THE TERRITORIAL TITLE OF THE STATE OF ISRAEL TO « PALESTINE » : AN APPRAISAL IN INTERNATIONAL LAW

by

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INTRODUCTION

The Camp David summit has again raised hopes and expectations for a just and durable settlement of the Middle East problem. However, still major questions remain unanswered, the newly revived and hopefully final peace process will not only be long and difficult, but a succesful conclusion can only be expected if the principal party involved, namely the Palestine People, takes part in the peace negotiations.

The Government of Israel, which had up to now only committed itself to a vague formula for some form of internal self-rule (under an Israeli umbrella) in the occupied West Bank and Gaza Strip (1), has now agreed to full « autonomy » for these territories during a starting period of 5 years. Howe-

(1) See e.g. CORNU, F., « *la réponse dilatoire de M. Begin* », le Monde, 20 June 1978, p. 1.

ver, even after the Camp David agreements, especially as far as the West Bank and Gaza Strip are concerned, nothing is definite about the ultimate status of that area (2). Israel has not officially renounced its claims to sovereignty over « Judea-Samaria » and « Gaza » (3), consequently, the main gate to a Middle East peace adjustment has indeed finally been set ajar, but we are still far removed from a global and final peace solution.

It is in this perspective that the present study has been conceived : namely as an attempt to offer a comprehensive but at the same time critical survey of the international legal aspects involved in Israel's presence in the former mandated territory of Palestine (4). The reference to « Palestine » is made on purpose since we deem it important to consider the problem in its entirety. This basically means an examination of Israel's status in the territories seized outside the terms of the U.N. Partition Plan of November 1947, and more in particular Israel's legal position in the West Bank and Gaza Strip, occupied since the Six Day War in June 1967 (5). The other territories occupied by

(2) See the Camp David « framework » for peace in the Middle East, document one (concerning the West Bank and Gaza), art. 1 (a)... « pour assurer une pleine autonomie... le gouvernement militaire israélien et l'administration civile israélienne cessent d'exercer leurs fonctions dès qu'une autorité autonome aura été librement élue par les habitants de ces régions, en remplacement de l'actuel gouvernement militaire... », le Monde, 20 September 1978, p. 6, le Monde, 21 September 1978, p. 5. See also Neue Zürcher Zeitung, 20 September 1978, p. 4 (in German).

(3) See Neue Zürcher Zeitung, 20 September 1978, p. 1. See also TATU, M., *« premières dissonances israélo-américaines »*, le Monde, 20 September 1978, p. 4. The author, however, states that the Israeli authority over these regions will be « en voie d'érosion » once the Camp David agreements are in the process of implementation.

(4) Under « former mandated territory » we understand the Cisjordanian part of that mandated territory, which « stricto sensu » also included a Transjordanian part until the independence of Transjordan in the spring of 1946. See RIEBENFELD, P., *Testimony before the special Sub-Cttee on Investigations of the Committee on International Relations,* U.S. House of Representatives, 94th Congress, 1 st Sess., 6 November 1975, p. 204 et seq.

See also STOYANOWSKI, J., *the Mandate for Palestine,* 1928, (reprint in 1976, Westport, Conn.), p. 205-206. The author states : « The interpretation given by the Mandatory to the above article (art. 25 of the Mandate text) has practically resulted in a complete separation between Palestine proper and Transjordan. N. Bentwich even speaks of a separate Transjordan Mandate, see 10 B.Y.I.L., 1929, p. 212-213.

(5) As to the terminology of this study, we will refrain from implying value judgments, for example the old biblical names of « Judea and Samaria », adhered to by some Israeli writers to indicate explicitly the « historical » connection of the West Bank of the Jordan River with the State of Israel. See i.a. *Prime Minister Begin's Address to the Knesset* on the occasion of President Sadat's Jerusalem visit, W. Asia Diary, vol. III, Jan. 8-14, 1978, p. 864 et seq.; BLUM, Y.Z., *« the Missing Reversioner : Reflections on the Status of Judea and Samaria »*, 3 Israel L.R., 1968, p. 279-301; DRORI, M., *« Municipal Elections in Occupied Judea and Samaria »*, 9 Israel L.R., 1974, p. 97-116.

We won't use the term « Cisjordania » either, which may be interpreted as Jordan having title to the said territory. Since it is the purpose of this study to present a legal appraisal, a neutral use of terms will be adopted, as for example the non-partisan expression « West Bank » used above. For similar reasons we will adhere to the term « occupied territories », and not « liberated territories », used by e.g. BLUM, Y.Z., *« Zion Was Redeemed by International Law »*, 27 Ha Praklit (in Hebrew), 1971, p. 316, or « conquered territories », as e.g. DINSTEIN, Y., *« Zion Shall Be Redeemed in International Law »*, 27 Ha Praklit (in Hebrew), 1971, p. 5-6, adheres to.

Israel, the Golan Heights and the Sinai, do not form part of the subject of this study because they fall outside the former mandated territory of Palestine and do not relate to the « Palestine question » as such (6).

CHAPTER I. THE COMING INTO BEING OF THE STATE OF ISRAEL AND ITS CONSEQUENCES FOR THE ARAB PALESTINIANS

In order to offer a legal appraisal of Israel's territorial title, we deem it, however, first of all necessary to briefly revisit the legal significance of the birth of the Jewish State.

A. A PROCESS OF AUTO-EMANCIPATION

The birth of Israel can the best be described by using the legal construction of « auto-emancipation ». An examination of the important events of 1947-1948 learns us that the well-known Partition Resolution, which envisaged a division of Palestine in two states — a Jewish one and an Arab-Palestinian one — within one economic union and with an international status for Jerusalem, adopted by the General Assembly of the United Nations on 29

(6) Up to now it is still uncertain whether Israel will withdraw from the Golan Heights, this problem has been completely left out in Camp David. On the other hand, one of the major changes in the Israeli position has occurred vis-à-vis its presence in the Sinai. Israel has never considered itself to be completely without title to at least some part of the Sinai, cf. Israel's policy on the Jewish settlements of Ofira (Sharm-el-Sheikh) and the Pichat Rafia area, which were destined to remain permanent Israeli settlements. Although theoretically under Egyptian sovereignty, they would be « administratively » connected to Israel. See TOMMER, Y., « *Mr Begin's Peace Plan, the Domestic Reaction* », the World Today, March 1978, p. 78.

This would mean a form of lease « sine die », which would hardly be distinguishable from real sovereignty. See also GENDELL, Ph. J., and STARK, P. G., « *Israel: Conquerer, Liberator, or Occupier within the Context of International Law* », 7 Southw. Law Rev., 1975, vol. 1, p. 225, 229-231.

Although not an affirmation of Israel's title, a clear suggestion to that end is made by BLUM, Y. Z., *Secure Boundaries and Middle East Peace,* Jerusalem, 1971, p. 86-87 (footnote). It has now clearly been stated in the second « accord-cadre » of Camp David dealing with the conclusion of a peace treaty between Israel and Egypt, in art. (a), that Egypt will exercise its full sovereignty over the entire Sinai area up to the international borders of the former Palestine mandated territory. See le Monde, 20 September 1978, p. 6; Neue Zürcher Zeitung, 21 September 1978, p. 4. The future of the Jewish settlements in the Sinai is not mentioned in this « accord-cadre », however, it was then agreed upon by the parties that the Knesset would vote on this question within two weeks after the signing of the Camp David agreements. The general opinion that the Knesset would pronounce in favour of their complete dissolution indeed materialized. On 27 September 1978 the Knesset approved by 84 to 19 with 17 abstentions the Camp David agreements including the full withdrawal from the Sinai on condition of the conclusion of a peace treaty with Egypt. See e.g. MÜLLER, C., « *Durchleuchtung der Camp David Dokumente in Israel* », Neue Zürcher Zeitung, 21 September 1978, p. 3; Europa Archiv, 25 October 1978, *Zeittafel, Israel,* p. Z 189.

November 1947 (7), cannot be considered « stricto sensu » as the legal basis for the State of Israel.

Indeed, severe difficulties encountered by the U.N. organs, be it the General Assembly, the Security Council, or even the Trusteeship Council, combined with the self-inflicted restricted role of mere « peace-keeping » by the mandatory power (8), led in the spring of 1948 to a complete « imbroglio » in the implementation process of the U.N. independence scheme.

In extremis, when the United Nations was in fact faced with the British withdrawal and renunciation of its mandatory responsibilities, a minimum compromise on basis of a mediation could be attained in the specially convened U.N. General Assembly session on the Palestine question, embodied in Resolution 186 (S-II) of 14 May 1948. This resolution, however, meant much more than a consenting to mediation. It would indeed turn out to be the last act performed by the United Nations in relation to Palestine as a mandated territory (9). Even if not explicitly stated in the Resolution, the United Nations implicitly relinquished its responsibilities for any continuing administration of Palestine (10). The result of all this was that Palestine became a « terra derelicta ». Indeed, the fact that any future administration was made virtually impossible by abolishing the only organ which could have assumed that duty, namely the Palestine Commission; the fact that the attitude of the United Nations to the future of Palestine remained vague and non-committal to say the least, the best proof for this being the appointment of a mediator without precise duties; and last but not least the fact that the United Nations never made it clear, either explicitly or implicitly, that the territory would come under U.N. administration after the British withdrawal, an American proposal for trusteeship with the U.N. as administering authority having been clearly defeated, point undubitably to a « *derelictio* » with as result that a « *sovereignty vacuum* » in Palestine ensued. It was now up to the Jewish and Arab Palestinians to fill this vacuum by proclaiming the independence of their respective states (11). This « sovereignty vacuum » only

(7) GAOR, 2nd Sess., Res. 181 (II) 29 November 1947, (A/519), p. 131-150.

(8) It has to be clearly stated here that this policy did not mean a rejection by the United Kingdom of the U.N. Partition Resolution, see e.g. FLECTCHER-COOKE, J., « *the United Nations and the Birth of Israel* », 28 Int. Journal, 1972/1973, p. 612 et seq.

(9) GAOR, 2nd Spec. Sess., 1948, suppl. n[r] 2, Res. 186 (S-II), p. 5-6.

(10) The question can also be put here as to whether the United Nations was not obliged to maintain the international status of Palestine. This must be answered in the negative. Only in the case of a territory not sufficiently emancipated and not able to govern itself, the United Nations would be compelled to assume the administration as « trustee ». This was not the case with Palestine, see e.g. SCHMIDT-SIBETH, H., *die Völkerrechtliche Probleme der Entstehung des Staates Israel,* Munich University, doctoral dissertation, 1965, p. 42.

(11) See e.g. SCHMIDT-SIBETH, H., *op. cit.,* p. 42-43; O'CONNELL, D. P., *International Law,* I, London, 1970, p. 130, 445; BERBER, F., *Lehrbuch des Völkerrechts,* I, Munich, 1975, p. 371, where the author correctly remarks that it was not a « derelictio » of « sovereignty » but of « Mandate authority » which took place. The question of where the sovereignty resided during the Mandate régime has actually the best been answered by Sir MCNAIR, A. in the *International Status of S. W.*

existed in the whole of Palestine for a symbolic second, i.e. between the termination of the Mandate and the Proclamation of Israel's independence. After Israel came into being, the « sovereignty vacuum » remained nevertheless existent in the rest of Palestine since no Arab Palestinian state was established there (12).

This explains why the « emancipation » of Israel has to be depicted as one of a special nature. The normal process for the granting of independence was indeed not observed. In a normal process of emancipation, the sovereignty rights are transferred by the mother country to the colony; in the case of a mandated or trust territory, it is the mandatory or trustee — in collaboration with the United Nations — which grants the independence. In this case, however, Israel asserted itself its independence and was born as a fully new state (13). It was, as H. Schmidt-Sibeth points out, « eine Emanzipation aus eigerer Machtvollkommenheit », an auto-emancipation (14).

The Declaration of the Establishment of the State of Israel must be considered « stricto sensu » as the legal act by which the Jewish community in Palestine called the State of Israel into being (15). The reference in the

Africa, Advisory Opinion, I.C.J. Reports, 1950, p. 128 at 150, where he states that sovereignty over a mandated territory is in abeyence; if and when the inhabitants of the territory obtain recognition as an independent state, sovereignty will revive and vest in the new state. See equally BROWNLIE, I., *Principles of Public International Law,* Oxford, 1973, p. 181-182; GERSON, A, *Trustee-Occupant, the Legal Status of Israel's Presence in the West Bank,* 14 Harv. Int. L.J., 1973, p. 33-35; LEVINE, A., the *Status of Sovereignty in East Jerusalem and the West Bank,* 5 N.Y. Univ. Journ. of Int. L. and Pol., 1972, p. 490-491.

It can be argued that sovereignty in abeyance under the mandate system could be seen as a « sovereignty vacuum ». However, the presence of the mandate authority makes such a contention redundant.

(12(SCHMIDT-SIBETH, H., *op. Cit.,* p. 73. The independence of Israel was proclaimed some hours before the official termination of the Mandate, so it could not take immediate effect.

(13) See e.g. O'CONNELL, D. P., *op. cit.,* p. 130.

(14) See e.g. SCHMIDT-SIBETH, H., *op. cit.,* p. 73; ROSENNE, S., *The Effects of the Change of Sovereignty upon Municipal Law,* 27 B.Y.I.L., 1950, p. 267; KAPLANM. and KATZENBACH, N. D., *Political Foundations of International Law,* London, 1961, p. 302; RÖPER, E., *Rechtsfragen bei der Entstehung Israels,* 18 Das Parlament, Beilagen, 1978, p. 20; MOSLER H. in Strupp-Schlochauer, *Wörterbuch des Völkerrechts, III,* 1962, p. 674, the coming into existence of Israel occurred ... « durch spontane Herrschaftsbildung ohne Zusammenhang mit einem bestehenden oder untergehenden Staat ».

