maintained that it constitutes a novelty, or that it reflects any recent modification of the attitude of the large part of the international

<sup>92</sup> *Legal Consequences of the Construction of a Wall*, *supra* note 1 at 167.

<sup>93</sup> *Ibid* at 167.

<sup>94</sup> *Ibid* at 184.

<sup>95</sup> *Ibid* at 166-167, 177, 189.

<sup>96</sup> See in particular following resolutions, where both expressions were used in separate contexts in a single document: *Israeli Settlements in the Occupied Palestinian Territory, Including East Jerusalem, and the Occupied Syrian Golan*, GA Res 68/82, UNGAOR, 68th Sess, Supp No 49, Resolutions 17 September – 27 December 2013, UN Doc A/68/49 (Vol I) at 280, UN Doc A/RES/68/82 (2013); *Israeli Settlements in the Occupied Palestinian Territory, Including East Jerusalem, and the Occupied Syrian Golan*, GA Res 67/120, UNGAOR, 67th Sess, Supp No 49, Resolutions 18 September – 24 December 2012, UN Doc A/67/49 (Vol I) at 307, UN Doc A/RES/67/120 (2012); *Israeli Settlements in the Occupied Palestinian Territory, Including East Jerusalem, and the Occupied Syrian Golan*, GA Res 66/78, UNGAOR, 66th Sess, Supp No 49, UN Doc A/66/49 (Vol I) at 201, UN Doc A/RES/66/78 (2011). For the general graphic illustration presenting most important parts of the wall in departure from the “Green Line”, see Annex II, below.

<sup>97</sup> See UN Doc A/RES/68/15, *supra* note 76, adopted with substantial majority of votes (165-6-6) (UNGAOR, 68th Sess, 58th Mtg, UN Doc A/68/PV.58 (2013) 20-21).

<sup>98</sup> UNSC, *Letter Dated 7 May 2003 from the Secretary-General Addressed to the President of the Security Council, Annex: A Performance-Based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict*, UN Doc S/2003/529, May 2003 at 6-8.

community which generally accepts the principle that the frontiers should be determined during the permanent status negotiations. It appears that the issue of recognition of the State of Palestine operates on a different level than issues of the permanent status negotiations, and seems rather to be associated with the undisputed status of the Palestinian territories than with the problem of precisely finalized frontiers. Moreover, it appears to be regarded by many governments as secondary to the process of negotiations and some of them expressly emphasize that the intended effect of recognition is to increase the prospects that negotiations will resolve final status issues.<sup>99</sup> In other words, this situation may be understood as a backdoor attempt to give precedence to the principle of self-determination of the Palestinian people within the recognized territory over the *de facto* deadlocked Middle Eastern peace process. This is accompanied by the continual acceptance of the boundaries as a subject of future negotiations in accordance with Israeli-Palestinian agreements.

In summary, the Green Line may be regarded as the *de facto* frontier between the State of Israel and the Palestinian territories, and it is hard to deny that the effects generated by this line are similar to those that a fully-established border would entail. But this is only insofar as the notion of a boundary applies to the pre-1967 lines. Though identity of effects may contribute to elimination of practical consequences of the doctrinal divergences between some concepts of international law,<sup>100</sup> this is certainly not the case here. The concepts of a temporary *de facto* frontier and a fully-established permanent border cannot be equated simply because in a particular case they entail similar legal consequences.<sup>101</sup>

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In the course of the last decades Israel has obtained sovereign rights to territories which it had captured during the war without any pre-existing title, and which its authorities themselves initially treated, properly from the point of view of international law, as occupied territories. Even though Israel's frontiers have not been formally determined in their entirety, precise spatial limits of its sovereign rights raise no doubts, as they are defined either by peace treaties and their provisions relating to borders, or by boundary arrangements predating emergence of the State of Israel, or by different status of territories which Israeli territory adjoins.

<sup>99</sup> UNGAOR, 66th Sess, 67th Mtg, UN Doc A/66/PV.67 (2011) 12 (view of the governments of Brazil, India and South Africa).

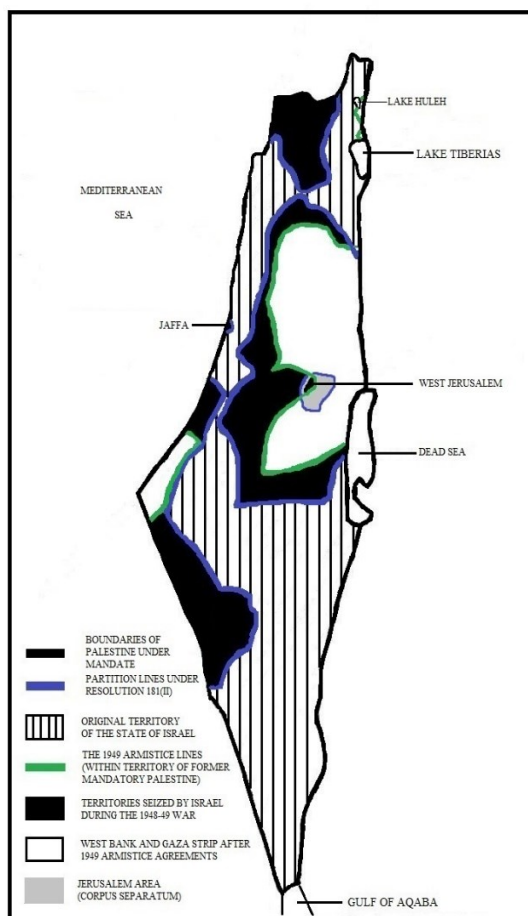
<sup>100</sup> *Interpretation of the Air Transport Services Agreement Between the United States of America and France* (1963), 16 RIAA 5 at 63 n 2.

