Vanderbilt Journal of Transnational Law

Volume 11
Issue 2 *Spring 1978*

Article 3

1978

Jurisdiction over Palestine--An Analysis of the Conflicting Arab-Israeli Claims of Legal Title

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NOTES

JURISDICTION OVER PALESTINE— AN ANALYSIS OF THE CONFLICTING ARAB-ISRAELI CLAIMS OF LEGAL TITLE

I. INTRODUCTION

The recent controversy over the establishment of Israeli settlements in occupied territory has resurrected a thirty year dispute over territorial sovereignty[1] in the area referred to before 1948 as Palestine.[2] Ever since the failure of the United Nations Partition Resolution in 1947 and Israeli independence in 1948, the Arabs and Israelis have been fighting over legal entitlement to Palestine. This dispute takes on added significance in light of the present Egyptian-Israeli peace negotiations, and the situation created by the Armistice Agreements and United Nations Resolutions 242 and 338 following the fighting in 1967 and 1973. These cease-fire accords have established military boundaries between Israel and its Arab neighbors that will remain until a peace agreement is signed by Israel and the interested Arab states.[3] Israel has refused to sign any agreement until its Arab neighbors recognize its sovereign existence. The Arab states, on the other hand, have in general refused to recognize Israel, contending that Israel usurped Palestine in 1948 and is not legally entitled to it. Some Arab states now indicate that they might be willing to recognize Israel, although they steadfastly refuse to acknowledge Israel's original claim to

1. Territorial sovereignty is the closest equivalent in international law to the domestic concept of deeded title to property. As is true in domestic property law, territory in international law may be acquired by means other than traceable claim of title alone, such as prescription, conquest, occupation, or abandonment. This note will discuss primarily the traceable Arab and Jewish claims to the area described as Palestine prior to 1948 and in so doing will refer to the term "legal title claim" rather than "territorial sovereignty."

2. Before Israel gained independence and recognition in the United Nations in 1948, the land it occupied had been referred to as Palestine. This note will refer to such disputed area as "Palestine" for the sake of consistency.

3. S.C. Res. 338, 28 U.N. SCOR (1747th mtg.), U.N. Doc. No. S/RES/338 (1973); S.C. Res. 242, 22 U.N. SCOR (1382d mtg.), U.N. Doc. No. S/RES/242 (1967). For the discussion of these Resolutions and Armistice Agreements, see notes 117-21 & accompanying text *infra*.

Palestine as part of such recognition. Thus, the major obstacle to any peace agreement that would satisfy the Armistice Agreements and resolve the long-standing boundary dispute remains the issue of legal entitlement to Palestine. It is unlikely that after thirty years of fighting the Arabs and Israelis will themselves be able to negotiate any resolution to such a dispute. Some neutral forum will therefore have to be selected. This note will attempt to analyze the conflicting legal claims to Palestine under a standard likely to be applied by an international judicial tribunal operating in conjunction with or under the auspices of the International Court of Justice. The analysis will be concerned not with the political or quasi-legal claims of the respective parties, examples of which are Israeli historical claims based upon decades of alleged persecution[4] and Arab claims of right to self-determination,[5] but with the respective parties' claims of legal title to Palestine. Furthermore, the analysis will be limited to Palestine as it was demarcated by the United Nations in 1947,[6] excluding discussion of the conflicting Arab and Israeli claims to other sensitive areas such as the Golan Heights, the West Bank, the Straits of Tiran, Jerusalem, and Sinai.[7]

Before setting out the standard that might be applied in this case by an international judicial tribunal, it will be useful to summarize the events giving rise to the claims asserted by the Arabs and the Israelis.

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4. For a comprehensive survey of the full extent of Jewish and Israeli claims to Palestine, see Mallison, *The Zionist-Israeli Juridical Claims to Constitute "The Jewish People" Nationality Entity and to Confer Membership in It: Appraisal in Public International Law,* 32 GEO. WASH. L. REV. 983 (1964).

5. Both the Israelis and the Arabs actually claim the right of self determination in Palestine under articles I(2) and 55 of the U.N. Charter. Such claims are here termed quasi-legal because of the constitutional nature of the U.N. Charter's legal effect. For discussions of the respective claims, see N. FEINBERG, THE ARAB-ISRAEL CONFLICT IN INTERNATIONAL LAW (1970).

6. *See* G.A. Res. 181, 2 U.N. GAOR, Resolutions 131, U.N. Doc. A/519 (1947). The relevant area would therefore include land east of the Jordan running to the Mediterranean Sea, north to Lebanon and Syria short of the Golan Heights, and south to, but not including, Gaza or Sinai.

7. All of these territories have distinct histories and have been the objects of separate legal disputes. The status of Jerusalem is perhaps the most interesting and current topic involving these separate territories, since it is a religious mecca for both Jews and Moslems. For a good background of the Jerusalem problem and for differing views on the solution to it, see N. FEINBERG, *supra* note 5; Comment, *The Arab-Israeli War and International Law,* 9 HARV. INT'L L.J. 232 (1968); Jones, *The Status of Jerusalem: Some National and International Aspects,* 33 LAW & CONTEMP. PROB. 169 (1968).

II. Background of the Legal Claims to Palestine

A. *History of Events Leading to Arab and Israeli Claims*

Both the Jewish and Arab inhabitants of Palestine claim historical connections to the area dating back to biblical times. These claims are asserted, however, as historic claims supplementing the more tenable modern claims to the land. The respective parties base their claims primarily on promises, documents, treaties, and agreements made and entered into by the vested powers[8] during and after World War I.

After 400 years of domination, Ottoman-Turkish suzerainty in Palestine was interrupted by the British invasion in 1915. The British continued thereafter to assert control over Palestine and, prior to the Turkish surrender, entered into separate agreements with the Arabs, the French, and the Jews regarding the disposition of Palestine. The controversial McMahon Agreement[9] of 1915 arguably promised Palestine to the Arabs after the war.[10] In 1916, however, the British signed the Sykes-Picot Agreement[11] with France, much of which abrogated the provisions of the McMahon Agreement. In 1917, Britain followed with a proposal in the Balfour Declaration[12] to make Palestine the site of a Jewish homeland, which proposal was also officially accepted by France and Italy. All these agreements were entered into *pendente bello,* however, meaning that Turkey did not officially forfeit its title to Palestine until it renounced the land at the Treaty of Lausanne on August 6, 1924.[13] Nevertheless, it was agreed in 1919 that Palestine would become part of the new League of Nations Mandate System, and in 1920 at San Remo, Britain was named Mandatory Power of the Palestine Mandate. Britain continued to adminster the Palestine Mandate until 1947 when it voluntarily surrendered its authority to the United Nations. After considerable discussion concerning

8. "Vested powers" refers to those nations which had de facto control over the Middle East after Turkey virtually abandoned the area during World War I. The three principal "vested powers" were Britain, France, and Russia.

9. McMahon Agreement, *reprinted in* Palestine Royal Commission, Report, Cmd. No. 5479, at 18-19 (1937) [hereinafter cited as Commission Report].

10. *See* note 65 & accompanying text *infra.*

11. *See Comment, supra* note 7, at 233.

12. Letter from the British Foreign Secretary to the Zionist Federation [hereinafter cited as Balfour Declaration], *reprinted in* Commission Report, *supra* note 9, at 22.