(15) For the text see e.g. BADI, J., *Fundamental Laws of the State of Israel,* New York, 1961, p. 9-10. The Supreme Court of Israel in *Ziv. v. Gubernik and Others,* 2 December 1948, and in *A. Shauki el Kharbutli v. Minister of Defence,* 3 January 1949, Ann. Dig. 1948, p. 7, held i.a. that the Declaration of Independence is not a constitutional law in the light of which the validity of other laws would be examined, but that it has the force of law for the purpose of establishing the fact of the legal creation of the State.

The importance of the Declaration of Independence is e.g. also emphasized by the Bundesgerichtshof (Federal Republic of Germany), which has said in a « Wiedergutmachung » case : « Allgemein anerkannt sei, dass der neue Staat nach dem Auslaufen des Britischen Mandats, auf Grund der « Declaration of the Establishment of the State of Israel » des Jüdischen Volksrats, vom 14 Mai 1948, am darauffolgenden Tage zur Entstehung gelangt sei ». See TOMUSCHAT, Ch., *Deutsche Rechtsprechung in Völkerrechtlichen Fragen,* 1958-1965, Bundesgerichtshof 23 Oktober 1963, 28 Z.A.Ö.R.V., 1968, p. 78-79.

Declaration of Independence to the partition plan of the U.N. General Assembly is of particular importance. That reference was of rather a general nature and made by way of a gesture of good-will; but this does not exclude the fact that a clear commitment on the part of Israel to fulfil its obligations as a new state vis-à-vis the community of nations was issued. It is certainly true that there is no mention of boundaries in the Declaration (16). However, the reference to the « area of the State of Israel » must be presumed to mean the area assigned to the Jewish State in the Partition Resolution (17). The only possible legal conclusion to be drawn from this process of auto-emancipation is the indisputable sovereign title of Israel within the borders traced by the United Nations partition plan.

To which extent Israel is justified in an international legal perspective to claim sovereign title to the other former Palestinian mandated territories vis-à-vis the rights of a « Palestine people » to these territories, is actually the core question to be answered in this study.

B. THE STATUS OF THE REMAINING PART OF THE FORMER PALESTINE MANDATED TERRITORY : A « SOVEREIGNTY VACUUM » BUT NO « TERRA NULLIUS »

A correct appraisal of the juridical status of the remaining Palestine territory can only be made by the use of the concept of « sovereignty vacuum ». This means that there was not only no state sovereignty vested in the territory, but also that there was no administering authority (as for example a « trustee ») entitled at that time to exercise its powers. However, the right of the inhabitants of such an area to sovereignty and independence does not become extinct, it remains in « suspension ». In contrast, the concept of « terra nullius » must be rejected (18), and this for the simple reason that, as I. Brownlie puts it,

> « A territory inhabited by peoples not organized as a state cannot be regarded as terra nullius susceptible to appropriation by individual states (in casu Israel or the Arab states) in case of abandonment by the existing sovereign (or by the administering authorities under a mandate system) » (19).

(16) See CATTAN, H., *Palestine and International Law,* London, 1976, p. 97, he states that this was done deliberately in order not to be bound by a similar delineation in the future. A proposal to include the boundaries of the State of Israel in the Declaration of Independence was narrowly defeated in the Provisional Council of Government, see also BEN GURION, D., *Israël, années de lutte,* Paris, 1969, p. 49-50.

(17) See LANDAU, J. in *Attorney General v. el Turani,* District Court of Haifa, 21 August 1951, I.L.R., 1951, p. 164 at 166-167.

(18) Those favouring the « terra nullius » approach include e.g. SCHMIDT-SIBETH, H., *op. cit.*, p. 73; RÖPER, E., *op. cit.*, p. 20; O'CONNELL, D.P., *op. cit.*, p. 445, relying here on a suggested interpretation by the U.K. Attorney General during the debate on the second reading of the Palestine Bill.

(19) BROWNLIE, I., *op. cit.*, p. 577-578.

A similar thesis is to be found in the Advisory Opinion of the International Court of Justice on the Western Sahara in which the Court held that :

> « State practice of the relevant period indicates that territories inhabited by tribes or peoples having a social and political organization (as the Arab Palestinians had in 1948) were not regarded as terra nullius » (20).

Needless to say that this equally applies to the present state practice.

1. *The Arab and Israeli opinions on the « sovereignty vacuum »*

The Arab Palestinians did not seem to consider the status of Palestine as that of a « sovereignty vacuum » and of course even less as that of a « terra nullius ». The spokesman for the Arab Higher Committee (A.H.C.), the representative organization of the Palestine People, I. Nakleh, declared in an address to the Security Council i.a. :

> « Now that the Mandate has ended, the People of Palestine consider themselves to be an independent nation... » (21).

However, a cablegram from the Secretary General of the League of Arab States to the Secretary General of the United Nations shows us how independent that Palestine nation was, we can inter alia read the following :

> « ... now that the Mandate over Palestine has come to an end and leaving no legally constituted authority behind to administer law and order in the country... »

Further is submitted that an intervention of the League is necessary to fill the *« vacuum »*, for the sole purpose of restoring peace and order (22). Hence, we can conclude from this Arab reaction after the expiry of the Mandate, that they actually considered the area to be a « vacuum » (23). There were at first even some Arab states, headed by Jordan, who conceived this vacuum as a « terra nullius », with as consequence that the area would be open for annexation. B. Boutros-Ghali informs us of these different Arab appraisals of Palestine's status (24), differences which could only be settled after an agreement was reached with Jordan (25).

(20) The *Western Sahara Order of 3 January 1975,* I.C.J. Reports, 1975, p. 3 at 38.

(21) SCOR, 3rd Year, nr 66, 292nd meeting, 15 May 1948, p. 8-9. See also CATTAN, H., *op. cit.,* p. 125, he views Palestine in its globality (with a non-existent Israel) as a « de facto » independent nation, which is of course erroneous.

(22) SCOR, 3rd Year, suppl. for May 1948, Doc. S/745, p. 83-88.

(23) The Arab League incorrectly considered the whole of Palestine to be a « vacuum », not recognizing the birth of Israel which they regarded as a « rebellion » or an « insurgence », sée *supra* (22).

(24) BOUTROS-GHALI, B., *« la crise de la Ligue arabe »*, A.F.D.I., 1968, p. 111, the author writes : « Les Etats qui voulaient décoloniser la Palestine... n'étaient pas d'accord sur le statut du futur Etat de la Palestine. La Transjordanie appuyée sur l'Irak préconisait l'annexation de la Palestine pour étendre l'empire hachémite, l'Egypte et l'Arabie Séoudite au contraire désiraient une république indépendante sous l'autorité du grand mufti de Jérusalem ».

This theory of the Palestine « sovereignty vacuum » can also be found in the writings of Israeli or pro-Israeli legal authorities. They too draw a clear distinction between the « sovereignty vacuum » and the « terra nullius », explicitly stating that Palestine had not become a « terra nullius » (26). However, by implicitly referring to the *non-uninhabited* status of Palestine as the basic reason for it non being a « terra nullius », E. Lauterpacht (27), J. Stone (28), and Y.Z. Blum (29) completely fail to elaborate on this key element, namely the presence of inhabitants, the presence of Arab Palestinians. The theory of the « sovereignty vacuum » can only be upheld if it is linked to the presence of a population with a right to sovereignty « in suspension ». When it lacks this content — as is obviously the case here — such theory not only becomes very artificial, but also leads to an erroneous legal appraisal of the territorial status.

2. *Is there really a « sovereignty in suspension » or did the Palestine People loose all rights to sovereignty ?*

a. *The non-proclamation of the Palestine State because of a negation of the Arab Palestine right to self-determination ?*

The Arab states and also the Arab Palestinians rejected any partition solution for Palestine (30). The Palestinians viewed the creation of Israel as a

Some Arab states did apparently not take into account that in December 1945 a Palestine « nation » had been admitted to membership (although with restricted rights) of the League of Arab States, see BOUTROS-GHALI, *le gouvernement provisoire de la République algérienne et la Ligue arabe,* Rev. Egypt. D.I., 1960, p. 68-69.

(25) HASSOUNA, H., *the League of Arab States and Regional Disputes,* New York, 1975, p. 33-41.

(26) See LAUTERPACHT, E., *Jerusalem and the Holy Places,* London 1968, p. 41-42. The author states : « ... the suggestion that there was a vacuum of sovereignty does not imply that Palestine became at the end of the Mandate « terra nullius » ...a Palestine to be carved up on the basis of first come first served ». See also BLUM, Y.Z., *the Missing Reversioner, Reflections on the Status of Judea and Samaria,* 3 Israel L.R., 1968, p. 283, although not immediately referring to a « sovereignty vacuum », but rather to a « sovereignty that must be located somewhere », he equally stresses the fact that no mandated territory can be regarded, on the termination of the mandate over it, as a res nullius open to acquisition by the first comer; see also STONE, J., *No Peace - No War in the Middle East,* Sydney (Austr.), 1969, p. 39.

Only dealing with the West Bank and conspiciously silent on the other parts of Palestine not originally envisaged for the Jewish State, A. Gerson, *op. cit.,* p. 42-43, not only rejects the notion of « terra nullius », but also of « sovereignty vacuum » because sovereignty, according to the author, resides in the Arab inhabitants. This requires the following precision : sovereignty can only be vested in a state, *the right to sovereignty,* however, can reside in the Arab inhabitants, but since this right is not exercised, since it is « in suspension », there exists a « sovereignty vacuum ». COCATRE-ZILGIEN, A., *l'imbroglio moyen-oriental et le droit,* 73 R.G.D.I.P., 1969, p. 56, rejects for different reasons the notion of « sovereignty vacuum ». The termination of the Mandate, according to the author, enabled Israel to acquire sovereign title over the whole of Palestine.
This second assertion is not true, let us just refer to the Proclamation of the Independence of the State of Israel as the best proof to the contrary.

(27) LAUTERPACHT, E., *op. cit.,* p. 41-42.

(28) STONE, J., *op. cit.,* p. 39.

(29) BLUM, Y.Z., *Reflections on the Status of Judea and Samaria,* 3 Israel L.R., 1968, p. 283.

« rebellion » of the Jewish minority and consequently their first priority was to put an end to this insurgence with the help of the befriended Arab neighbours (31). The Palestinians refused indeed to accept the self-determination framework as worked out by the United Nations, which was, according to them, a negation instead of a realization of their right to self-determination (32).

An appraisal of the decision of the United Nations (implicitly supported by the Mandatory) can, however, not lead to the conclusion of a negation of the Palestine People's right to self-determination. It is true that the General Assembly did not decide on basis of the « majority rule » principle, but after a deep-going analysis of the situation, and we refer here to the findings of the U.N. Special Commission on Palestine and the Ad Hoc Committee on Palestine of the General Assembly, the U.N. General Assembly had to take into account the indisputable strength of a distinct Jewish national identity in Palestine, which could only express itself through the realization of a separate

(30) This could already be observed in the preparatory stage when the Arabs formulated their objections against a partition and a separate Jewish State in the Ad Hoc Committee on the Palestine Question of the General Assembly, i.e. in its second Sub-Cttee, see GAOR, 2nd Sess., A/AC 14/32, p. 274 et seq. By the vote on the Partition Resolution the Arab states were unanimously against. Shortly before the termination of the Mandate, on 12 May 1948, Ambassador el-Khoury of Syria, addressing the Security Council as official Arab spokesman, once more strongly rejected the partition of Palestine, see S/PV/291, p. 14. See also TRYGVE LIE, *In the Cause of Peace,* New York, 1954, p. 163 et seq.

(31) See NAKLEH, I., Palestine spokesman, in his address to the Security Council, SCOR, 3rd Year, nr 66, 15 May 1948, p. 8-9; Seminar of Arab Jurists, *op. cit.,* p. 101-102; HASSOUNA, H., *op. cit.,* p. 245, 278. Already in February 1948 the Arab League had decided to respond to the appeal of the A.H.C. to provide assistance to the Arab People of Palestine. See in that sense also statements issued by different Arab Governments to justify their intervention : Egypt, SCOR, 3rd Year, 292nd meeting, p. 3;

Transjordan, SCOR, 3rd Year, suppl. for April 1948, p. 90, S/748; Saoudi-Arabia, SCOR, 3rd Year, suppl. for April 1948, p. 96, S/772. Authoritative Arab author B. Boutros-Ghali, however, casted some doubts on this Arab commitment to suppress the Jewish rebellion and restore peace and order in Palestine, see *supra* (22).

(32) MALLISON, W.T., *the Balfour Declaration, an Appraisal in International Law,* in I. Abu-Loghod, the Transformation of Palestine, N.W. University Press, 1971, p. 110; WRIGHT, Q., *the Middle East Problem,* 64 A.J.I.L., 1970, p. 277; BASSIOUNI, M.C., *« Self-Determination » and the Palestinians,* Proc. A.S.I.L., 1971, p. 36, in which the author states that only those people who have a legitimate right to a given territory can exercise it there. This is a correct viewpoint in so far as the world Jewish community did not have a right to self-determination, but only the Jews present in Palestine, and their national identity was undubitable. See also CATTAN, H., *op. cit.,* p. 78-79, the author's arguments, however, rely on the incorrect premise of a « de facto » Palestine independence and the consequent sole right of the inhabitants to decide on their future based on the majority rule. The Seminar of Arab Jurists, *the Palestine Question,* 22-29 July 1967 in Algiers, 1968, Beirut, p. 87-91, the authors argue that the self-determination principle was violated because no official plebiscite was organized, or in default of that, because the principle that the Jewish community could not be granted more than an official minority status, was not adopted: AKEHURST, M., *the Arab-Israeli Conflict and International Law,* 5 New Zealand Univ. L.R., 1973, p. 234-235, 236, in which he states that it was : « a clear sacrifice of the interests of the majority... not compatible with the rights which the Covenant of the League of Nations had conferred on the population of Palestine as a whole ».

right to sovereignty and independence (33). We will not indulge ourselves in a discussion of the juridical nature of the principle of self-determination in the early years of the United Nations, we simply re-emphasize the fact that « *self-determination* » and *right to « statehood »* have to be assessed here within the scope of the mandate system. We refer in this regard to A. Rigo Sureda who very aptly states :

> « It can therefore be concluded that the General Assembly, acting with the consent of the Mandatory, can modify the status of a mandated territory (even splitting it up in two parts) and that, in doing so, it is competent to decide on claims to self-determination put forward by communities living in the said territory » (34).

b. *Different approaches as to the continued existence of the right to sovereignty of the Arab Palestinians*

There is a first group of scholars who completely leave out any discussion on the existence of an Arab population in Palestine. Hence, they do not have to deal with the existence or non-existence of their right to self-determination, we refer in this regard i.a. to Y.Z. Blum (35), J. Stone (36), S.M. Schwebel (37).