<sup>101</sup> *Panama and Abundio Caselli v United States* (1933), 6 RIAA 377 at 378 (The General Claims Commission established between the United States and Panama had no doubts that in respect of the canal zone the treaty had transferred "such rights as the United States would possess if it were the sovereign thereof", without transferring the title to the zone). See also *Luckenbach Steamship Co v United States* (1930), 5 Annual Digest of Public Intl L 80 at 81 (SC United States); *In Re Kenneth Robert Bartlett* (1930), *ibid* 81 at 82 (SC Panama) (evidence that the Supreme Courts of the United States and Panama treated the Canal Zone as, respectively, "foreign" and "not foreign" territory).

This particular case of acquisition of territorial sovereignty must be recognized as of highly exceptional character, in departure from the principles rooted in Article 2 (4) of the *Charter*. True, this case had many of its own peculiarities. Apparent reserve of the international community in relation to similar claims set forth by Jordan seems to suggest that the decision could have been facilitated by “intrapalestinian”, after all, character of the case. Invasion of Arab states on Palestine and consistent denial of right to establish their state by Jews did not render a service to the Palestinian cause, either. Eventually, not yet developed principle of self-determination of peoples could not have lent such a support to Palestinian Arabs as it has since mid-seventies of the previous century in relation to territories occupied by Israel during the June war of 1967. Nevertheless, in the light of the considerations presented above the existence of Israel’s title is clearly proven, as is required by generally accepted principle that exceptions to well-established rules must not be lightly presumed – the principle which must be especially strictly applied in case of departure from one of the most fundamental norms of contemporary international law. Therefore, it is an inevitable conclusion that there has been an international practice revealing that the principle that the use of force cannot serve as a root of the title to territory even in the United Nations era cannot be analyzed without due attention paid to special considerations surrounding those cases where the international community *de facto* decided to depart from its application.

## Annex I

Sketch map No 1 Territorial changes in Palestine 1947-49.<sup>102</sup>

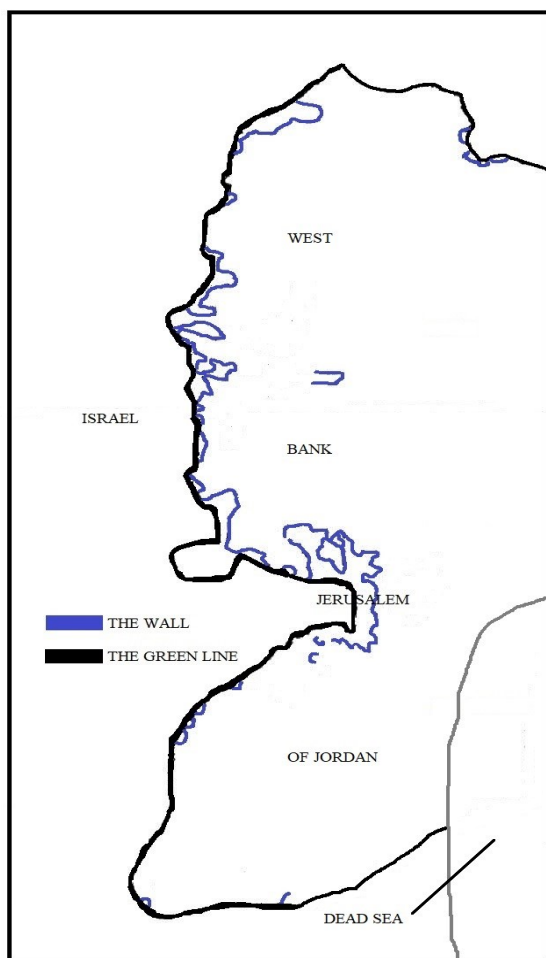


<sup>102</sup> Prepared on the basis of United Nations, *UN Partition Plan – 1947*, Map No 3067 Rev 1, April 1983; United Nations, *The Armistice Lines of 1949*, Map No 547.I, October 1953.



## Annex II

Sketch map No 2 Selected important parts of the wall built in the Occupied Palestinian Territories (in departure from the “Green Line”).<sup>103</sup>



<sup>103</sup> Prepared on the basis of *The Interactive Map of the Occupied Palestinian Territory*, online: United Nations Office for the Coordination of Humanitarian Affairs <[ochaopt.org/page/interactive-map](http://ochaopt.org/page/interactive-map)>.