13. Treaty of Lausanne, July 24, 1923, 28 L.N.T.S. 12 (entered into force Aug. 6, 1924).

the proper disposition of a League of Nations mandate, the United Nations General Assembly passed the Partition Resolution[14] calling for the establishment of separate Jewish and Arab states in Palestine. War erupted between the Arabs and Israelis in Palestine shortly after Israel's declaration of independence in May 1948, preventing any institution of the United Nations resolution plan and eventually giving rise to a single Israeli state in Palestine. For thirty years the Arab nations have continued to assert the claim of the Palestinian Arabs to Palestine, rejecting both the Balfour Declaration and the United Nations Partition Resolution. The Israelis, on the other hand, point to these documents as legitimate sources of international territorial sovereignty, the legitimacy of which is reinforced by Israel's recognition as a member state in the United Nations.

B. *The Different Types of Legal Claims to Title in International Law*

Having established an outline of the critical events underlying the Arab and Jewish legal claims, the next task is to set forth the various forms of such claims. Territorial sovereignty is defined as "The right of a state to function within a certain territory, unimpeded by any interference from the outside . . . ."[15] Although territorial sovereignty may be achieved by other means,[16] most states obtain sovereignty by acquiring some kind of legal title to the areas they occupy. A state may acquire legal title to territory in several ways, including cession, occupation, prescription, conquest, annexation, revolution and succession, discovery, and abandonment.[17] Because of the nature of the Arab and Jewish territorial claims to Palestine, however, only cession, occupation, prescription, and conquest will be relevant to the present discussion.

Cession is a derivative method of territorial acquisition by which

14. G.A. Res. 181, *supra* note 6.

15. 1 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 241 (1963).

16. *See* note 5 *supra*. Other sources of territorial sovereignty may be derived from claimed ethnic, historic, economic, strategic, and geographic rights to certain territories. A strategic claim, for example, is based on the necessity of acquiring territory in order to establish effective self defense of vulnerable existing sovereign territory. For a general discussion of these claims, see N. HILL, CLAIMS TO TERRITORY IN INTERNATIONAL LAW AND RELATIONS (1945); E. LUARD, THE INTERNATIONAL REGULATION OF FRONTIER DISPUTES (1970).

17. For a discussion of each of these sources of legal title, see 1 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 398-449 (1940).

sovereignty is transferred through "an agreement between the ceding and the acquiring states."[18] This method of obtaining title raises issues of whether the ceding state had proper title and authority to make a valid transfer to the acquiring state, and whether all the conditions precedent to the transfer of titles as stipulated in the agreement have been met. It is the most important of the four categories in analyzing the respective Arab and Israeli claims to Palestine. Second, conquest is the forceful taking of the territory of one state by another state. This method of acquiring territorial sovereignty requires that the territory be "effectively reduced to possession."[19] The major issues raised by this method of acquisition are whether the sovereignty of the acquiring state, even with effective possession, will be recognized through the acquiescense of states and customary international law,[20] and whether conquest can even establish legitimate title if in the process the acquiring state has violated a principle of international law, a provision of a United Nations General Assembly resolution,[21] or the United Nations Charter itself. Third, prescription, based on the assumption that the original territorial title holder has not surrendered his rights to the land, provides that a state in long and undisturbed possession of certain territory may acquire a legitimate title to it adverse to the original title holder.[22] The primary issues arising from territorial claims founded on prescription are whether there has been a sufficiently active and extended possession of the land by the acquiring state, and whether there has been sufficient acquiescense by the original title holder to invoke the doctrine of prescription. Finally, occupation, being an original rather than derivative method of territorial acquisition, is "the intentional appropriation by a state of territory not under the sovereignty of any other state."[23] "Occupation is usually, though not necessarily, associated with the discovery" of certain territory rather than ac-

18. *Id.* at 421.

19. *Id.* at 427.

20. For a brief description of how the acquiescence of states relates to customary international law in the recognition of territorial sovereignty, see H. STEINER & G. VAGTS, TRANSNATIONAL LEGAL PROBLEMS 258-62 (2d ed. 1975) [hereinafter cited as STEINER & VAGTS].

21. Much of the current controversy regarding present Arab-Israeli borders concerns Israeli acquisition of territory allegedly in direct violation of U.N. Resolutions 242 and 338. *See* notes 117-21 & accompanying text *infra*.

22. Y. BLUM, HISTORIC TITLES IN INTERNATIONAL LAW 14 (1965).

23. 1 G. HACKWORTH, *supra* note 17, at 401.

quisition of previously discovered territory.[24] Examples of *territoria nullius,* territory open to discovery and acquisition by occupation, are:

> I. . . . (1) Uninhabited lands . . . . (2) Lands inhabited by individuals who are not permanently united for political action. (3) Lands which have been abandoned by their former occupants. (4) Lands which have been forfeited because they have not been occupied effectively . . . . II.—Lands inhabited by any permanent political society can be acquired only by Conquest, Cession, or Prescription.[25]

The obvious issues presented by acquisition through occupation are whether the lands are in fact *territoria nullius,* and whether there has been effective occupation of the territory in question by the acquiring state.[26]

A brief summary of the different methods in which legal title to certain territory may be acquired cannot, without more, determine who actually possesses legal title in a given case. Unlike the intricate recording process which forms the foundation of legal title to property in domestic law, the international legal system has no institution through which to check or establish legal title to a given territory after it has been validly acquired. Furthermore, there is no system to determine priority among the four types of legal claims mentioned above. The small percentage of *territoria nullius* and territories whose titles have been transferred from one sovereign to another, however, would seem to obviate the need for a recording and deeding system in international law. Certainly the transfer or acquisition of territory is not an event that could occur daily and go unnoticed among the members of the international order. Nevertheless, the international legal system does suffer from one grievous deficiency in that it does not possess an adjudicatory system to establish the legality of acquisitions or transfers of territorial title, or even to determine the origin of legal title to the territory in the first place. Admittedly, occupation of *territoria nullius* or transfer of title through bilateral or multilateral agreements or treaties may definitively vest legal title to a territory in

24. *Id.* Discovery in this context means discovery by a sovereign state intending to annex the territory as its own. Territory discovered by tribes or people not united for political action may still be subject to legitimate occupation by a sovereign state. *See id.*

25. *Id.* at 396-97.

26. Effective occupation appears to entail registering certain indicia of sovereignty such as displaying the national flag or establishing a diplomatic or military post.

the acquiring state.[27] However, if the transferring party in a treaty covering a territory has dubious authority or title to convey it or the territory is itself subject to more than one agreement or treaty made by the transferring party, even treaty agreements will give rise to title disputes. In some instances of voluntary submission by parties of such disputes, the International Court of Justice in the Hague will acquire jurisdiction to adjudicate the controversy,[28] but the Court possesses only voluntary jurisdiction in all cases, which prevents many disputes from being so adjudicated. Alternatively, the United Nations General Assembly has on occasion attempted to resolve border disputes between states.[29] Such intervention, however, as authorized by article II(7) of its Charter, is limited to those situations that represent threats to world peace and security. Thus, neither the International Court of Justice nor the United Nations possesses sufficient jurisdiction or authority to resolve many of the disputes that arise concerning legal title to specific territory. The Arab-Israeli dispute over Palestine is itself a good example. In 1948, subsequent to the United Nations Partition Resolution, the Arab Higher Committee petitioned the International Court of Justice on behalf of the Arab inhabitants of Palestine to adjudicate the issue of legal title to Palestine. Because Israel refused to submit to the Court's jurisdiction, the petition was never heard, leaving the United Nations to attempt intervention and mediation in the ongoing Arab-Israeli dispute, which it has attempted without success.