Adherents to a second theory acknowledge the existence of the Palestinians but do not recognize their right to independence and sovereignty. They merely accept a respect for their religious and civil rights (38), or deal « in concreto » with their right to self-determination but only consider it as a political or moral principle with no legal force (39).

A third group of legal scholars actually recognize the right to sovereignty of the Arab Palestinians, but argue that this right has become extinct since it was not exercised, in that regard S. Rosenne states :

> « This should be remembered today, when the right of the Arabs of Palestine to self-determination is asserted, it was they who rejected it in 1948 » (40).

Similarly Ph. J. Gendell and P.G. Stark contend that, even when the Arab Palestinians did not proclaim the independence at the same time as the Jews did,

(33) See e.g. SOHN, L., *Cases on United Nations Law,* New York, 1967, p. 419 et seq.

(34) RIGO SUREDA, *the Evolution of the Right to Self-determination, a United Nations Practice,* London, 1973, p. 48, see also p. 133. See e.g. also the partition of the Ruandi-Urundi trust territory in two states (Ruanda and Burundi), G.A. Res. 1746 (XVI) of 27 June 1962.

(35) BLUM, Y.Z., *Reflections on the Status of Judea and Samaria,* 3 Israel L.R. 1968, p. 283; BLUM, Y.Z., *Secure Boundaries and Middle East Peace,* Jerusalem, 1971, p. 88-89.

(36) STONE, J., *op. cit.,* p. 39.

(37) SCHWEBEL, S.M., *What Weight to Conquest ?,* 64 A.J.I.L., 1970, p. 346-347.

(38) COCATRE-ZILGIEN, *op. cit.,* p. 56.

(39) FEINBERG, N., *the Arab-Israeli Conflict in International Law,* in MOORE, J.N., *op. cit.,* I, p. 429; SCHMIDT-SIBÉTH, H., *op. cit.,* p. 19-22.

(40) ROSENNE, S., *Directions for a Middle East Settlement - Some Underlying Legal Problems,* 33 Law and Contemp. Probl., 1968, p. 51. See also LEVINE, A., *op. cit.,* p. 495; LAUTERPACHT, E., *op. cit.,* p. 18.

> « they made no apparent effort to claim title within a reasonable time. Thus, by virtue of the doctrine of extinctive prescription, the Palestinians have arguably lost whatever legal title they may have possessed » (41).

Finally, a fourth group not only defends the right to sovereignty of the Arab Palestinians, but also upholds its continued existence « hic et nunc ». A. Gerson puts forward that the Palestinian rejection of the Partition Resolution did not represent a renunciation of their right to sovereignty, but was rather a non-acceptance of the limitations on this right in the way it was conceived by the United Nations. He then states that this right still exists since no opportunity to exercise it has occurred up till now (42). One would expect an explanation for this non-occurrence of opportunity, however, the author fails to give one (43). Equally M.C. Bassiouni defends the still actual right to sovereignty of the Palestine People, however, not limited to the West Bank and Gaza. He offers as reason for the non-proclamation of the independence of an Arab Palestine state in 1948, the deplacement of the Palestinians from their territory on a large scale (44).

c. *A loss or extinction of the Arab Palestinians' right to sovereignty and independence ?*

If the Palestinians had entirely ceased to exist as a « people », be it because of an explicit or even an implicit acceptance of, or acquiescence in, « foreign rule » over their territory (45), a loss or extinction of their right to sovereignty and independence could be said to have taken place. However, at no point in time during the post-Mandate era substantial proof for this can be furnished. Indeed, after the termination of the Mandate, the Arab Higher Committee continued to represent the Palestine People. In July 1948 the Arab League decided to install a provisionary civil administration in « Palestine » and on 23 September of the same year an all-Palestine Government was proclaimed in Gaza. This government claimed to be representative for the whole of the former Palestine mandated territory, recognition was extended to it by all Arab League states, except by Jordan. The all-Palestine Government, however, was unable to exercise any real authority over « Palestine » territory,

(41) GENDELL, Ph.j. and STARK, P.J., *op. cit.*, p. 226-227.

(42) GERSON, A., *op. cit.*, p. 35-36.

(43) The only possible explanation we can find is an implicit reference to the combined intervention of the Arab League at the termination of the Mandate, impeding the Palestinians to assert their independence, however, nothing is mentioned about the Israeli intervention which took place at the same time. It has equally to be noted that the author recognizes the right to sovereignty of the Palestinians over the West Bank (and Gaza), but not over the other Palestine territories allotted to them by the Partition Plan. Once again, an explanation for this incomprehensible distinction is not provided, ibidem, p. 36-40.

(44) BASSIOUNI, M.C., *the Middle East, the Misunderstood Conflict,* 19 Univ. Kansas L.R., 1971, p. 386-388; see also ARMANAZI, G., *the Rights of the Palestinians : the International Definition,* 3 J. Palest. St., nr 3, 1974, p. 90.

(45) Under « foreign rule » we dot not understand Israel's sovereignty over the territory allotted her in the partition plan, since this is a perfectly legal title.

not even over the West Bank and the Gaza Strip, which remained respectively under Jordanian and Egyptian control, it consequently ceased to function in September 1952. The nucleus of the Palestinians' rights to sovereignty, nevertheless, remained. Indeed, « Palestine » continued to be represented in the Arab League. In 1959 the League reached a consensus on the formation of a newly defined Palestine entity, this plan could finally be implemented in 1964 when the Palestine Liberation Organization (P.L.O.) was established and the Palestine National Charter was formally adopted (46). It took another five years, namely until 1969, before their right to self-determination would be re-acknowledged by the United Nations (47). This marked the start of a new and decisive era for the Palestine People in which their right to sovereignty would gain wide recognition. In 1974 the P.L.O. was even granted observer status by the U.N. General Assembly (48). As a result of this, the Palestinians' right to sovereignty which was « in suspension » for over two decades, must be re-appraised in the light of that new evolution, this will be our task in the last part of this study.

CHAPTER II. ISRAEL'S TITLE TO THE TERRITORIES SEIZED OUTSIDE THE TERMS OF THE PARTITION PLAN. JORDAN'S AND EGYPT'S JURIDICAL POSITIONS IN « PALESTINE »

A. THE JURIDICAL STATUS OF ISRAEL'S PRESENCE IN THE TERRITORIES SEIZED IN EXCESS OF THE PARTITION RESOLUTION

The intervention of the Arab League in Palestine and the war with Israel in 1948-1949 resulted in profound changes of the map of « Palestine ». When in 1949 the armistice agreements were signed between Israel and its four Arab neighbours (Jordan, Lebanon, Syria, Egypt), not only had Israel expanded its

(46) See e.g. BOUTROS-GHALI, B., *la Ligue des Etats arabes,* 137 Rec. Cours, 1972, III, p. 34-35; HASSOUNA, H., *op. cit.,* p. 264-269, 287-290; FISHER, R.A., *Following in Another's Footsteps : International Legal Standing by the Palestine Liberation Organization,* 3 Syracuse Journ. Int. L.C., vol. 1, 1975, p. 232-233; BASSIOUNI, M.C., *« Self-Determination » and the Palestinians,* Proc. A.S.I.L., 1971, p. 34-35. See also BERTELSEN, J.S., *Non-State Nations in International Politics, the Palestinian Arabs,* New York, 1977, esp. p. 13-18 on the emergence of the Palestine nation (1956-1967).

(47) ARMANAZI, G., *op. cit.,* p. 92, speaks in this regard of a « breakthrough » in the U.N. practice vis-à-vis the Palestine Question (Res. 2535 (XXIV) of the General Assembly).

(48) See for the P.L.O. observer status, GAOR, Res. 3237 (XXIX), 22 November 1974, 29th Sess. suppl. 31 (1), (A/9631), p. 4. On the U.N. practice as to the Palestinians' right to self-determination, see e.g. CATTAN, H., *op. cit.,* p. 217-221, however, his interpretation of the U.N. resolutions as rejecting the existence of the state of Israel cannot be adhered to. See in this regard the most recent position on Palestine by the United Nations, G.A. Res. 32/40, 15 December 1977 and the most recent *report of the U.N. Cttee on the Exercise of the Inalienable Rights of the Palestine People,* GAOR, 32nd Sess., suppl. 35 (A/32/35), esp. p. 11-13.

territory beyond the borders foreseen in the Partition Plan, but Egypt occupied the Gaza Strip and Jordan was in the process of annexing the West Bank of the Jordan River.

The armistice agreements were no peace treaties and could as such not establish « de jure » borders between Israel and its neighbours. The legal significance of these agreements is nothing more than an obligation for the parties involved to respect the demarcation lines and to refrain from revising them unless they consent to such revision by drawing up a permanent peace settlement (49). The intention — to use the words of the Jordanian U.N. representative on the eve of the 1967 Six Day War — was to bring about a « situation frozen by an armistice agreement » (50).

Although the Palestine People were not a party to the armistice agreements, this does not prejudice their right to sovereignty. It is exactly this right that grants the armistice agreements their full effect and significance of merely establishing *demarcation borders.* If the Palestinian fact had been non-existent, it would have been perfectly correct to consider the demarcation borders as « de jure » boundaries. After all, Israel, Jordan, and Egypt would only have occupied a « terra nullius ».

However, since the Palestinian fact (this inclusive their right to sovereignty) was never non-existent, the « terra nullius » concept has to be rejected, as we have examined earlier. Authoritative Israeli or Israel-oriented scholars of international law also reject this thesis. But the rejection of the « terra nullius » concept fits very well into their defense or justification framework for Israel's title over the territories seized in excess of the area allotted her by the Partition Plan. A « terra nullius » would indeed have meant that the area was open to occupation for every entrant, including the Arab neighbours (51). Seen the fact that the presence of the Palestinian population couldn't be flatly denied, the very vague and actually empty « non-uninhabited » terminology to characterize the status of the said territories is uniquely used by Israel-oriented sources to prove that Israel was

(49) HIGGINS, R., *United Nations Peace Keeping,* 1946-1967, I, London, 1969, p. 33-49.
Each of these four agreements contains a clause stating that the rights, claims, or positions of the parties concerned in a final peaceful settlement shall not be prejudiced by the armistice agreements, the provisions in the agreements are exclusively dictated by military consideration.

(50) U.N. Doc. S/PV 1345 of May 31, 1967, p. 47.

(51) GERSON, A., *op. cit.,* p. 42, footnote 124, states that the difference between « terra nullius » and the « non-uninhabited » terminology is mere semantic juggling. We can agree to this , but the author interprets it erroneously in that sense that equally in case of a « terra nullius » only the « legitimate » entrant can acquire title to the territory.
In case of « terra nullius », the question of « legality » or « illegality » of entry is not at the discussion, see e.g. BERBER, F., *op. cit.,* p. 368-369, on the conditions for occupation of « terra nullius ».

indeed entitled to extend its sovereignty thereover, because it acted in legal self-defense and consequently cannot be termed but a « legitimate entrant » (52).

Is it now possible to speak of legal self-defense or of « legitimate » entry in such a state of affairs ?

1. *What are the legal consequences of this so-called legitimate entry by Israel ?*

We agree on the fact that — is so far as Israel's neighbours wanted to destroy the young state — there existed an act of aggression (53). However, the error made by Israeli or pro-Israeli scholars of international law is that they view the Arab intervention in the context of an aggression, not only against Israel, but equally against « Palestine » or « Eretz Yisrael » (the land given to Israel) as a whole. Y.Z. Blum defends this thesis by specifically referring to individual statements by the U.N. representatives of the two superpowers (Tarasenko, Ukraine-USSR and Austin, USA), but he fails to take into account the general policy of the Security Council who kept completely silent on this question of aggression or non-aggression (54). The

(52) See *supra(26), see e.g.* SCHWEBEL, S.M., *op. cit.*, p. 346, he writes : « But the attack (of the neighbouring Arab states) did justify Israeli defensive measures, both within and, as necessary, without the boundaries allotted her by the partition plan... »; similarly LAUTERPACHT, E., *op. cit.*, p. 45, submits : « By provoking this Israeli movement (because of their aggression) outside the boundaries of the Jewish State, the Arabs themselves legitimized the process by which Israel filled the vacancy in sovereignty in the areas (outside her borders as envisaged by the partition plan) which, in order to save their kin, the Israeli forces were obliged to defend and therefore to occupy ».

(53) See the statements of the Secretary General of the Arab League, SCOR, 3rd Year, suppl. ftr May 1948, p. 83-88, S/745; of the Arab spokesman in the Security Council, Syrian Ambassador el-Khoury, SCOR, 299th meeting, nr 71, 25 May 1948, p. 13-14; and of the representative of the Arab Palestinians, NAKLEH, I., SCOR, 3rd Year, 292nd meeting, nr 66, 15 May 1948, p. 8-9. In all these statements the creation of the State of Israel was described as a rebellion or an armed insurrection which had to be suppressed. In so far as this suppression was directed against Israel itself, these statements were a clear indicator of an Arab aggression. See also AKEHURST, M., *op. cit.*, p. 236-237, in which the author erroneously considers the Arab intervention as an aid against a « subversion ». Firstly, the creation of Israel was not a subversion; secondly, Palestine was not an independent state and the A.H.C. was not its legitimate government which could call upon foreign aid.

(54) BLUM, Y.Z., *Reflections on the Status of Judea and Samaria,* 3 Israel L.R., 1968, p. 284-286. On the attitude of the United Nations, see MARTIN, P.M., *le conflit israélo-arabe,* Paris, 1973, p. 66-80; HASSOUNA, H., *op. city.*, p. 329-330.

The Security Council sent a questionnaire to the Arab countries i.a. asking them to submit a defence for their intervention in Palestine. In their reply the Arab countries basically relied upon art. 52 of the U.N. Charter, which was as a matter of fact not directly applicable. Instead they should have based their case on the « sovereignty vacuum » theory, which created the possibility for legal entry into Palestine, however, not for attacking Israel, see SCOR, 3rd Year, 301st meeting, 22 May 1948, p. 7-15.

Similarly adhering to this erroneous theory of an Arab aggression against « Palestine », see STONE, J., *op. cit.*, p. 39; SCHWEBEL, S.M., *op. cit.*, p. 346; LEVINE, A., *op. cit.*, p. 492; SHAMGAR, M., *the Observance of International Law in the Administered Territories,* in MOORE, J.N., *op. cit.*, II, p. 374-75.

greater part of Palestine still constituted a « sovereignty vacuum », which could be freely occupied by foreign powers, but over which no sovereign title could be established. As a result of this, both Israel and the Arab countries could move into the other part of « Palestine » allotted to the not established Arab Palestine state, but could not acquire sovereign title over those areas. The distinction between a « legitimate » and « illegitimate », or more precisely expressed « legal » or « illegal » entry, was as such not posed.

2. *The impact of the Palestinian right to sovereignty in this seizure by Israel*

The situation in the 1948-1949 War was generally characterized by a lack of deeper insight in the factual legal status of « Palestine », namely that of a « sovereignty vacuum ». Israel did not initially claim outright sovereignty over these seized territories, instead she left this question open (55). The United States, as Israel's principal ally, maintained the view that Israel could not annex those territories or at least not all of them, so it exercised a strong pressure on the Jewish State to make territorial concessions (56). The United Nations refrained from commenting upon the legality or illegality of the Israeli and Arab entry into Palestine and its juridical consequences for a possible acquisition of title over the area. Only U.N. mediator Bernadotte suggested that the disposition of territories allotted to the Arab Palestine state should be left to the states of the Arab League, but this in full consultation with the Arab inhabitants of Palestine (57).

However, soon after the armistice agreements were concluded, Israel moved to fully incorporate the territories not allotted her in the partition plan, although she never officially declared the location of her borders (58).

(55) See CATTAN, H., *op. cit.*, p. 128-129, he cites Israeli declarations made in the United Nations.

A like attitude was taken by Israel when it signed the « protocol » of Lausanne (12 May 1949), actually an historic document since it was the only occasion on which Israel and its Arab neighbours could be brought together by the U.N. Conciliation Commission on Palestine and acquiesced in the 1947 U.N. partition plan as a basis for a peace solution, see FORSYTHE, D.P., *United Nations Peace Making*, London, 1972, p. 50-52; FEINBERG, N., *On an Arab Jurist's Approach to Zionism and the State of Israel*, Jerusalem, 1971, p. 80-85, in which the author explicitly refers to the Israeli reservations and to the protocol itself where the parties reserved their rights to make « territorial adjustments ». It is however doubtful whether we can still consider the Israeli extension of sovereignty over all the territories seized during the 1948-1949 War as a « territorial adjustment ». Apart from that we may not forget to take into account the « suspended » right to sovereignty of the Palestinians.

(56) See CATTAN, S., *op. cit.*, p. 128; the author also points out that Israel's flexible position as regards the seized territories only lasted until she was admitted to membership of the United Nations.

(57) See ibidem, p. 126-127; the mediator actually favoured an incorporation into Transjordan. See for the U.N. attitude esp. G.A. Res. 194 (III), 11.12.1948, GAOR, 3rd Sess., suppl. A/810, I part, p. 21-25.

(58) BLUM, Y.Z., *« Zion Was Redeemed by International Law »*, 27 Ha Praklit, 1971 (in Hebrew), p. 317. See also the letter of 27 Oktober 1949 sent by Israel to the U.N. Conciliation Commission on Palestine, U.N. Doc. A/1367, p. 53-54.

Formally, there is still a distinction in status between these territories and the actual part of Palestine foreseen for the Jewish State in the partition plan, nevertheless, this distinction does not alter Israel's claim to full sovereignty over the whole area within the 1949 armistice boundaries (59).

Israel's sovereignty claims can only be appraised in relation to the Palestinians' right to sovereignty « in suspension », consequently, a sovereign title is impossible. Indeed, there is even no general recognition of the additional territory occupied in excess of the partition plan (60). But even if Israel does not hold sovereign title over these seized areas, it is not, as e.g. H. Cattan contends, a mere belligerent occupant either (61). Belligerent occupation can only occur in a territory which is under an established authority but whose authority has been ousted. A « sovereignty vacuum » is per definition not subjected to an established authority. It should be added that an « established authority » does not ipso facto mean a « sovereign authority ». As a result of this, Israel can actually only be considered as a « trustee », and while enjoying that status, it is entitled to exercise the supreme authority, but not the sovereignty, over the said territories (62).

(59) See especially J.L., *the International Status of Palestine,* 90 J.D.I., 1963, p. 972-974, in which the author writes : « The area of Jurisdiction and Powers Ordinance, 1948... rendering Israeli Law applicable to territory under Israeli military occupation, incorporated a distinction between « the area of the State of Israel as such » and « any part of Palestine which the Minister of Defence has defined by Proclamation as being held by the Defence Army of Israel ». The Distinction between the two areas has been worn away in Israeli jurisprudence, the Area of Jurisdiction and Powers Ordinance enabling Israeli Courts to apply Israeli legislation to the territory originally under military occupation (thus the 1948-1949 seized territories), although the division between the two portions has continued to exist, if no more than formally, on the statute books ».

E. Lauterpacht equally defends the sovereign title of Israel, he views this question independent from the armistice agreements which actually created, according to Lauterpacht, « de jure » boundaries, see LAUTERPACHT, E., *op. cit.,* p. 45. This once more proves the artificiality of his « sovereignty vacuum » concept which can actually be equated with that of a « terra nullius ». See also FEINBERG, N., *On an Arab Jurist's Approach to Zionism and the State of Israel,* Jerusalem, 1971, p. 29; the author states that the only answer to the question of the legal status of these territories is the strict adherence to the « status quo », however, he leaves wide open the question of annexation or simply administration by Israel.

(60) WRIGHT, Q., *Legal Aspects of the Middle East Situation,* 33 Law and Contemp. Probl., 1968, p. 18.

(61) CATTAN, H., *op. cit.,* p. 129.

(62) In a territory held on « trust », as we studied above, sovereignty is in abeyance or « in suspension », although the right to sovereignty belongs to the inhabitants. It will revive when the trusteeship ends and the population is enabled to exercise its right to sovereignty. The situation here in « Palestine » is in that sense unique in that the greater number of the « inhabitants » do not reside in the area.

The concept of trusteeship, which we use here, is of course not tnat described in Chapter XII of the U.N. Charter since there is as such no U.N. co-responsibility. That does not take away the fact that certain parallels can be drawn, we refer especially to art. 76 (b) of the Charter where the promotion of self-government and independence is emphasized. That of course requires a positive attitude on the part of Israel as to the Palestinians' right to sovereignty, to which extent this will be complied with, will be discussed later.

B. THE LEGAL STATUS OF JORDAN IN THE WEST BANK

What has been stated on the position of Israel in the territories not allotted her by the Partition Plan, « grosso modo » also applies to Jordan's legal position in the West Bank. Jordan occupied the West Bank and subsequently annexed it, but this did not happen without problems. After the proclamation of the all-Palestine Government in September 1948, not everybody in « Palestine » favoured this government, definitely not those who supported King Abdullah of Transjordan. They organized a National Palestine Congress in Jericho in October 1948, where about 5000 notables of the West Bank convened, to denounce the all-Palestine Government and to call upon King Abdullah to take Palestine in his protection (63). In the spring of 1949 a civil government was installed in the West Bank and in December 1949 the electoral laws were changed so that equally representatives from the West Bank could get elected for the Jordanian parliament. The official merger with Transjordan was then approved by the newly elected parliament on 24 April 1950 (64).

The key problem to be assessed here is whether or not the Arab Palestinian inhabitants of the West Bank agreed to be part of Jordan, A. Gerson stated in that respect :

> « ... nothing however would have precluded Jordan from succeeding to Palestinian sovereign rights, had the Palestinian Arabs chosen to cede such rights... » (65).

Indeed, serious doubts arise as to the democratic consent expressed by the West Bank population vis-à-vis the Jordanian annexation. Moreover, the Arab League unanimously denounced Jordan's annexation as violative of the League's policy, which had always furthered the principle that the military intervention should be temporary and devoid of any character of occupation or partition of « Palestine ». Especially because of the League's attitude, Jordan found itself in a very uncomfortable position and came even on the brink of exclusion. In extremis an agreement could be reached with the Hachemite Kingdom, which contained an explicit assurance by Jordan that the annexation was without prejudice as to the final settlement of the Palestine problem (66).

(63) KIRK, G., *Survey of International Affairs, the Middle East,* 1945-1950, London, 1954, p. 286.

(64) SCHMIDT-SIBETH, *op. cit.,* p. 74-76; DAVIS, H., *Constitutions, Electoral Laws, Treaties of States in Near and Middle East,* Durham, N.C., 1953, p. 253-266. Nevertheless, this annexation did not appear to be final. Indeed, section 2 of the annexation law reads : « ... this unity shall in no way be connected with the final settlement of Palestine's just cause within the limits of national hopes, Arab cooperation, and international justice ». See also WHITEMAN, M., *2 Digest of International Law,* Washington, 1963, p. 1166. However, this alone would prove to be an insufficient formulation for the Arab League states.

(65) GERSON, A., *op. cit.,* p. 36.

(66) See on this « Jordan crisis » HASSOUNA, H., *op. cit.,* p. 33-41; GERSON, A., *op. cit.,* p. 37-38. See for Jordan's acceptance of the League's policy, *Minutes of the League's Council,* 12th Ordinary Sess., 7th meeting, 12 Juny 1950, p. 293-294.

The Arab League, as only instance up to now, gave a correct legal appraisal of Jordan's juridical position when it stated that Jordan was only entitled to hold the West Bank on « trust » (67). Jordan can, however, not be considered as a « trustee-occupant » as A. Gerson describes it (68). The concept of trustee-occupation is, equally as that of belligerent occupation, typical for a state of belligerency, which was clearly not the case in the West Bank, at least not before the Six Day War. The territories occupied and so-called annexed by Jordan (and similarly by Israel) were not territories belonging to an established state and occupied in a war against that state, but territories that constituted a « sovereignty vacuum » with the « suspended » right to sovereignty vested in the Arab Palestinians. For identical reasons, nor Jordan or Israel can be considered as belligerent occupants, whether lawful or unlawful (69).

While Israel considers itself fully sovereign in the territories seized in excess of the Partition Resolution, contrary to its actual status in international law, the attitude of Jordan, since it is bound by its own annexation proclamation and its subsequent commitment to the Arab League's policy, was for

(67) See e.g. HASSOUNA, H., *op. cit.*, p. 41-43.

(68) GERSON, A., *op. cit.*, p. 39-40; SAUSER-HALL, G., while appraising the legal status of Germany after the unconditional surrender at the end of World War II, provides us with an interesting study on « trustee-occupation », *l'occupation de l'Allemagne par les puissances alliées,* 3 Ann. suisse D.I., 1946, p. 36-53. The administrative measures taken by the four Allied Powers were demonstrably in excess of the powers of a belligerent occupant under the Hague Regulations, nevertheless, depicting the status as that of a « debellatio » with a devolution of sovereignty could not be adhered to either. Consequently, the status of trustee-occupant correctly expresses the legal position of the Allied Powers in Germany at that time.

(69) For Israel as belligerent occupant, see CATTAN, H., *supra* (61). See also *the Fjeld,* Prize Court of Alexandria, 4 November 1950, I.L.R., 1950, p. 348-349. The Court refused to consider Israel as a « state », instead it regarded her as an « insurgent movement » of the Jewish population in Palestine. In doing so, the Court failed to give a correct legal appraisal of the concept of « insurgent movement », which is always linked to the presence of an established state authority, such authority was clearly not present in « Palestine ». This is once again an additional proof for our « sovereignty vacuum » theory in relation to the territories foreseen for the Arab Palestine state, and for Israel's effective sovereign title to the area allotted her in the Partition Plan.

On the other hand, for Jordan as a belligerent occupant, see BLUM, Y.Z., *Reflections on the Status of Judea and Samaria,* 3 Israel L.R., 1968, p. 283-293. The author indeed correctly submits that Jordan was not entitled to annex the West Bank, but consequently concludes that Jordan was nothing more but an (unlawful) belligerent occupant. This fallacious interpretation rests on a double basis; firstly on a mis-interpreted « non terra nullius » status, see *supra* (26), secondly, on a mis-interpreted Jordanian « aggression », see *supra* (54). The author equally attacks Jordan's annexation of the West Bank on the basis of the armistice agreements, *ibidem,* p. 288, but he neglects to refer to the fact that this « freeze of the situation » imposes the same restrictions on Israel. Finally, the author bases the belligerent occupation on the correct legal assumption of the « ousting of the legitimate sovereign », but he fails once more to point out that legitimate sovereign which was (unlawfully) ousted by Jordan in order that itself could become the (unlawful) belligerent occupant in the West Bank, *ibidem,* p. 293.