The lack of success heretofore in judicially resolving the Arab-Israeli dispute does not foreclose the possibility of an arbitrated solution in the future. As suggested earlier, adjudication by an international tribunal appears to be the best long range solution

27. The problem of legal title may persist, however, if there is a dispute as to whether the occupied territory was *territoria nullius* and whether there was effective occupation, or whether the transferring state in a treaty passing legal title to another state had a valid original legal title to the transferred territory. Thus, even these seemingly simple acquisitions of legal title by the acquiring state may be fraught with controverted facts that make resolution difficult.

28. Prominent examples of disputes that have been submitted to the International Court of Justice in this fashion are: The Fisheries Case, (Norway & England), [1951] I.C.J. Rep. 116; Arbitral Award in the Island of Palmas Case (United States v. Netherlands), Hague Ct. Rep. 2d (Scott) (Perm. Ct. Arb. 1932) [hereinafter cited as Island of Palmas Case]. These cases will be discussed more fully later in the text.

29. The most noteworthy examples are the United Nations efforts in Korea, Vietnam, the Middle East, and Cyprus.

to the question of legal title to Palestine. It therefore becomes necessary to analyze the standards used by the principal international judicial tribunal, the International Court of Justice, in cases deciding legal title to territory, in order to establish the test most likely to be employed by an international judicial tribunal in deciding Arab-Israeli legal title dispute in Palestine. Finally, it will then be necessary to scrutinize the respective parties' critical assertions that constitute the basis of their legal claims to legal title in Palestine.

III. THE *Island of Palmas* CASE AND THE TEST APPLIED BY THE INTERNATIONAL COURT OF JUSTICE IN DETERMINING LEGAL TITLE TO DISPUTED TERRITORIES

A discussion of the standard to be applied by an international judicial tribunal in determining legal title to territory must begin with the *Island of Palmas*[30] case. It is both the first articulation of international substantive law on disposition of territory[31] and the leading case today in that area. Moreover, the case deals with both historic title claims to territory and the traditional methods of acquiring legal title to territory: discovery, occupation, abandonment, and prescription. In emphasizing the importance of these four methods in the scheme of territorial title acquisition, the case expressly lays out a standard to be followed in weighing the relative merits of the respective parties' claims based on these methods of acquisition.

The initial premise of the *Island of Palmas* standard is that judicial facts and claims must be considered in light of the law and overall environment existing at the time the claim arose.[32] Additionally, the continuing integrity of any such claim must accord with the "conditions required by the evolution of the law."[33] The arbitration[34] in the *Palmas* case further stated that "if a dispute

30. Island of Palmas Case, Hague Ct. Rep. 2d (Scott).

31. Jessup, *The Palmas Island Arbitration,* 22 AM. J. INT'L L. 735 (1928).

32. Y. BLUM, *supra* note 22, at 201. This concept, labelled "inter-temporal law," emphasized the idea that international law is dynamic, and that the territorial environment is also ever-changing, but that it would be unjust to measure a claim to territory by any law of political situation other than that which existed at the time the claim was first established. Professor Jessup attacked this theory in a subsequent article. *See* note 31 *supra.*

33. Island of Palmas Case, Hague Ct. Rep. 2d (Scott) 101.

34. The arbitrator was Max Huben, then president of the Permanent Court of International Justice, who was selected to adjudicate the matter pursuant to

arises as to sovereignty over a portion of territory, it is customary to examine which of the States claiming sovereignty possesses a title—cession, conquest, occupation, etc.—superior to that which the other State might possibly bring forward against it."[35] Not only claims of legal title but display of sovereignty was also considered a significant factor in determining title superiority.[36] The case established that where one of the parties to the dispute has actually displayed its sovereignty, its claim to the territory must have existed from the inception of that claim to the moment "for which the decision of the dispute must be considered critical."[37] This latter moment is referred to as the "critical date" and represents one of the crucial aspects of the *Island of Palmas* test. Responding to the problem raised by territorial disputes that are usually drawn out for a considerable period of time, the arbitrator established a "critical date" after which claims would not be given weight on their merit but considered only insofar as they shed light on the validity of all claims prior to the "critical date."[38] The *Minquiers and Ecrehos Case*, a later International Court of Justice decision involving territorial rights, further defined the concept as "the date after which the acts or omissions of the parties cannot affect the legal situation."[39]

The *Island of Palmas* case itself, however, provides no guidelines for determination of the "critical date." British counsel in the *Palmas* case did suggest a list of possible dates that might be deemed "critical" in a given case:

> (I) the date of the commencement of the dispute;
> (II) the date . . . when the challenging or plaintiff State first makes a definite claim to the territory;
> (III) the date . . . when the dispute "crystallized" into a definite issue between the parties as to territorial sovereignty;
> (IV) the date when one of the parties . . . takes active steps to initiate a procedure for settlement of the dispute, such as negotiations, conciliation, mediation . . . or other means falling short of arbitration or judicial settlement;

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an arbitration treaty signed by the United States and Netherlands on January 23, 1925.

35. Island of Palmas Case, Hague Ct. Rep. 2d (Scott) 16.

36. *Id.*

37. *Id.*

38. Jessup, *supra* note 31, at 746.

39. The Minquiers and Ecrehos Case (United Kingdom & France), [1953] I.C.J. 47. *See* Johnson, *The Minquiers and Ecrehos Case*, 3 INT'L & COMP. L.Q. 189, 208 (1954).

(V) the date on which any of these procedures [mentioned in (IV) above] is actually resorted to or employed;

(VI) the date on which, all else failing, the matter is proposed to be or is referred to arbitration or judicial settlement.[40]

Apart from this list, however, there is no authority that recites the factors to be reviewed in selecting one of these dates as "critical" or how to resolve the conflict when more than one date qualifies as "critical." In *Legal Status of Eastern Greenland,*[41] the Court selected the moment when Norway openly challenged Denmark's rights over Eastern Greenland, which was the moment the dispute arose, as the "critical date."[42] In the *Minquiers and Ecrehos Case*, the Court declined to identify unequivocably the "critical date," despite counsel for the United Kingdom's argument that "in the ordinary course of events and assuming that once a concrete issue has arisen between two countries, they decide to settle it by international adjudication, the critical date would be the date on which they agreed to submit the dispute to a tribunal."[43] Instead, the Court fixed the "critical date" as the time "the French Government had made a definite claim to sovereignty in respect of each of the disputed islets."[44] While the *Island of Palmas* and succeeding cases suggest that the "critical date" will be readily ascertainable where the case turns on the validity of a decree, agreement, or treaty, or where the date when the dispute actually arose is agreed upon by treaty or stipulation, where neither of these situations exist such cases provide little assistance in determining the "critical date." Therefore, although the *Minquiers and Ecrehos* case describes at least what the "critical date" is not, distinguishing it from the "origin of the dispute,"[45] determination of the "critical date" of a given dispute must apparently be made on a case by case basis.

The second crucial concept in the *Island of Palmas* test for determining territorial title is that of comparative title. The case established that since neither party to such territorial disputes will be able to produce an absolute and clear title, the Court should weigh all the claims of the respective parties to ascertain which has the

40. *See* Y. BLUM, *supra* note 22, at 210.
41. Order of August 3d, [1932] P.C.I.J., ser. A/B No. 48.
42. *See* Y. BLUM, *supra* note 22, at 212.
43. *Id.* at 215-16.
44. *Id.* at 217.
45. *Id.* at 219.

superior title.[46] Rather than compare each set of conflicting claims at various stages of the dispute, the comparative title scheme traces each claim from the "origin of the dispute" to the "critical date," analyzes its validity as a whole, then considers the relative strengths of all the conflicting claims in determining which party has superior title.[47] This scheme was carefully followed in the *Legal Status of Eastern Greenland* and *Minquiers and Ecrehos* cases.[48] Furthermore, although the process was not clearly articulated in the *Fisheries Case,*[49] the Court adjudicated the dispute between Norway's claim of historic title to its coastline and England's claims under customary international law by analyzing the respective claims individually, then measuring their overall merits relative to each other. Thus, the concept of comparative title is well accepted in international judicial decisions. In a given case the strength of one party's claim will depend not only on its inherent validity, but also on the relative strength of the other party's claim and the degree to which the other party has acquiesced in or challenged the former's claim to the disputed territory.

The standard to be applied by an international judicial tribunal in territorial title disputes contains one other determinative element. The above-mentioned cases generally state that the party who sets an adjudication of territorial title in process bears the burden of proving superior title, unless it presents a prima facie claim, in which case the burden shifts to the other party.[50] Since prima facie claims are unlikely in such territorial disputes, the complaining party, often the one displaced from the territory in question, will have the more difficult task in establishing its claim. The added burden on the complaining party, however, should not affect the outcome, since the relative strength of the conflicting claims, when analyzed under the comparative title scheme, should rarely be so evenly balanced as to make the burden of proof a factor, as is indicated by the cases mentioned above.

With this background it is now necessary to trace the respective Arab and Jewish claims to territorial title in Palestine. Following the test established in the *Island of Palmas* case and refined in later International Court of Justice cases, it will be essential to

46. *Id.* at 223.
47. *Id.*
48. *See id.* at 224.
49. The Fisheries Case (Norway & England), [1951] I.C.J. Rep. 116. For an analysis of the case, see STEINER & VAGTS, *supra* note 20, at 252.
50. *See* Y. BLUM, *supra* note 22, at 230.

trace these claims from their date of origin to the "critical date." It will therefore also be necessary to establish the "critical date." Finally, the relative strengths of these claims must be weighed and a possible conclusion reached as to rightful title to Palestine.

IV. THE ARAB AND JEWISH TERRITORIAL TITLE CLAIMS

A. *Historical Claims*

The Arabs[51] and the Jews[52] each propound more than one type of claim to the territory of Palestine. Nevertheless, the *Island of Palmas* scheme can adequately accommodate these claims differing both in kind and in inherent validity, while measuring their relative strengths. The first type of claim involved in the dispute over Palestine is historical. Under the *Island of Palmas* test, both the Arab and Jewish claims must be traced from the origin of the dispute until the "critical date" if necessary. In this case, however, none of the historical claims extends to the "critical date."

Although the Jews do not place primary emphasis on their historical claims, such claims are continually asserted.[53] Just as they formed the foundation of the Zionist movement in the early twentieth century, Jewish historical claims are integral to the defense of Israeli existence, as is evidenced by the 1972 Knesset declaration that the Jewish people had a historical right to the land in Palestine.[54] The Jewish historical claim is based on both biblical promises and a faith in the origin and destiny of the Jewish people in Palestine. These historical claims provided the backbone of Zionism, a movement which promoted the Jewish occupation of Palestine and eventually helped form the state of Israel.[55] The claim itself, however, is based on historical interpretation, which differ-

51. The term "Arabs" is understood mainly to include the Palestinians who still inhabit the territory or have been driven out by Israel. However, the term may on occasion also include those Arab people or states who have openly supported the Palestinian claim.

52. The term "Jews" refers primarily to the Zionists who originally lobbied for the Jewish Homeland in Palestine and to the Israelis who claim sovereign rights to the land they occupy. It is recognized that many non-Israeli Jews do not adopt the Israeli claims to legal title to Palestine.

53. *See* N. FEINBERG, *supra* note 5, at 21.

54. *Cf.* Dawn, *The Arab-Israeli Confrontation: A Historian's Analysis*, 5 DEN. J. INT'L L. & POL. 373 (1975). The entire issue contains a number of articles related to various aspects of the Middle East problem.

55. *See generally* Mallison, *supra* note 4, at 983. This article contains an excellent and comprehensive survey of Jewish historical claims and connections to the territory occupied by Israel.

entiates it significantly from the historical claim asserted by Norway in the *Fisheries Case* that it had occupied the territorial waters it claimed for an extended period throughout history.[56] Thus, the Jewish historical claim must be viewed not as one of long-standing territorial occupation and use but of ancient religious and cultural connection to the territory.

Although the Jewish historical claim lacks strength because it is not primarily based on occupation and use, the importance of the claim lies in its strength relative to the Arab historical claim. Arab occupation of Palestine prior to and during the Ottoman reign was more significant than that of the Jews, both in terms of numbers[57] and control. In the period immediately prior to World War I, the Palestinian people had their own executive, legislative, and judicial bodies, and possessed a flag.[58] Nevertheless, from the origin of the dispute in 1917[59] until the "critical date" thirty years later, the Palestinians were never in exclusive control or occupation of Palestine. No Palestinian state existed, nor did the Arab inhabitants contemplate actual sovereignty over the territory.[60] Thus, the Arab claim also falls short of of comparison to the historical claim made by Norway in the *Fisheries Case.* When compared to the Jewish claim, however, the Arab historical claim has a stronger background of long-standing occupation and sense of territorial entitlement. The degree and effect of this relative strength in the Arab claim would be for the designated international judicial tribunal to decide.

B. *Claims of Cession*

In the case of the dispute over Palestine, the most important category of claims is cession. Although entirely different in kind

56. *See* [1951] I.C.J. Rep. 116. The Court in the Fisheries Case was careful to point out that Norway's historical claim consisted not only of extended occupation throughout a period of history but also of economic interest fostered by Norway's reliance on its continual use of the territorial waters. *See id.*

57. As late as 1918, the Arab inhabitants outnumbered the Jewish inhabitants by more than twelve to one.

58. *See* Comment, *The Palestinian People and Their Legal, Political, and Military Status in the World Order,* 5 N.C. CENT. L. REV. 326, 329 (1973).

59. The Arabs and the Jews lived in peaceful coexistence until the Balfour Declaration in 1917 stated that there should be a Jewish Homeland in Palestine and touched off a great territorial dispute. For futher discussion of the "origin of the dispute," see note 62 & accompanying text *infra.*

60. *See* Akehurst, *The Arab-Israeli Conflict and International Law,* 5 N.Z. U. L. REV. 231, 232 (1973).

from the historic claims, claims of cession also fall within the *Island of Palmas* standard. As pointed out earlier, the major issue in claims of cession is whether the transferring state or institution had the proper authority and adequate title to make a valid transfer,[61] which remains the central issue in the Palestine dispute as well. This category of territorial claims also requires determination of the "time when the dispute arose" and the "critical date." Since both the Arab and the Jewish claims derive originally from the British, beginning at 1915 and 1917 respectively, the "time when the dispute arose" would logically occur when the first conflict of interests occurred in 1917.[62] Determination of the "critical date" is considerably more difficult. Since the *Island of Palmas* and its later companion cases provide few guidelines in establishing a "critical date," no rule of thumb can be applied to the present dispute. The *Minquiers and Ecrehos* case forecloses coincidence of the "critical date" and the "origin of the dispute."[63] Subsequent to the "origin of the dispute," Palestine remained under a League of Nations mandate until 1947, when the United Nations passed the Partition Resolution. Since the Arabs objected strenuously at this time and even petitioned the International Court of Justice to intervene, 1947 would seem to be the most appropriate "critical date" in the present case, for it coincides with three of the five remaining possible dates from the list set forth above: "the date when the dispute 'crystallized' into a definite issue between the parties as to territorial sovereignty"; "the date when one of the parties takes active steps to initiate a procedure for settlement of the dispute"; and "the date on which, all else failing, the matter is proposed to be or is referred to arbitration or judicial settlement."[64] Therefore, 1947 should be deemed the "critical date," because although the active dispute over Palestine first arose in 1917, it was in 1947 that the Jews were awarded territorial rights to the exclusion of the Arabs.