The same erroneous appraisal of Jordan as « belligerent occupant », on virtually identical grounds, is made by e.g. STONE, J., *op. cit.*, p. 39; SCHWEBEL, S.M., *op. cit.*, p. 346; SHAMGAR, M., *op. cit.*, p. 374-375; LEVINE, A., *op. cit.*, p. 492-494; GENDELL Ph.J. and STARK, P.G., *op. cit.*, p. 222-223, 227; MARTIN, P.M., *le conflit israélo-arabe,* Paris, 1973, p. 274-276.

a long time not that clear. It could the best have been described as that of a « de facto » sovereignty (70). That this « de facto » sovereignty could hardly be distinguished from a « de jure » sovereignty (with Jordan in the position of an ousted sovereign after the Six Day War), was i.a. clearly shown in 1972 when King Hussein presented its plan for a final territorial settlement in the form of a federal Kingdom of Jordan (71). It was only during the important Rabat summit of the Arab League at the end of October 1974 that Jordan consented to the creation of an independent Palestinian state comprising i.a. the West Bank (72).

C. THE LEGAL STATUS OF EGYPT IN THE GAZA STRIP

The 1947 partition plan forsaw that the area commonly known as the Gaza Strip be part of the proposed Arab Palestine state. This area came subsequently under Egyptian administration in the 1948-1949 War. Egypt, contrary to Jordan or Israel, did not move for annexation. The Egyptian administration could, until the Six Day War, be considered as the only one who acted in concert with the juridical status of the area, which was that of a « trust territory ». In the view of Egypt, the Gaza Strip remained part of Palestine and therefore Palestine might be said to have retained an actual existence, albeit in a somewhat truncated form (73). It would be erroneous to

(70) Under « de facto » sovereignty we understand that there is actually an exercise of sovereign powers, but this without prejudice as to the ultimate disposition of the territorial title. Only two states, namely Pakistan and the United Kingdom, recognized Jordan's title over the West Bank.

For the United Kingdom see Debates, h.c., vol. 474, cols. 1137-1139. It should also be mentioned here that certain legal scholars defend a « de jure » sovereign status for Jordan over the West Bank, see e.g. SCHMIDT-SIBETH, *op. cit.*, p. 74-76; RÖPER, E., *op. cit.*, p. 21.

(71) The Arab states rejected the « Hussein proposals » as not in accordance with its « trustee » status in the West Bank, see 1 J. Palest. St., nr 4, 1972, p. 166-170 (Hussein proposal), *ibidem*, p. 155-161 (Arab and Palestinian reactions).

(72) See for the text of the so-called « Palestine Resolution », 4 Journ. Pal. St., vol. 2, 1975, p. 177-178. The resolution speaks of the exclusive Palestine (P.L.O.) authority over any liberated part of Palestine, without precising to which part of Palestine the Palestinians can claim sovereignty. It is not immediately clear in the Resolution whether it equally relates to Israel's original territorial title (partition plan of 1947). We can, however, definitely interpret the Resolution as clearly referring to the West Bank and the Gaza Strip. See also FISHER, R.A., *op. cit.*, p. 245; KYLE, K., *the Palestinian Arab State, Collision Course or Solution,* the World Today, Sept. 1977, p. 346; GENDELL Ph.J. and STARK, P.G., *op. cit.*, p. 227, footnote 127, submit that the Jordanian parliament embodied this waiver of claims in a constitutional amendment. However, the constitutional amendments of November 1974, in so far as they related to the Palestine question, only entitled the Sovereign to re-organize the Kingdom in order to de-Palestinize the branches of government, see FISHER, W.B., *the Middle East and North Africa,* 1975-1976, London, 1975, p. 453, 463.

(73) J.L., *op. cit.*, p. 982-984. Since 1948 the Courts have continued to apply Palestinian law (basically Mandatory law). The executive authority was vested in the Governor-General appointed by the Egyptian Minister of Defence. Advisory legislative powers were exercised by a partly elected, partly appointed council. The Governor-General issued ordinances and decrees

simply describe the Egyptian presence as that of a belligerent occupant, not only were the conditions under which Egypt entered the Gaza Strip the same as those under which Jordan entered the West Bank, ipso facto excluding a possible belligerent occupancy, but Egypt in actual fact assumed its task of « trustee » (74).

D. THE STATUS OF JERUSALEM, THE DIVIDED CITY

« Other than for the Palestine Mandate « stricto sensu », the United Nations had not renounced its responsibility for Jerusalem, which was destined to be placed under an international régime as « corpus separatum » (75). The Trusteeship Council of the United Nations, which had been instructed to work out an appropriate statute, adopted its final plan on 4 April 1950 (76).

In the meanwhile, and this as a direct result of the 1948-1949 War, the city had been split in two parts, a western and an eastern sector, respectively occupied by Israel and by Jordan. Both countries subsequently proceeded to incorporate their respective parts of the city into their state territory (77).

in the Palestine Gazette to supplement existing enactments, so did the first, namely the Law nr 621 of 1953, provide i.a. for the continuation of the Palestine Order in Council of 1922 and of all Palestine laws in force. In a constitutional Decree, signed by President Nasser on 5 March 1962, we can read as follows in Chapter 1 (art. 1) : « The Gaza Strip is an inseparable part of the land of Palestine and its people are a part of the Arab Nation ». That the area was not under Egyptian sovereignty is i.a. made clear by the British Foreign Secretary Selwyn Lloyd, March 1957, H.C. Debates, vol. 566, col. 1320.

(74) Erroneously assessing Egypt's status in the Gaza Strip as that of a belligerent occupant, see e.g. MARTIN, P.M., *op. cit.*, p. 276-277; SHAMGAR, M., *op. cit.*, p. 373; GENDELL Ph.J. and STARK, P.G., *op. cit.*, p. 224-225. The Egyptian administration could not simply be viewed as a mere « military administration » see also J.L., *op. cit.*, p. 982-984.

(75) See SHEPARD-JONES, S., *the Status of Jerusalem, Some National and International Aspects,* 33 Law and Contemp. Pr., 1968, p. 177-179.

(76) A « modified » statute for Jerusalem's status worked out by the U.N. Conciliation Commission for Palestine, which proposed extensive co-gestionary powers for both Israel and Jordan, was rejected, see GAOR, Ad Hoc Polit. Cttee, annex, vol. I, p. 10, U.N. Doc. A/973, 1949. See for the final plan, Special Report of the Trusteeship Council, U.N. Doc. A/1286, 1951. The Council re-emphasized in this final plan the principles of a far-reaching internationalization under U.N. administration. See also VAN DUSEN, M., *Jerusalem, the Occupied Territories, the Refugees,* in M. Khadduri, Major Middle Eastern Problems in International Law, Washington, 1972, p. 39-41; AKEHURST, M., *op. cit.*, p. 237-238.

(77) See e.g. J.L., *op. cit.*, p. 974-976, in which the author states that, as far as Jerusalem (west sector) is concerned, the annexation by Israel and the subsequent proclamation of Jerusalem as Israel's capital, has not gone unchallenged. Indeed, several countries (whereunder the USA, Great Britain, France, the USSR, Belgium...) refuse to recognize Israel's sovereignty over the New City (West Jerusalem). They have not moved their embassies to Jerusalem and maintain a single Consulate or Consulate-General for both sectors of the city. See in this regard the *Consulate-General of Belgium in Jerusalem* and the *Consul-General of Belgium in Jerusalem,* District Court of Jerusalem, 30.3.1953, 13.7.1953, I.L.R., 1953, p. 391-400. As for the Old City (East Jerusalem), Jordan's annexation in April 1950 as part of the incorporation of the West Bank into its state territory, remained virtually non-recognized by other states, only Great Britain and Pakistan granted recognition and the British Government did it only « de facto ».

However, the city of Jerusalem was not a « sovereignty vacuum », contrary to the status of the other « Palestine » territories. It cannot be argued that the proposed international régime would have made Jerusalem an independent entity, a « city-state », therefore the internationalization proposal went too far (78). The United Nations could have been considered as being invested with the supreme title over the city if the « corpus separatum » statute had been implemented. This would have meant the emergence of a « sui-generis » concept in international law, namely a fully internationalized territory, over which the U.N. could to a large extent actually exercise the powers of a « sovereign », leaving only a form of internal autonomy for the inhabitants (79).

The envisaged international régime for Jerusalem was of course not destined to be perpetual, the right to « ultimate sovereignty » remaining vested in the inhabitants. In a referendum after 10 years under the régime, the population could have expressed its wishes as to modifications of the régime (80).

It is true that the United Nations only possesses limited inherent powers of government, and as D.P. O'Connell states :

> « It is doubtful if it has the powers of legislation implied in the exercise of sovereignty... ».

Nevertheless, the author makes an implicit exception for the proposed status of Jerusalem (81). Indeed, the United Nations not only enjoys those powers expressly conferred upon it by the Charter, but has also the powers and competence which may reasonably be deduced or implied from its purposes and functions. It is based upon this thesis, which finds increasing acceptance in the practice of the United Nations and in the interpretation of the Charter by the International Court of Justice, that the conferring of such far-reaching powers upon the United Nations — taking into account of course that rather « unique » situation of an envisaged international Jerusalem after the relinquishment of the mandatory powers — can be adhered to (82).

The fact that such an international régime was never implemented, the fact that the U.N. never constituted the administering authority in the city, and last but not least the gradual exhaustion of U.N. interests in internationali-

(78) See e.g. BROWNLIE, I., *op. cit.*, p. 64-65.

(79) The reaction of the Israelis and the Arabs vis-à-vis the international régime for Jerusalem was rather negative, see e.g. VAN DUSEN M., *op. cit.*, p. 39.

We re-emphasize that the U.N., as only remaining authority for Jerusalem after the Mandate renunciation by the United Kingdom, was entitled to draw up an appropriate statute for the city of Jerusalem, taking into account the right to self-determination of its inhabitants (an approximately equal number of Arabs and Jews) and the city's international spiritual vocation.

(80) See e.g. CATTAN, H., *op. cit.*, p. 179.

(81) O'CONNELL, D.P., *op. cit.*, p. 104-105.

(82) See for this theory of the « implied » powers, e.g. KELSEN, H., *Principles of Public International Law*, New York, 1967, p. 284-285.

zation, can indeed lead to the conclusion that the United Nations has relinquished its competence for Jerusalem (83). This would, however, be a premature interpretation of the U.N. position in Jerusalem. The United Nations may have acquiesced in the « status quo » of the city, respectively under a « de facto » Israeli and « de facto » Jordanian sovereignty (Jordan is an ousted « de facto » sovereign since the 1967 War), but it never, either explicitly or implicitly, endorsed any final partition, nor any other alteration in this « status quo » (84).

Consequently, a thesis of « sovereignty » for Israel and mere « belligerent occupation » for Jordan (85), or a thesis of « sovereignty » for both Israel and Jordan (86), or even a thesis of « belligerent occupation » for the two aforementioned countries (87), have to be rejected. While Jordan's official position was that of a « de facto » sovereign (88), Israel has always considered itself as fully « de jure » sovereign in West Jerusalem (89), contrary to its status of « de facto » sovereign under international law. This « de facto » sovereignty status may, however, not prejudice an ultimate solution which must take into account the right to self-determination of both the Jewish and the Arab Palestinian People.

(83) See e.g. LAUTERPACHT, E., *op. cit.*, p. 23-33.

(84) This attitude was well voiced in the immediate U.N. reaction to the Israeli « occupation » - « incorporation » of East Jerusalem in June 1967 and has always reflected its policy, notwithstanding many years of silence on the status of Jerusalem, see G.A. resolutions 2253 (4.7.1967) and 2254 (14.7.1967), 5th Emerg. Spec. Sess., suppl. 1, (A/6798), 1967, p. 4. See also AKEHURST, M., *op. cit.*, p. 238, in which the author writes that there still exists a vestige of title to Jerusalem in the United Nations, CATTAN, H., *op. cit.*, p. 182-183; SHEPARD-JONES, S., *op. cit.*, p. 178; the official position of the *Belgian Government,* see the answer by the Minister of Foreign Affairs to a question by E. Glinne, M.P., Bull. Q.R., Ch., 6 April 1971, 1069, in which the Minister stated that Jerusalem is still considered as a « de jure » international territory, this in accordance with the U.N. practice.

(85) See e.g. LAUTERPACHT, E., *op. cit.*, p. 37-47; LEVINE, A., *op. cit.*, p. 492-495; MARTIN, P.M., *op. cit.*, p. 268-270.

(86) See e.g. SCHMIDT-SIBETH, H., *op. cit.*, p. 73-76; BERMAN, S.M., *Recrudescence of the « Bellum Justum et pium » Controversy and Israel's Reunification of Jerusalem,* 7 Intern. Probl., nrs 1-2, 1969, p. 30, 35.

(87) See e.g. CATTAN, H., *op. cit.*, p. 179-180, 183.

(88) See for the annexation law, e.g. WHITEMAN, M., 2 *Digest of International Law,* Washington, 1963, p. 1166.

(89) The Area of Jurisdiction and Powers Ordinance of 1948 has also been applied in respect of Israel's jurisdiction over its sector of Jerusalem.

CHAPTER III. THE SIX DAY WAR OF JUNE 1967 AND ITS AFTERMATH, CONSEQUENCES FOR ISRAEL'S TERRITORIAL STATUS

A. ISRAEL AS « BELLIGERENT OCCUPANT »

Whether or not the Six Day War must be considered as a war of aggression or as a war of self-defence on the part of Israel, the one prohibited under art. 2 (4) of the U.N. Charter, the other permitted under art. 51 of that same Charter, is difficult to judge upon (90). Indeed, the arguments had to be examined as part of a sequence of Byzantine complexity, consequently, the United Nations Security Council refrained from expressing its opinion on the matter (91).