1. The Arab Claim

From 1915-1916 the British, in order to induce the Arabs to join

61. *See* text at note 18 *supra.*

62. Although the dispute arguably might not have arisen until 1947 when the rights of the Arab inhabitants of Palestine were really put in issue, the actual claims of cession have their origins in World War I, when sufficiently adverse interests were created in Palestine to establish a bona fide dispute.

63. *See* [1953] I.C.J. 47.

64. Y. BLUM, *supra* note 22, at 210.

forces against Turkey, entered into the Husein-McMahon Agreement guaranteeing Arab sovereignty in certain areas of Palestine.[65] Although Britain later denied that the land included in these agreements encompassed the territory set aside for a Jewish Homeland in the subsequent Balfour Declaration, as part of the agreements the British were to acknowledge Arab independence up to 37° north latitude from the Mediterranean to the Persian border, excluding only "portions of Syria lying to the west of the districts of Damascus, Homs, Hama, and Aleppo . . . ."[66] The Arabs maintained that the agreement included the rest of the Arabian peninsula since all but the southern boundaries had been defined therein, giving rise to the later claim that the British clearly agreed to recognize Arab independence in Palestine and could not therefore subsequently promise the same thing to the Jews. Three judicial facts, however, significantly affect the strength of the Arab claim. First, while the British were in strong de facto control of the Middle East following virtual Turkish abandonment of the area, Turkey did not legally surrender its sovereignty until 1924, leaving considerable doubt about the authority of Britain to make such promises to the Arabs. On the other hand, the Husein-McMahon Agreement might be read to contain conditional promises whose legal effect was to spring into existence as soon as Britain acquired territorial rights to the area after the war. Whether such an interpretation is valid and whether Britain ever acquired such territorial rights is certainly open to question. Second, in 1916 Britain and France signed the Sykes-Picot Agreement, in which Palestine was to be governed under a special regime established by France, Britain, and Russia.[67] This joint declaration by the three powers with the greatest interests in the area probably represents the most legitimate disposition of whatever expectancy rights or authority Britain had in Palestine. If that is true, this trilateral agreement would also nullify any prior promises Britain had made to the Arabs in regard to Palestine. Third, Britain issued the Balfour Declaration in 1917,[68] which, if it did not validly transfer territorial

65. McMahon Agreement, *supra* note 9; *see* Comment, *supra* note 7, at 233. This article also provides an excellent background of the events leading up to the 1967 June war.

66. Comment, *supra* note 7, at 233. This area includes Palestine, although the British denied later that they intended Palestine to be included.

67. *Id.*

68. *See* Balfour Declaration, *supra* note 12; Comment, *supra* note 7, at 233-34.

rights in Palestine to the Jews, certainly evidenced that Britain did not intend the promised Arab independence in the McMahon Agreement to apply to Palestine. Moreover, the Balfour Declaration was the precursor of later multi-national agreements that established the Palestine mandate,[69] the implementation of which arguably abrogated the previously promised Arab rights in Palestine. Thus, the judicial legitimacy of the Arab claim of cession derived from the Husein-McMahon Agreement has weaknesses in that it may be subject to future dispositions of the same Palestinian land. Nevertheless, under the *Island of Palmas* standard, the effectiveness of the Arab claim is not reduced completely if in comparison to it the Jewish claim of cession is even weaker.

2. The Jewish Claim

The Jewish claim of cession must be traced back to the Balfour Declaration, which set forth a proposal for establishing a Jewish Homeland in Palestine.[70] Although the document itself had no legal effect in transferring title to Palestine,[71] the Declaration gave initial recognition to an organized Jewish interest which developed significantly under the League of Nations mandate.[72] The Declaration clearly contemplated, however, that the Jewish interest in Palestine would not be exclusive, expressly asserting that "nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine . . . ."[73] Thus, although it originated with the Balfour Declaration, the Jewish claim of cession derives primarily from the Palestine Mandate, which was formally approved by the Council of the League of Nations at San Remo in 1922 as part of the Mandate System.[74]

Whether the Palestine Mandate ceded title to the Jewish people depends on the legal effect, that of either cession or occupation, of the League of Nations Mandate System. The purpose of the Mandate System was to supervise the development of conquered territories where no government control existed.[75] Presumably legal

69. *See* note 75 & accompanying text *infra*.

70. Comment, *supra* note 7, at 233-34.

71. The Balfour Declaration was a policy statement that resulted from negotiations between the Zionists and the British, French, and Italian governments regarding the Zionist plan for a homeland in Palestine. *Id.* at 233.

72. The Palestine Mandate was granted to Britain in 1920. *Id.* at 235.

73. Comment, *supra* note 7, at 234.

74. *Id.* at 235.

75. The purpose of the Mandate System was specifically to "advance 'the

title to Palestine passed to the League of Nations when Turkey formally surrendered at Lausanne in 1924. The more difficult question is whether in adopting the Palestine Mandate, the League of Nations retained that legal title, allowing only Arab and Jewish settlement of the land, or whether it validly transferred title to the designated inhabitants of Palestine. If the League retained title, the next question is whether the Jewish people could acquire the legal title through occupation of conquered territory that normally must be disposed of by an effective agreement involving the interested parties,[76] or whether title passed to the United Nations upon dissolution of the League of Nations.[77] If the League transferred title through the mandate, the crucial issue is whether the Jewish claim of cession is valid in the face of the language in the Palestine Mandate that guarantees the rights of Arabs as well as Jews in Palestine.[78] These are all issues that the appropriate international tribunal would have to decide in handling the Jewish claim of cession, but at least some guidance is provided by the Palestine Mandate itself and the conditions set forth in it.

In 1927, the Council of the League of Nations,[79] acting pursuant to article 22 of the League of Nations Covenant creating a Mandate System, confirmed Britain as the Mandatory Power in Palestine, empowering it with the responsibility for enacting the propos-

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well-being and development' of the inhabitants of the territory as a 'sacred trust of civilization' and to serve 'the interest . . . of humanity in general.' " N. FEINBERG, *supra* note 5, at 42. For a discussion of Britain's authority over Palestine as mandatory power, see Lauterpacht, *The Contemporary Practice of the United Kingdom in the Field of International Law—Survey and Comment,* 6 INT'L & COMP. L.Q. 506 (1957).