1. *No territorial acquisition as the result of the use of force*

It is generally recognized in international law that no acquisition of territory by belligerent actions is possible, whether it be a war of self-defence or a war of aggression. Only the U.N. Security Council possesses the necessary authority to appraise the aggressive or non-aggressive character of a war, however, it often refrains from expressing itself seen the very controversial nature of a factual appreciation (92). This basic principle of « la victoria no da derechos » is not only inherent in the rules of customary international law, defining military occupation and permitting acquisition of territory only by annexation following a generally recognized complete conquest or « debellatio » (93), or by a « cession » of territory in a peace treaty terminating the state of war (94), but it is equally embodied in the Charter of the United

(90) See e.g. for the thesis that Israel was the aggressor, HASSOUNA, H., *op. cit.*, p. 333-334; CATTAN, H., *op. cit.*, p. 167-176; the Seminar of Arab Jurists, *op. cit.*, p. 105; BASSIOUNI, M.C., *the Middle East, the Misunderstood Conflict,* 19 Univ. Kansas L.R., 1970-71, p. 393-396; SHIHATA, I., *the Territorial Question and the October War,* 4 J. Palest. St., nr 1, 1974, p. 44-46.

See for the thesis that Israel acted in self-defence, e.g. STONE, J., *the Middle East under Cease Fire,* in MOORE, J.N., *op. cit.*, II, p. 52-64; SHAPIRA, A., *the Six Say War and the Right to Self-Defence,* 6 Israel L.R., 1971, p. 65-80; SCHWEBEL, S.M., *the Middle East, Prospects for Peace,* in MOORE, J.N., *op. cit.*, II, p. 136-137; DINSTEIN, Y., *the legal Issue* of *Para War and Peace in the Middle East,* 44 St. John's L.R., 1969-1970, p. 466, 468-470.

(91) Neither in Security Council Res. 242 of 22 November 1967, SCOR, 1967, p. 8-9, or in S.C. Res. 338 of 22 October 1973, SCOR, 1973, p. 10, the two basic Resolutions on the Middle East question providing i.a. a legal appraisal of the state of belligerency, an indication can be found as to the « aggressive » or the « self-defensive » character of the Six Day War.

(92) See the definition of « aggression », G.A. Resolution 3314 of 14 December 1974, GAOR, 29th Sess., suppl. 31, (A/9631), p. 143, which re-emphasizes that it is the Security Council which determines in accordance with art. 39 of the Charter the existence of an act of aggression.

(93) « Debellatio » in the actual practice of international law only remains a theoretical possibility, see O'CONNELL, D.P., *op. cit.*, p. 441.

(94) A « cession » in a peace treaty is only valid if it is not concluded under the threat to, or the use of force, see the *Convention of Vienna on the Law of Treaties,* art. 52, 63 A.J.I.L., 1969, p. 875; WRIGHT, Q., *the Middle East Problem,* 64 A.J.I.L., 1970, p. 272.

Nations in art. 2 (4) and in the important Declaration on Principles of International Law Concerning Friendly Relations in G.A. Resolution 2625 (XXV) of 24 October 1970 (95).

Taking into consideration this basic principle, Israel cannot assert sovereign title over East Jerusalem, the West Bank, or the Gaza Strip by simply relying on its military conquest.

2. *Does Israel possess a « better title » to the « Palestine » occupied territories ?*

It is argued by Israeli and pro-Israeli legal scholars that Israel actually possesses a « better title » than respectively Jordan and Egypt to the West Bank and the Gaza Strip. These contentions are based upon the thesis that both Jordan and Egypt were mere belligerent occupants there, who have been ousted in the Six Day War, making it possible for Israel to « legitimately » in state of self-defence enter into these territories. This entry is not regarded, however, as that of a simple belligerant occupant either, still according to this theory, the ousted belligerents cannot claim « reversionary rights » as the holders of sovereign title can. Consequently, in the absence of these reversionary rights there is actually no other state which has a « better title » than Israel to these territories, which could even make Israel the potential sovereign over the West Bank and the Gaza Strip (96).

(95) See also McDOUGAL M.S. and FELICIANO, F.P., *Law and Minimum World Public Order,* New Haven, Conn., 1961, p. 732-739; O'CONNELL, D.P., *op. cit.,* p. 433; WRIGHT, Q., *the Middle East Problem,* 64 A.J.I.L., 1970, p. 270-271; SCHWEBEL, S.M., *What Weight to Conquest ?,* 64 A.J.I.L., 1970, p. 345. This principle is equally adhered to by leading Israeli scholars of international law as e.g. BLUM, Y.Z., *Secure Boundaries and Middle East Peace,* Jerusalem, 1971, p. 83; ROSENNE, S., *Directions for a Middle East Peace,* 33 Law and Contemp. Probl. 1968, p. 59-60, this last author, nevertheless, states that many effects in the political map of the world would follow from an unquestioning acceptance of this principle.

It is true that the « no acquisition of territory by war » principle is not part of classical international law, but is one of the leading principles of contemporary international law which developed after World War I. In this regard we refer i.a. to the Covenant of the League of Nations, the Briand-Kellogg Pact, the Stimson Doctrine and last but not least the whole U.N. practice. See also the extensive U.N. practice specifically pertaining to the « no weight to conquest » principle in the Middle East question, e.g. S.C. resolutions : 242 (22.11.1967), 252 (21.5.1968), 267 (3.7.1969), 298 (25.9.1971), 338 (22.10.1973), 381 (30.11.1975), Declaration of 11.11.1976, Report of the S.C. (1976-1977). e.g. G.A. Resolutions 2628 (XXV), 2799 (XXVI), 2949 (XXVII), 3331 (XXIX), 3414 (XXX), 31/6 (26.10.1976), 32/40 (15.12.1977).

There are nevertheless still adherents to the theory of justified territorial expansion for the victor in wars of self-defence, see BERMAN, S.M., *op. cit.,* p. 35-37; MARTIN, P.M., *op. cit.,* p. 261-265. Such contentions, however, are not only contrary to the rules of contemporary international law, but they would also open the gates for arbitrary actions under the pretext of being the victim of an « aggression ».

(96) See for this theory on the « better title » e.g. BLUM, Y.Z., *Secure Boundaries and Middle East Peace,* Jerusalem, 1971, p. 90-91; STONE, J., *No Peace - No War in the Middle East,* Sydney, 1969, p. 38-40; SCHWEBEL, S.M., *What Weight to Conquest,* 64 A.J.I.L., 1970, p. 346-347; LAUTERPACHT, E., *op. cit.,* p. 48 (specifically then for East Jerusalem); LEVINE, A., *op. cit.,* p. 495-496, the author suggests here that Israel could change its public posture to that of a « sovereign » in order to create clarity, *ibidem,* p. 498.

We cannot but reject the thesis of « better title » since its premises are clearly incorrect. We have extensively examined the legal status of Jordan's and of Egypt's presence in « Palestine » and came to the conclusion that both had to be considered as « trustees » in the territories under their respective administration. Consequently, « trustees » cannot be dealt with in the same way as « belligerent occupants », they clearly have reversionary rights (97).

It is now contended by e.g. A. Gerson that Jordan and Egypt as « trustees » (incorrectly called trustee-occupants) would not be entitled to reversionary rights since they did not only mismanage their « trust », but equally used it as a permanent threat of aggression against Israel (98). The first argument has to be dismissed because it relates to the domestic affairs of both countries, it can only be of relevance in the case of an obvious and generally condemned non-fulfilment of their responsibilities, to that end no proof can be furnished (99). The second argument concerning the goal of the « trust » must also be rejected, because stating that the « trust » shall last until a final settlement for the Palestinians' right to self-determination can be worked out, cannot be equated with a destruction of Israel, as A. Gerson all too easily interprets it. Consequently, there can be no question of an unlawful custodianship, Jordan's and Egypt's reversionary rights remain intact. All this leads us to conclude that Israel can only acquire the status of a belligerent occupant, while Jordan and Egypt maintain their rights as « ousted trustees », and the Palestine People still possess their ultimate claims to sovereignty and independence.

3. *Does Security Council Resolution 242 of 22 November 1967 provide Israel with an extra title to certain territories ?*

The well-known S.C. Resolution 242, definitely a key element in the search for a peaceful settlement in the Middle East, has been the subject of many studies and unavoidably also of different interpretations. Nevertheless, if we re-capitulate its contents, we actually discover two major principles : firstly, the prohibition of territorial enrichment by the use of force; secondly, the necessity of secure and recognized boundaries for every state in the Middle

However, under the actual Israeli Government led by Menachem Begin this necessary clarity has not been brought forward, see CORNU, F., « la réponse dilatoire de M. Begin », *le Monde,* 20 June 1978, p. 1, 3. Even after the Camp David « accords-cadre » for peace in the Middle East, this necessary clarity has not been brought forward, see also supra (3).

(97) See e.g. GERSON, A., *op. cit.,* p. 40, as to the reversionary rights of the « trustee-occupants » respectively the « trustees ».

(98) *Ibidem,* p. 41, the author only deals with the West Bank, but it is well understood that the same applies to the Gaza Strip.

(99) A parallel can be drawn with the Namibia Mandate; here the United Nations revoked the Mandate because of a fundamental breach of the mandate contract by South Africa, which persisted in depriving the population of their right to self-determination, see G.A. Res. 2145 (XXI) of 27 October 1966. See also the I.C.J. Advisory Opinion on Namibia, I.C.J. Reports, p. 6 at 46-47, 50. Such a breach of their « trustee » obligations has definitely not occurred in the case of Jordan, nor in the case of Egypt.

East. That there was no direct reference to the rights of the Palestine People can be deplored but that was soon adjusted in the U.N. practice. As to the first principle, we simply refer to our examination above of the « no weight to conquest » principle. As to the second principle, it re-affirms the position of the United Nations in favour of the « statehood » of Israel, but it does not precise where Israel's « de jure » boundaries have to be situated. It is exactly here that an interpretation dispute arose between the French and English version of the Resolution, respectively stating : withdrawal *from the* territories (retrait des territoires occupés) and withdrawal *from* territories occupied in the Six Day War. If we take into account the wording process of the Resolution, the English version carries indeed the most weight (100). In addition to this, it has been argued that S.C. Resolution 242 was not destined to be binding because it was taken under Chapter VI of the U.N. Charter (peaceful settlement of disputes) and not under Chapter VII (measures of peace enforcement) (101). However, this S.C. Resolution, containing basic principles for a durable settlement of the Middle East question, is so widely accepted and referred to that we may well state that it gained the rang of « *binding* » document in international law (102).

The principles enumerated in the Resolution have also to be assessed within the framework of general international law, in which the « no territorial gains as the result of war » principle is of a primordial importance, meaning that the prerequisite of « secure and recognized » boundaries for Israel does not automatically include an extension of its territory. Reading into the Resolution a concept of permitted territorial expansion on basis of « self-determined » security requirements, would definitely mean an « innovation » in international law, for which no authoritative confirmation can be found (103). Secure and recognized boundaries can only be established by

(100) See for a convincing argumentation, e.g. HOTZ, A.J., *Legal Dilemma's, the Arab-Israel Conflict,* 19 S. Dakota L.R., 1974, p. 255-259.

(101) See e.g. STONE, J., *No Peace - No War in the Middle East,* Sydney, 1969, p. 23-24, 26-27; ROSENNE, S., *Directions for a Middle East Peace,* 33 Law and Contemp. Probl., 1968, p. 57. SHAPIRA, A., *the S.C. Resolution of November 22, 1967, its Legal Nature and Implications,* 4 Israel L.R., 1969, p. 229-241.

This does not mean that all S.C. resolutions taken under Chapter VI of the Charter are ipso facto non-binding, see e.g. *the Legal Consequences for the States of the Continued Presence of South Africa in Namibia notwithstanding the S.C. Resolution 276 (1970),* I.C.J. Reports, 1971, p. 6 at 53-54. See also HIGGINS, R., *the Advisory Opinion on Namibia, which U.N. Resolutions are binding under art. 25 of the Charter ?,* 21 I.C.L.Q., 1972, p. 270 et seq.

(102) See e.g. SHIHATA, I., *op. cit.,* p. 48-49; the principles of S.C. Resolution 242 were again emphasized 6 years later in S.C. Resolution 338, and they remain a constant factor in the U.N. practice.

(103) Favouring the thesis that security requirements permit unilateral territorial adjustments, so-called based on international law, see esp. BLUM, Y.Z., *Secure Boundaries and Middle East Peace,* Jerusalem, 1971, p. 71-79; STONE, J., *No Peace - No War in the Middle East,* 1969, p. 28; ROSTOW, E., *the United Nations and the Middle East,* Proc. A.S.I.L., 1970, p. 69.

Reference to such a « theory » cannot be found in contemporary international law, see e.g. BROWNLIE, I., *op. cit.,* p. 130-174; O'CONNELL, D.P., *op. cit.,* p. 405-447.

See also PERRY, G., *Security Council Resolution 242, the Withdrawal Clause,* 31 Middle East J., 1977, p. 413-433, the Resolution must be read in its entirety, not only emphasizing secure borders, but equally « no weight to conquest », and the territorial inviolability.

multilateral or bilateral agreements with all the parties concerned, including the Palestine People. Only these agreements can possibly contain certain territorial adjustments, but then on the basis of the generally accepted international law principle of « cession ».

4. *Does the concept of « uti possidetis » facilitate Israel's acquisition of title to « Palestine » occupied territories ?*

This legal maxim is i.a. used by Y.Z. Blum who suggests that there exists a « fait accompli » of occupation and that the « uti possidetis » would enable Israel to establish its sovereignty over parts of the occupied territories by a mere subsequent agreement with the Arab neighbours (104). A definitely more direct, but clearly erroneous approach, is put forward by S. Berman who considers the « uti possidetis » as a key element to justify an outright annexation of occupied territory, hereby appraising the ceasefire agreements as terminating the state of war and as an acquiescence by Jordan (and Egypt) in the « fait accompli » of the occupation (105). The « uti possidetis » principle should be used with great care, it originated in ancient Rome (decree of the Preator) and it actually reads : « uti possidetis, ita possideatis » (as you possess, so may you possess). This concept was used by the Latin American republics in the 19th century to delineate their mutual borders, because not always clear border lines had been drawn between the former Spanish administrative units. Hence, they merely resorted to a feasible practice for their own convenience (106). The « uti possidetis » principle has hardly been accepted in international law (107) and may definitely not be understood as a « fait accompli » of occupation enabling sovereign title to be vested in Israel by mere subsequent agreement with the neighbouring countries (108).

5. *Can Israel rely upon « natural » and « historic » rights to claim title to « Palestine » occupied territories ?*

Certain circles defend the thesis that Israel, supported by such rights, is entitled to acquire sovereignty over the entirety of the former Palestine

(104) BLUM, Y.Z., *Secure Boundaries and Middle East Peace,* Jerusalem, 1971, p. 83-84. See also STONE, J., *No Peace - No War in the Middle East,* Sydney, 1969, p. 29, 32. However, this author does not interpret the principle in such a far-going way and relies i.a. on the « uti possidetis » to justify Israel's continuing presence in the occupied territories.

(105) BERMAN, S.M., *op. cit.,* p. 31, 35.

(106) See e.g. HYDE, Ch., *International Law,* Boston, 1947, p. 501; SCHAUMANN W. in STRUPP-SCHLOCHAUER, *Wörterbuch des Völkerrechts, III,* 1962, p. 483-484; see also GERSON, A., *op. cit.,* p. 6, footnote 15.

(107) Even BLUM, Y.Z. admits this, see *Historic Titles in International Law,* The Hague, 1965, p. 341-342.

(108) See e.g. BROWNLIE, I., *op. cit.,* p. 138, the author refers to its contemporary meaning which embodies the general principle that pre-independence boundaries (in Africa or in Asia), set up by the colonial power, remain in being.

Consequently, « uti possidetis » obviously does not relate to post-independence situations of belligerent occupation.

Mandate (Eretz Yisrael) (109). Even recent statements by the Israeli Government point in that direction (110). However, in so far as the legal nature of such claims is concerned, they lack any basis whatsoever in international law (111).

6. *Does Israel possess rights to Palestine as a successor to the Mandatory ?*

Some (isolated) scholars answer this question in the affirmative, however, the theory of Israel as a successor to the United Kingdom has been clearly rebuked by Israel's own jurisprudence (112).

B. IMMEDIATE OR NON-IMMEDIATE WITHDRAWAL FROM OCCUPIED TERRITORIES ?

Another important controversy in the Arab-Israel conflict is centered around the continuing presence of Israel in the occupied « Palestine » territories. The principle of no territorial gains by the use of force, well established in international law, cannot be equated with the « principle » of the non-continuation of belligerent occupation and the obligation to immediately withdraw, without first having juridically appraised the actual situation (113). The nature itself of the belligerent occupation plays a prominent

(109) See the stand taken by the national religious party, M. Brecher, *the Foreign Policy System of Israel,* London, 1972, p. 172-174. See also the reactions of that same party, of the right wing of the Likoud party, and of especially the ultra nationalist Gouch Emounim movement, CORNU, F., « les accords de Camp David », *le Monde,* 20 September 1978, p. 3.

(110) See KYLE, K., *op. cit.,* p. 344, referring to the view of Prime Minister Begin. See also *Prime Minister Begin's Address to the Knesset,* 20 November 1977, on the occasion of President Sadat's visit, in W. Asia Diary, Jan. 8-14, 1978, p. 866.

(111) See e.g. BLUM, Y.Z., *Historic Titles in International Law,* The Hague, 1965, the author does not at all refer to or does not examine the so-called historic rights of Israel. See also STONE, J., *Liberation Movements, Arab and Jewish,* 91 Quadrant (Australia), vol. XVII, 1974, p. 62, in which the author states that such theory may be thought to express a principle of morals and justice, rather than of technical international law.

(112) The thesis that Israel was the only authority left in « Palestine » at the renunciation of the Mandate by Great Britain, and was consequently entitled to succeed to the Mandatory for the whole of Palestine, is e.g. defended by GENDELL Ph.j. and STARK, P.G., *op. cit.,* p. 226, 229.

However, the authors fallaciously attribute the same opinion to i.a. BLUM Y.Z. and LEVINE, A. See also in defence of this thesis COCATRE-ZILGIEN, A., *op. cit.,* p. 56-57.

For a good survey of the Israeli jurisprudence rejecting such a theory, see e.g. WHITEMAN, M., *op. cit.,* 2, p. 807, 853, 857, whereunder the well-known *Shimshon Palestine Portland Cement Factory ltd v. A.G. of Israel,* Supreme Court of Israel sitting as Court of Civil Appeals, 12.4.1950, I.L.R., 1950, p. 72-81.

(113) HIGGINS, R., *the Place of International Law in the Settlement of Disputes by the Security Council,* 64 A.J.I.L., 1970, p. 7-8, the author states that it is « particularly disturbing to the lawyer » the way in which the notion of territorial acquisition has become blurred with that of military occupation. See also BLUM, Y.Z., *Secure Boundaries and Middle East Peace,* Jerusalem, 1971, p. 80-83; GERSON, A., *op. cit.,* p. 44-45, footnote 132. Both authors refer to Q. Wright as one of the leading authorities committing this « disturbing » error, see WRIGHT, Q., the Middle East

part in this discussion. In so far as the prohibition of territorial acquisition was concerned, the aggressive or defensive character of the Six Day War was of no relevance. In so far as the withdrawal question is concerned, however, in case of a real aggression, the aggressor-belligerent occupant cannot claim the right to continue the occupation, this according to the generally accepted legal maxim « ex inuria ius not oritur » (114). On the other hand, in case of a belligerent occupation out of self-defence, the entry cannot be termed as « illegal », consequently, the belligerent occupant is legally entitled to remain present in the territory pending a peace treaty (115). Since in the case of Israel's entry into the occupied territories, no judgement can be passed on the « lawfulness » or « unlawfulness » of its belligerent actions, we cannot conclude that Israel « illegally » occupies the territories seized in the Six Day War, but neither can we defend the thesis that it is a « legal » belligerent occupant.

All this has some important consequences. Firstly, no « vacuum » can subsist in the occupied « Palestine » territories, an administering authority is necessary. Israel fulfils this role now, but must strictly obey to the international legal rules of the belligerent occupation (116). Secondly, Israel is only

Problem, 64 A.J.I.L., 1970, p. 272 (Blum's reference), and WRIGHT, Q., the United Nations and the Middle East, Proc. A.S.I.L., 1970, p. 74 (Gerson's reference). However, WRIGHT Q. has always defended the « package deal » approach and never submitted that Israel's belligerent occupation was as such « illegal », to state otherwise would be unfair vis-à-vis this late great American scholar of international law; see especially his articles in the A.J.I.L. of 1970, p. 275 and in 33 Law and Contemp. Probl., 1968, p. 24, and also his contribution in the Proc. A.S.I.L., 1970, p. 74.

(114) Territorial acquisition and (forcible) occupation are incorrectly put on the same footing of « inadmissibility » without making a clear appraisal of the nature of the belligerent occupation by e.g. HASSOUNA, H., *op. cit.*, p. 310-311; SHIHATA, I., *op. cit.*, p. 52.

This view is on the other hand correctly defended by Arab legal scholars, on the premise that the Six Day War has to be regarded as an Israeli was of aggression, see e.g. CATTAN, H., *op. cit.*, p. 205-207; see also STONE, J., *No Peace - No War in the Middle East,* Sydney, 1969, p. 32, who declares : « If Israel would have unlawfully resorted to war, the insistence on Israel's withdrawal might have substance ». The premise of either an Israeli aggression or an Israeli self-defence cannot be upheld as we stated earlier.

See equally on this question, GERSON, A., *War, Conquered Territory, and Military Occupation in the Contemporary Legal System,* 18 Harv. Int. L.J., 1977, p. 544.

(115) See e.g. STONE, J., *No Peace - No War in the Middle East,* Sydney, 1969, p. 29, 33; BLUM, Y.Z., *Secure Boundaries and Middle East Peace,* Jerusalem, 1971, p. 83-84; ROSENNE, S., *Directions for a Middle East Settlement,* 33 Law and Contemp. Probl., 1968, p. 59-60. These aforementioned authors also tend to rely on the maxim « uti possidetis » in order to justify a continuing occupation. This concept, however, cannot be used within the framework of belligerent occupation, see supra (121). See also on « legal » belligerent occupation, HIGGINS, R., *supra* (126) at p. 8; GERSON, A., *Israel's Presence in the West Bank, a Trustee-Occupant,* 14 Harv. Int. L.J., 1973, p. 44.

(116) Even if the belligerent occupation is clearly illegal (for example the occupation of Belgium by Germany in World War I and II), the administrative acts of the belligerent occupant, nevertheless based on an illegal presence, have to be considered as valid in so far as they do not violate the 1907 Hague Regulations and the 1949 Geneva Conventions. See e.g. *XI Trials of War Criminals before the Nuremberg Military Tribunals,* 1948, p. 1230, 1247; BERBER, F., *op. cit.*, II, *Kriegsrecht,* Munich, 1969, p. 128; STONE, J., *Legal Controls of International Conflicts,* London, 1959, p. 695; KELSEN, H., *op. cit.*, p. 139 et seq., with i.a. a special reference to the Belgian jurisprudence of the immediate post World War I period, *ibidem,* p. 141-142.

the belligerent occupant as long as there is no peace treaty, its legal position can the best be described as a « situation de fait » frozen by the ceasefire agreements of June 1967 (117). Thirdly, Israel's status of belligerent occupant may, however, change in relation to the right of self-determination of the Palestinians. In that regard, as we will see later on, a re-appraisal of the nature of the belligerent occupation will become necessary.

C. AN ATTEMPT TO ASSESS THE OFFICIAL ISRAELI POSITION AS REGARDS ISRAEL'S LEGAL STATUS IN THE « PALESTINE » TERRITORIES OCCUPIED IN THE SIX DAY WAR.

It is not within the scope of this study to legally appraise Israel's administration of these occupied territories, we simply want to point out some important elements of this administration and conclude from that brief assessment whether the Israeli Government in fact considers Israel's position as that of a mere belligerent occupant, and if not, how its actual position can the best be described ?

1. *The Old City or East Jerusalem*

Officially, the Government of Israel denies the outright annexation of East Jerusalem, instead it speaks of an integration of East Jerusalem in the administrative spheres of Israel (118). However, this official position can hardly be considered to be in harmony with the governmental policy in concreto. Indeed, the Israeli Government has extended full civilian government to the Old City, which cannot be termed but annexation (119), this clearly in violation of international law.

(117) See S.C. resolutions 233, 234, 235, 236, for the text see 62 A.J.I.L., 1968, p. 302-304.

(118) See i.a. Israel's Foreign Minister Abba Eban's declarations in the General Assembly and in the Security Council, U.N. DOCS. A/6753, S/8052 (1967). See also a statement by SHAPIRO, Y.S., Justice Minister, 3 July 1967, 49 Knesset Proceedings, p. 2453. This position is equally supported by e.g. STONE, J., *No Peace - No War in the Middle East,* Sydney, 1969, p. 20, and by LAUTERPACHT, E., *op. cit.,* p. 48.

(119) The Law and Administration Ordinance (Amendement nr 11) Law of 27 June 1967 permitted the extension of the law, jurisdiction, and administration of the State of Israel to any area of Eretz Yisrael or « Palestine » designated by governmental order, see 21 Laws of the State of Israel, 75 (1967). The Israeli Government then passed Administrative and Judicial Order nr 1, extending Israel's law, jurisdiction, and administration to East Jerusalem on 28 June 1967. See GERSON, A., *Israel's Presence in the West Bank, Trustee-Occupant,* 14 Harv. Int. L.J., 1973, p. 11-12, the author also states that Israel's official position is mere semantic from the viewpoint of legal effect. The same author refers to a ruling of the Israel Supreme Court (sitting as the High Court of Justice) in October 1970, *Rijuni and Others v. Military Court in Hebron,* in which the majority of the Court confirmed the annexation of East Jerusalem, *ibidem,* p. 12. Reference can also be made to a similar case, namely *M. Abdullah Dawidi and Others v. Military Court in Hebron,* see Jerusalem Post, 17 November 1970, p. 6. Also in support of the thesis that Israel has extended its sovereignty over East Jerusalem, see e.g. MARTIN, P.M., *op. cit.,* p. 270-274; BERMAN, S., *op. cit.,* p. 31; LEVINE, A., *op. cit.,* p. 499-500. The status of East Jerusalem is not part of the Camp David « framework » for peace in the Middle East. The problem will form the subject of an exchange of letters between Israel and Egypt. It is generally expected that the parties will « agree to disagree » by stating their old well-known positions, see TATU, M., *« premières dissonances israélo-américaines »,* le Monde, 20 September 1978, p. 4.

2. *The West Bank and the Gaza Strip*

As regards these territories, the position of the Government of Israel cannot be analyzed that easily. It is true that no legislative measures have been taken which can lead us to the conclusion that an annexation has actually taken place (120), but this does not imply that Israel acts in compliance with her status of « belligerent occupant ». Israel, as a party to the Fourth Geneva Convention of 1949 (121), disputes the « de jure » applicability of this convention to the Israeli presence in especially the West Bank and the Gaza Strip. Israel adheres only to a « de facto » observance, and this not even in its entirety (122). Israel contends that its military administration applies Jordanian law in the West Bank (with allowance for minor modifications) (123). A key part in this state of belligerent occupation is played by the 1945 British Defence Emergency Regulations, which have been incorporated, according to the Israeli Government, into the Jordanian legal system. This is denied by Jordan who expressly submits that its own Transjordanian Defence Regulations (1935) are in force in the West Bank (124). The situation in the Gaza Strip seems to be somewhat different. Since 1972 the military government there has « de facto » been replaced by a civil administration (125). It is, however, not so much Israel's administration of the West Bank and the Gaza Strip that would go beyond its powers of belligerent occupant, it is much more its policy of colonization of the area (126) which constitutes a direct violation of the Fourth Geneva Convention,

(120) See also e.g. LEVINE, A., *op. cit.*, p. 496; MARTIN, P.M., *op. cit.*, p. 276, 278; GERSON, A., *Israel's Presence in the West Bank, Trustee-Occupant,* 14 Harv. Int. L.J., 1973, p. 12-13.