76. N. FEINBERG, *supra* note 5, at 33.

77. If title to Palestine is not deemed transferred to the Arabs or Jews through the mandate, the next question is whether upon dissolution of the League of Nations, title passed outright to the United Nations or whether title was preserved in the mandate, over which the United Nations merely acquired supervision. For further discussion on this issue, see note 92 & accompanying text *infra*. *See also* Bough, *The United Nations and the Non-Self-Governing Territories,* 5 NAT. B.J. 371 (1947); Rappard, *The Mandates and International Trusteeship Systems,* 61 POL. SCI. Q. 408 (1946) (discussing United Nations authority over the League of Nations mandate system territories).

78. Comment, *supra* note 7, at 236-37.

79. The Council was assigned the task by member states of the League of Nations of solving the intricate territorial questions brought about by World War I. Thus, the authority to transfer, incorporate within the Mandate System, or otherwise dispose of any territory ceded to the League of Nations after the war presumably resided in the Council.

als of the Balfour Declaration.[80] According to article 22, the Mandate System consisted of three different types of mandate covering "*certain* communities formerly belonging to the Turkish Empire."[81] Although certain territories are specifically referred to in the article 22 paragraphs defining the different types of mandate, Palestine is not included in any of the paragraphs.[82] If the designated tribunal determined that Palestine was not included within the category "certain communities formerly belonging to the Turkish Empire" and therefore did not fall within the guidelines of any of the three enumerated types of mandates, the Palestine Mandate would not have the same legal effect as a qualified mandate under the Mandate System.[83] Not only might the original grant of territorial rights differ from the other mandates, but Britain could conceivably, as Mandatory Power, alter the nature and extent of the original grant of territorial rights by allowing, as it in fact did, increases in immigration, governmental sovereignty, and even independence of the mandate subjects.

On the other hand, if Palestine is included in the "other communities" category of paragraph (4) of article 22, that would qualify it as an "A" mandate.[84] According to article 22, an "A" mandate includes "communities" whose "existence as independent nations can be provisionally recognized."[85] Although the meaning of this definition is subject to dispute, it would seemingly limit the mandatory subject's territorial rights to the original grant from the League of Nations, whether or not that is determined to include full legal title.

This still leaves the question of to whom title would pass through the Palestine Mandate, regardless of whether it passed as an original grant to the mandate subjects, was subsequently acquired by them, or was transferred to the United Nations upon dissolution of the League of Nations. As pointed out above, the Palestine Mandate unmistakably preserved the rights of the Arab inhabitants in Palestine,[86] which provision was also impliedly accepted in article 80 of the United Nations Charter.[87] Read with the similar

80. N. FEINBERG, *supra* note 5, at 39.
81. *Id.* at 41.
82. *Id.*
83. Akehurst, *supra* note 60, at 235.
84. *Id.* at 235.
85. *Id.*
86. *See* note 73 & accompanying text *supra.*
87. Article 80 stated that nothing in the Charter would alter the provisions of

guarantee found in the Balfour Declaration, whatever territorial rights were transferred would arguably pass to the Arab and Jewish inhabitants equally. This would be especially true if Palestine were declared an "A" mandate, whereby the common rights of all the inhabitants of Palestine set forth in the Balfour Declaration would pass directly to the then existing.community constituting the mandate subject.[88] The Jews would argue, on the other hand, that Palestine was not an "A" mandate and that it did not therefore establish territorial rights in the general community of Palestine. Rather, they would argue that the different mandate format allowed the Mandatory Power to supervise the gradual "Zionization" of Palestine that actually occurred from 1922 to 1947, enabling the execution of what they claim was the Balfour Declaration's intended goal—an exclusive Jewish Homeland in Palestine.[89] Resolution of this issue, however, does not turn solely on the determination of whether Palestine was an "A" mandate. The appropriate tribunal might find that no legal title would pass to the Jews regardless of the mandate formed unless the "condition" preserving Arab rights were adequately satisfied.[90] Moreover, the tribunal might find that regardless of the mandate formed, title to Palestine remained in the League of Nations, passed to the United Nations upon dissolution of the League, and finally was transferred to Israel by the 1947 Partition Resolution.[91] Thus, the Partition Resolution becomes the final event in the process of tracing the Arab and Jewish territorial claims from the "origin of the dispute" to the "critical date."

C. *The Partition Resolution*

In 1947 Britain, as Mandatory Power, submitted the Palestine

existing agreements, which would presumably include the existing mandates of the League of Nations Mandate System, or the rights of any peoples. *See* N. FEINBERG, *supra* note 5, at 40.

88. *See* Comment, *supra* note 7, at 236.

89. *See* N. FEINBERG, *supra* note 5, at 41-45.

90. A 1939 British White Paper concluded that under the Palestine Mandate the Arabs had been denied their rights guaranteed in the Balfour Declaration and incorporated in the mandate, further proposing that severe restrictions should be imposed on the development of the Jewish Homeland.

91. For further discussion of constitutional issues and policy discussions behind the Partition Resolution, see Eagleton, *Palestine and the Constitutional Law of the United Nations,* 42 AM. J. INT'L L. 397 (1948); Elaraby, *Some Legal Implications of the 1947 Partition Resolution and the 1949 Armistice Agreements,* 33 LAW & CONTEMP. PROB. 97 (1968).

question to the General Assembly of the United Nations, which at the time was the only apparent authority competent to dispose of territories under the League of Nations Mandate System.[92] After exhaustive debate, the General Assembly recommended termination of the mandate and the Partition of Palestine into separate Arab and Jewish states.[93] As mentioned above, the Partition Resolution may be analyzed as the final link in the Jewish claim of cession or as an independent source of territorial title transfers to the Jews. This latter characterization raises the problem not only of determining the validity of such an attempted title transfer but also of categorizing the transfer in the first place.[94] Regardless of how the transfer is categorized, however, the authority of the General Assembly to transfer legal title is critical to the Jewish claim.[95]

The question of whether title to Palestine was originally vested in the subjects of the mandate or was retained by the League of Nations has already been discussed. Assuming on the one hand that the League of Nations did not retain title, the United Nations authority to establish sovereignty in the Jewish people is tenuous. Although an adequate discussion of the United Nations' constitutional powers is impossible here, a few such powers are worthy of note. First, under articles 1(2) and 55 of the Charter, the General Assembly may enact resolutions that promote the rights of self-determination.[96] Second, the General Assembly may pass resolutions in order to preserve peace, which is generally thought to have

92. Rosenne, *Directions for a Middle East Settlement — Some Underlying Legal Problems,* 33 LAW & CONTEMP. PROB. 44, 47 (1968). This volume contains a number of informative articles pertaining to the Partition Resolution and the disposition of Palestine after expiration of the Mandate. For the United States position on the Partition Resolution, see Armour, *American Support for United Nations Plan for Palestine,* 9 DEP'T ST. BULL. 1029 (1947).

93. G.A. Res. 181, *supra* note 7; *see* Rosenne, *supra* note 92, at 47.

94. If the United Nations disposition of Palestine through the Partition Resolution is not characterized as the last link in a cession claim, it will be difficult to categorize, for it does not fit the definition of the remaining types of title acquisition: conquest, prescription, and occupation. It seems more appropriate, therefore, to look to the United Nations action as a political settlement.

95. Whether the Jewish claim is based on cession or otherwise, a transfer of title without the authority or proper title in the first instance should not give rise to valid legal title in the transferee.

96. It is particularly interesting in the Arab-Israeli dispute that both sides claim the right of self determination with respect to Palestine. Unfortunately, the subject is beyond the scope of this note, but for general reference, see H. CATTAN, PALESTINE AND INTERNATIONAL LAW (1973); N. FEINBERG, *supra* note 5, at 44-55.

been the underlying reason for the Partition Resolution.[97] These resolutions are recommendations without binding legal effect, but the Security Council has the power to give them effect and enforce them where peace and world security would otherwise be jeopardized. The Partition Resolution, however, involves disposition of disputed territory subject to a mandate and therefore contains unique problems that alter even the general authority of the United Nations to dispose of territory. The United Nations arguably had no authority over Palestine because the mandate had already expired with the dissolution of the League of Nations prior to the British surrender of authority in 1947.[98] It is therefore maintained that the United Nations Charter could not provide the General Assembly with jurisdiction to dispose of the dissolved mandate and that the Partition Resolution consequently was void and without legal effect.[99] Alternatively, it is argued that Palestine was an "A" mandate whereby sovereignty had been transferred originally to the subjects of the mandate, which precluded the United Nations from acquiring any authority over Palestine upon dissolution of the Mandate. Consequently, the Partition Resolution would violate article II(7) of the United Nations Charter, which prohibits the United Nations intervention in matters that are essentially within the jurisdiction of any *state*, if the same were defined to include Palestine.[100] Thus, it is argued that the Partition Resolution was nothing more than a political settlement which falls far short of transferring legal title to Palestine and that the Jewish people took advantage of the settlement to create a state and subsequently claim illegal de facto sovereignty in Palestine.[101]

Second, even if Palestine were a special mandate over which Britain had complete authority, as the Jews argue, and the British validly surrendered such authority to the United Nations, there should arguably have been no change in the status quo of the mandate unless the mandatory subjects agreed to it by referendum

97. Potter, *The Palestine Problem before the United Nations*, 42 AM. J. INT'L L. 859, 860 (1928).

98. H. CATTAN, *supra* note 96, at 42.

99. *Id.*

100. The argument may break down when the exact meaning of the word "state" is analyzed. Article II(7) was specifically designed to prevent United Nations encroachment on the sovereignty of a state, protected in other articles of the Charter. By using the word "state," however, the Charter has left open the possibility of United Nations action in situations, as in Palestine in 1947, where political and nationalistic instability prevent peaceful occupation of the territory.

101. H. CATTAN, *supra* note 96, at 72.

vote.[102] No such referendum having occurred, such a defect would invalidate any United Nations attempt to do more than create a political settlement in the Partition Resolution, without transferring legal title to the Jewish people.

Assuming on the other hand that the League of Nations retained title to Palestine, the United Nations might nevertheless not have acquired sufficient authority over the territory to transfer legal title to it. Although the United Nations might have acquired supervisory authority over the mandatory territory, that authority would not include power to transfer legal title.[103] Alternatively, the United Nations might have acquired authority to transfer legal title to Palestine since the British surrendered its authority directly to the United Nations in 1947. If one assumes that the League of Nations retained legal title, however, Britain would not by definition have had authority to transfer that title or to appoint another organization to do so. Third, title might have attached to the mandate immediately after the dissolution of the League of Nations. Title would then have passed to the United Nations when it acquired supervisory powers over the mandate, but only to the extent that the General Assembly continued to supervise the mandate as it had been originally established. Finally, title to Palestine might have simply expired by the dissolution of the League of Nations, allowing the United Nations to claim authority over the territory under articles X and XIV of the United Nations Charter.[104] The Jewish claim would be vindicated by the designated international tribunal's finding that title passed to the United Nations from the League of Nations under any of the above theories. Nevertheless, even assuming title to Palestine did not pass to the United Nations, either because it simply had not vested originally in the League of Nations or because it did not transfer to the United Nations after dissolution of the League, the Jewish claim of cession is not necessary defeated. Moreover, in the Partition Resolution, the United Nations established a political settlement that led eventually to Jewish sovereignty as an independent state. In 1948 that state was subsequently recognized by the member states of the United Nations.[105] The designated international

102. Elaraby, *supra* note 91, at 97.

103. *See* Potter, *supra* note 97, at 860.

104. These articles essentially provide that the United Nations can step in and claim authority over territory in order to resolve territorial conflict that threatens world peace and security as provided in article II(7).

105. *See* Brown, *The Recognition of Israel*, 42 AM. J. INT'L L. 620 (1948).

tribunal, therefore, would be faced with the issue of whether such international recognition of state sovereignty might sufficiently supersede the stated Arab claims to provide the Jewish people with original legal title to the area occupied by the state of Israel. No answer can be given here, but as provided for under the *Island of Palmas* standard, various "acts and omissions" subsequent to the "critical date," previously established in 1948,[106] may be relevant to the determination of this critical issue.

V. Acts Subsequent to the Critical Date

It would be impossible in this short space to outline all the events occurring after the "critical date" that are relevant to a determination of the Partition Resolution's efficacy in transferring legal title to Palestine. Instead, this section will briefly trace the important events of 1948-49, 1967, and 1973 as they lend support to or detract from the respective Arab and Jewish claims to Palestine established as of the "critical date."

A. *Recognition of Israeli Statehood and the War of 1948*

Although the 1948 Partition Resolution called for the creation of separate Arab and Jewish states,[107] the Jewish people declared, in May of 1948, the independence of Israel and exclusive rights to the land they occupied in Palestine.[108] The effect of creating such state sovereignty and of subsequent recognition by member states of the United Nations is crucially important. Some argue that general recognition by other states will cure defects in a state's title to territory.[109] Others contend that neither de facto nor de jure recognition of statehood will extinguish a valid title claim to the territory occupied by that state.[110] Given the conflict of authorities on this issue, a precise holding by the designated tribunal would be extremely difficult, yet entirely critical to the legitimacy of the Jewish claim.

Almost immediately after Israel's declaration of independence, war broke out in Palestine. Consequently, the proposal for an Arab

106. *See* note 64 & accompanying text *supra.*

107. Elaraby, *supra* note 91, at 102.

108. *See* Brown, *supra* note 105, at 620.

109. Akehurst, *supra* note 60, at 243. For further discussion on this topic, see Baum, *Full Recognition of Israel,* 8 Law Guild Rev. 441 (1948); Brown, *Recognition of Israel,* 42 Am. J. Int'l L. 620 (1948).

110. H. Cattan, *supra* note 96, at 61.

state in Palestine was completely frustrated.[111] Nevertheless, separate armistice agreements negotiated in response to the Security Council resolution of November 16, 1948 calling on the combating states "to seek agreement forthwith,"[112] were concluded between Israel and the various Arab states.[113] Based on these agreements, it is arguable that in recognizing the 1949 armistice lines, the Arab states were collectively recognizing Israel's Partition Resolution boundaries, from which the armistice lines were established.[114] Given the general Arab refusal, however, to recognize the state of Israel, these armistice agreements should hardly be read as an Arab sanctioning of Jewish title to the area they occupied in Palestine in 1948.[115] Furthermore, the armistice lines are no more than military lines, the function and recognition of which is totally unrelated to the determination of legal territorial boundaries.[116] Consequently, as with the recognition of Israel's statehood, the 1949 armistice agreements have an effect on how the designated tribunal would evaluate the before mentioned title claims to Palestine as of the Partition Resolution "critical date."

B. *The 1967 June War and Resolution 242*

The Arab recognition of Israeli issues that surfaced in the 1949 armistice agreements remained unsettled after that date. Although from 1949 to 1964 the Arab consensus vacillated between a compromise solution based on the Partition Resolution and an absolute claim to Palestine,[117] in 1964 the Arab states finally adopted a common policy and unanimously agreed to organize "the people of Palestine to enable them to liberate its homeland

111. Akehurst, *supra* note 60, at 104.

112. S.C. Res. of Nov. 16, 1948, 3 U.N. SCOR (381st mtg.), U.N. Doc. No. S/1080 (1948); Akehurst, *supra* note 60, at 106.

113. *Id.* at 104. Israel entered into separate agreements with Jordan, Syria, Egypt, and Lebanon.

114. Comment, *supra* note 7, at 238.

115. The armistice agreements might just as easily be interpreted as attempts to avoid Security Council sanctions initiated to restore peace under the November 16, 1945 resolution and Chapter VII of the United Nations Charter.

116. Comment, *supra* note 7, at 254-55. This argument is further supported by the Israeli violations of the armistice agreements, which suggest that Israel distinguished the territorial grant in the Partition Resolution from its duties under the Armistice Agreement.

117. Peretz, *A Binational Approach to the Palestine Conflict*, 33 LAW & CONTEMP. PROB. 32, 33 (1968).

and determine its future."[118] These events, taken in light of the Arab position in the 1949 armistice agreements, indicate that far from conceding Israel's territorial title in Palestine the Arabs continue to contest the validity of the Partition Resolution.

Another piece of evidence following the "critical date" that sheds light on the respective title claims at that time is Resolution 242, the United Nations first effort to establish a binding peace in the Middle East after the 1967 war. Resolution 242 serves primarily to disclose how the United Nations views its territorial grant to the Jewish people under the Partition Resolution. Resolution 242 specifically required that the Arabs reach a peace agreement with Israel before the latter would be forced to withdraw from the territories it had occupied during the 1967 June War.[119] Moreover, as a precondition to any peace agreement the Arabs would have to recognize the existence of Israel, referred to in Resolution 242 as Israeli "sovereignty," "territorial integrity," "political independence," "right to live in peace within secure and recognized boundaries," and "territorial inviolability."[120] The language of Resolution 242 therefore strongly suggests that whatever solution it sought to establish in the Partition Resolution, the United Nations clearly recognized the subsequent Israeli acquisition of sovereignty in Palestine. Such unequivocal recognition of Israeli sovereignty adds increased importance to the issues mentioned above of whether a gap existed in the title to Palestine between the dissolution of the League of Nations and the Partition Resolution, whether title instead passed from the League of Nations to the United Nations, whether if title passed the United Nations effectively transferred it to Israel in the Partition Resolution, and finally whether the Partition Resolution effectively created an original title in Israel notwithstanding lack of title in the United Nations. Accordingly, resolution of these issues by the designated international tribunal could lead to the result that although the legal claim of title in Palestine traced back to the Arabs or all the inhabitants of Pales-

118. *Id.*, at 33-34 n.9. Delegations from Syria, Jordan, Algeria, Sudan, Iran, Saudi Arabia, Egypt, Yemen, Kuwait, Lebanon, and Libya all joined in the Arab Summit Conference at Cairo. Later the same year a National Congress composed of 422 Palestinians convened for the first time and spawned the Palestinian Liberation Organization.

119. S.C. Res. 242, *supra* note 3. For a good discussion of Resolution 242 and the then recognized boundaries of Israel, see Rostow, *The Illegality of the Arab Attack on Israel of October 6, 1973,* 69 AM. J. INT'L L. 272 (1975).

120. *See* Rostow, *supra* note 119, at 275. *See also* note 6 *supra.*

tine in 1922, Israel nevertheless had acquired through the Partition Resolution an indefeasible sovereign claim to the territory it had occupied in Palestine as of 1948.

C. *Resolution 338*

Since the peace agreement required by Resolution 242 as a precondition to Israeli withdrawal necessitated Arab recognition of Israeli statehood and since the Arabs were unwilling to concede anything to Israel until they did withdraw from occupied territory, no progress was made toward a peaceful settlement. After war erupted in 1973, the Security Council adopted Resolution 338 in order to revive the proposals contained in Resolution 242.[121] In reiterating the Resolution 242 proposals, Resolution 338 not only reemphasized the United Nations position of recognized Israeli sovereignty but reaffirms the steadfastness of the Arab and Jewish claims. Resolution 338 serves as further evidence, therefore, that as concerns the acts or omissions of the parties after the "critical date" under the *Island of Palmas* standard, there has been consistent support for the respective Arab and Jewish claims established as of the 1947 "critical date."

VI. CONCLUSION

Given the lack of progress under either Resolution 242 or 338 and the bitter contest over legal title to Palestine, judicial resolution of this dispute has obvious attractions. Although there is no indication that a treaty granting jurisdiction to a designated international judicial tribunal is imminent, the Arabs and Israelis might soon recognize the value of this measure as an avenue to lasting peace. If they do, they could agree in their jurisdictional treaty to have the tribunal decide either the exclusive legal rights of one party to the territory, as was the case in the *Island of Palmas* decision, or dictate some settlement granting rights to both parties. Presumably, the *Island of Palmas* standard would be applied by the tribunal in either case.

In arriving at its decision, the designated tribunal would have to resolve many difficult issues. Although the validity of and weight to be given the respective historical claims of the parties could present the tribunal with a thorny problem, there are other issues in the claims of cession that are more crucial to the ultimate

121. S.C. Res. 338, *supra* note 3; *see* Rostow, *supra* note 119, at 275.

decision. Specifically, the tribunal would have to determine: (1) the validity of the Husein-McMahon Agreement in relation to later British promises and the territory included in those agreements; (2) whether in the case of any British promises or agreements, Palestine could legitimately be disposed of before Turkey actually ceded it to the League of Nations in 1924; (3) whether if the League of Nations acquired title to Palestine following Turkey's surrender it retained it or transferred it to the inhabitants of Palestine, or even just to the Jewish inhabitants, under the Palestine Mandate; (4) whether Britain as Mandatory Power had the authority to transfer title to the mandated territory to the United Nations in 1947; (5) whether if the League of Nations retained title to Palestine, such title passed automatically to the United Nations after the League of Nations had dissolved and the mandate expired; (6) whether the United Nations could, even without having title transferred to it, have disposed of Palestine and created an original legal title in Palestine under the Partition Resolution; (7) whether recognition of Israeli statehood entitled Israel to absolute sovereignty in Palestine even though the Jewish claim of cession failed. All these critical issues must be determined with reference only to the claims made by the respective parties as of the "critical date," established here as 1947, and the events since then that shed light on those claims.

The foregoing analysis points up the inconsistency and even the mutual exclusivity of the Arab and Jewish claims, leaving the designated tribunal with a formidable task. From what has been discussed it seems that there is considerable merit in the Arab claim of cession. There is, however, legitimacy in the Israeli claim of sovereignty acquired from thirty years of existence as a recognized state. All this suggests the attractiveness of having the Arabs and Jews consent to a settlement decree whereby a designated tribunal would be empowered to establish Arab legal title to certain areas in Palestine and Israeli legal title to at least the territory it occupied as a state in 1947. In addition to defusing the underlying tension between the Arabs and the Israelis concerning legal rights to Palestine, such a holding would have the political advantage of firmly establishing Israel's sovereignty in parts of Palestine where Israelis are already firmly entrenched. Moreover, the legally designated Arab lands could be used as a home for Palestinian refugees, thereby ending the long-standing problem caused by their ouster from Palestine during the last three decades.

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