(121) The Fourth Geneva Convention is the Convention relative to the protection of civilian persons in the time of war, see 75 U.N.T.S., 287.

(122) See for official Israeli statements and positions, e.g. GERSON, A., *Israel's Presence in the West Bank, Trustee-Occupant,* 14 Harv. Int. L.J., 1973, p. 2-3, esp. footnote 3.

(123) GERSON, A., *ibidem,* p. 13-14.

(124) See e.g. VAN AGGELEN J.G.C., *Protection of Human Rights in the Israeli Held Territories since 1967 in the Light of the Fourth Geneva Convention,* Rev. Egypt. D.I., 1976, p. 85-90. The Jordanian Government refers to an amendment to the Transjordanian Defence Regulations (1935) enacted by the Jordanian Government which made these Regulations applicable to territories occupied by the Jordanian Army (16 May 1948), and to an Order issued by the Jordanian Military Commander (24 May 1948) stating that the Palestine legislation shall be continued to remain in force with the exception of the provisions contradicting the Jordanian Defence Regulations.

(125) See e.g. MARTIN, P.M., *op. cit.*, p. 278.

(126) This policy has already been introduced in 1967 with the erection of a security belt of « Nahals » (settlement for military purposes) along the floor of the Jordan valley, it then progressively expanded into the establishment of a series of real « civilian » settlements (even outside the borders of « Palestine » or Eretz Yisrael, to reach a dramatic escalation in the summer of 1977, shortly after the Begin government had taken office. This escalation was caused by the legalization of a number of « wild cat » settlements. See i.a. MONROE, E., *the West Bank : Palestine or Israeli ?,* 31 Middle East J., 1977, nr 4, esp. p. 398-401.

See also VAN AGGELEN, J.G.C., *op. cit.*, esp. p. 109-110. This policy has been strongly denounced by an overwhelming majority in the U.N. General Assembly in Res. A/32/5 of 27 October 1977. The General Assembly instructed Israel to desist forewith from taking any action

especially then of arts. 33, 49, 53, stating that it is expressly forbidden for the belligerent occupant to transfer parts of his own population into the territory that he occupies. Such acts, which have to be interpreted as those of an holder of the « supreme title » be it not of the « sovereign title », are normally justified by the Israeli authorities in referring to the theory of the « better title » (127), which is, as we extensively proved, devoid of any basis in international law (128).

As we have already mentioned it in our introduction, Israel has not officially given up its claim to sovereignty over the West Bank and the Gaza Strip. The Camp David accords-cadre for peace in the Middle East still leave this question open (129).

that would result in changing the legal status of the occupied territories, including East Jerusalem. A similar statement was on that occasion issued by the Belgian U.N. Ambassador as official representative of the European Community. The Belgian Ambassador pointed out correctly that Israel's presence in the territories occupied since 1967 was nothing more but that of a « belligerent occupant », see U.N. Monthly Chronicle, 10, 1977, p. 8.

See also *Letter from the State Department Legal Advisor concerning the Legality of Israeli Settlements in the Occupied Territories,* XVII Int. Leg. Materials, vol. 3, 1978, p. 777-779, in which Israel is explicitly described as a belligerent occupant and the interests and the protection of the civilian population are implicitly cited as overriding any Israeli « better title » claims.

(127) This theory of « better title » is indeed the major justification put forward by Israel for its policy on « settlements » in the occupied territories. See the declaration by the Israeli U.N. Ambassador Ch. Herzog on 26 October 1977 in the General Assembly, U.N. Monthly Chronicle, 10, 1977, p. 6-7. Although there is still a strong tendency present within the Israeli Government favouring an extension of Israeli sovereignty over the West Bank and Gaza, a somewhat more moderate viewpoint, a brainchild of Foreign Minister Moshe Dayan, namely that of an horizontal partition of sovereignty between the State of Israel and the local inhabitants of the West Bank and Gaza seems to prevail for the time being, this thesis fits equally well into the « better title » theory; see KYLE, K., *op. cit.*, p. 344-345.

Nevertheless in the light of the permanent character of most of the settlements and the pronouncement of Israeli leaders to the effect that they are permanent, the International Commission of Jurists, *Israeli Settlements in Occupied Territories,* 19 the Review, 1977, p. 30, state that it would seem naive to regard this policy as anything other than a step towards eventual assertion of sovereignty over these territories.

For further references to Israeli Government statements on the « better title » principle, see e.g. the Israeli Minister of Justice SHAPIRO, Y.S., 27 June 1967, 49 Records of Knesset Proceedings, p. 2420; BLUM, Y.Z., « Zion was Redeemed in International Law », *27 Ha Praklit,* 1971, p. 315 (in Hebrew). MONROE, E., *op. cit.*, p. 401; TOMMER, Y., *op. cit.*, p. 79, this last author quotes Prime Minister Menachem Begin who declared, after the January 1978 meeting of the joint Egypto-Israeli political commission in Jerusalem, that, if Egypt rejected Israel's terms, the Israeli Government would feel legally justified... in making unilateral territorial adjustments in accordance with international law governing territories taken in a war of self-defence. It is not clear whether this would also include an annexation simply based on « lawful » conquest, in addition to the more « sophisticated » principle of « better title ».

An « understanding » (not published) envisages that, after the signing of the Camp David agreements on a « framework » for peace in the Middle East, during the whole negotiation and transition period of 5 years no new Jewish settlements will be set up in the occupied West Bank and Gaza. M. Begin, however, declared for the cameras of the American Broadcasting Corporation (A.B.C.) that the Israeli Government was « stricto sensu » only bound by a period of 3 months, the negotiation period for a peace treaty with Egypt, see TATU, M., *« les premières dissonances israélo-américaines »*, le Monde, 20 September 1978, p. 4.

(128) See *supra* (3).

(129) See *supra* (34).

CHAPTER IV. THE PALESTINE PEOPLE'S RIGHT TO SOVEREIGNTY NOT ANY LONGER « IN SUSPENSION » AND ITS CONSEQUENCES FOR ISRAEL'S PRESENCE IN « PALESTINE »

A. THE PALESTINIANS' RIGHTS TO SOVEREIGNTY AND INDEPENDENCE ESTABLISHED AND RECOGNIZED IN INTERNATIONAL LAW

When the right of the Palestinians to self-determination was recognized by the United Nations in the 1947 partition plan for Palestine, it was not so much done on the basis of the Charter principles on self-determination (arts. 1 (2), 55), as of the compliance with the termination of the Mandate and the granting of the independence (130). That the right of the Palestinians to sovereignty remained in a state of « inertia » for over two decades, was the direct consequence of their refusal to exercise it within the framework of the partition plan and the subsequent filling of the « sovereignty vacuum » by Israel, Jordan, and Egypt. For the United Nations they had become « refugees », only the Arab League kept on recognizing them as a national entity, but it was not until the mid-sixties that they were able to affirm or re-affirm their identity among the Arab nations (131). In the aftermath of the Six Day War, in which the last « Palestine » territories had been occupied by Israel, the Palestine People's national identity received a shock but at the same time also got a boost that would enable them to present their case in the forum of the World Organization (131). It is indeed from 1969-1970 on that the Palestinians were reborn as a « people » and that their right to self-determination has been uninterruptedly proclaimed and recognized by the United Nations (132).

(130) See e.g. TOMEH, G., *When the U.N. Dropped the Palestine Question,* 4 J. Palest. St., nr 1, 1974, p. 15-30; BERTELSEN, J.S., *op. cit.,* p. 13-25; BASSIOUNI, M.C., *« Self-Determination » and the Palestinians,* Proc. A.S.I.L., 1971, p. 34-35; FISHER, R.A., *op. cit.,* p. 232-233; MCCLEARY H. SANBORN, *the Question of Palestinian Statehood Exemplifies the Inconsistencies of the Requirements of Statehood,* 7 Calif. Western Int. L.J., 1977, p. 460.

(131) See e.g. MUSHKAT, M., *Global versus Sovereign Oriented Approaches in Contemporary International Law and Some Problems of the Middle East Conflict,* 16 Intern. Probl., 1977, p. 46.

(132) See e.g. ARMANAZI, G., *op. cit.,* p. 91-93; MALLISON W.T. and MALLISON, S.V., *the Role of International Law in Achieving Justice and Peace in Palestine-Israel,* 3 J. Palest. St., nr 3, 1974, p. 83-84. Even more important than the first G.A. resolution on the right to self-determination of the Palestinians (Res. 2535 B [XXIV]), is the G.A. Res. 2672 C (XXV) of 8.12.1970, GAOR, suppl. 28 (A/8028), p. 73, in which for the first time a clear link is established between the Palestinian right to self-determination and their right to return to Palestine.

See also for the U.N. practice on the Palestine right to self-determination, CATTAN, H., *op. cit.,* p. 217-221. The right to self-determination of the Palestine People is not only emphasized by a continuing U.N. practice of nearly a decade now, the resolutions dealing with the Palestinian self-determination have also been adopted with a large majority, consequently, an « opinio juris communis » can be said to have emerged, adding to the importance of this right in international law.

The general principle of self-determination can definitely not be equated with the right to separate statehood as such. However, in the case of the Palestine People a different appraisal needs to be made, indeed, their right to sovereignty was already explicitly recognized in the Partition Plan of 1947. Consequently, we have consistently used their right to sovereignty and their right to self-determination as terms with equal legal bearing. This, however, does not mean that their right to self-determination, although from 1969-1970 on in a new and decisive era of wide recognition, was immediately conceived as an explicit right to statehood. It took until 1974 before the United Nations General Assembly would reiterate the Palestinian right to independence with the same strength as it had done in the Partition Resolution of 1947 (133). Nevertheless, there still remained an uncertainty as to the actual exercise of this right to sovereignty. In order to work out concrete guidelines for this purpose, a Committee on the Inalienable Rights of the Palestinian People was established by the General Assembly in 1975 (134).

This Committee confirmed the Palestinians' right to sovereignty and independence over the West Bank and the Gaza Strip, but was of course confronted with Israel's well established status in the territories seized in excess of in partition plan in the 1948-49 War, although Israel's position there is not that of a « sovereign », but only that of a « trustee » as we scrutinized it above. As far as these territories are concerned, the Committee, on the one hand, appraises the Palestinian right to self-determination as a right to return to these areas, on the other hand however, it favours a recognition of Israel's sovereignty over these territories by the Palestinians. These would then be entitled to fully enjoy their civil and political rights, not only there, but in the

As far as the right to self-determination of peoples is concerned, there is no doubt that its pre-eminent character as a principle of contemporary international law has by now become widely accepted. Not only did it play a decisive part in the whole decolonization process, but it was equally embodied in such important legal documents as the U.N. Covenants, respectively on Civil and Political Rights, and on Economic, Social, and Cultural Rights (G.A. Res. 2200 (XXI) of 16 December 1966), which came into force on 23.3.1976 and on 3.1.1976, see GAOR, suppl. 16, (A/6316), p. 49-60 and U.N. DOC. (ST/LEG/SER/ D/10); and in the Declaration of Principles of International Law on Friendly Relations and Cooperation Among Nations (G.A. Res. 2625 (XXV), 24.10.1970), GAOR, suppl. 28 (A/8028), p. 121-124. The right to self-determination of peoples, however, cannot be equated with the right to sovereignty and independence (statehood) belonging to every single people in the world. The 1970 Declaration of Principles of International law Concerning Friendly Relations expresses this very clearly in the so-called saving clause (para. 7) in its self-determination section. A like statement can be found as one of the principal conclusions in the end report of special rapporteur H. Gros-Espiell (U.N. Sub-Commission on Human Rights on the Prevention of Discrimination and the Protection of Minorities), who undertook an extensive study on the implementation of the right to self-determination in the U.N. practice, see E/CN 4/ Sub 2/377, p. 22. This standpoint is also upheld by the World Court, see e.g. *the Western Sahara Order,* Advisory Opinion, I.C.J. Reports, 1975, p. 3 at 31-33.

(133) See G.A. Res. 3236 (XXIX), 22.11.1974, suppl. 31 (1), (A/9631) p. 4. See also CATTAN, H., *op. cit.*, p. 219. The author states i.a. that the General Assembly laid down the true guidelines for a solution of the Palestine problem.

(134) See G.A. Res. 3376 (XXX) 10.11.1975, GAOR, suppl. 34 (A/10043), p. 3.

whole State of Israel. Even the original Jewish State of the partition plan would have had a large Arab Palestinian population (135). These proposals have also been endorsed by the General Assembly (136).

The right to self-determination of the Palestine People is in that sense unique in that it is probably the only case of a well established recognition of a right to sovereignty and independence of a people who live for the greater part outside their national homeland. It was then also one of the main purposes of this study to prove that their right to sovereignty, as it existed on the moment of the birth of Israel in 1948, has not become extinct, on the contrary, that it has been reinforced in its legal validity. Nevertheless, the fact that the Palestinians are not in the possession of the territories they are legally entitled to, puzzles many international legal scholar while appraising their international status. On the one hand, they have to conclude that the Palestine Liberation Organization as the official representative of the Palestinian People possesses a definite international legal standing; on the other hand, they are very reluctant to depict « Palestine » as a state in « statu nascendi » (137). The basic elements of a defined people and even of an established authority can be said to be present, however, there is as yet no possibility to vest a sovereign title in the Palestinians over « Palestine » territory. Moreover, the question over which « Palestine » territories the Palestinian People are indeed entitled to exercise their sovereignty rights, has up to now unfortunately not been thouroughly examined in its global perspective. By delineating Israel's territorial title, we have shown what represents the actual

(135) See the most recent report of the Committee on the Exercise of the Inalienable Rights of the Palestinian People, GAOR, 32th Sess., suppl. 35 (A/32/35), esp. p. 11-13.

(136) See the last resolution of the G.A. on the Palestine Question, A/Res. 32/40, 15.12.1977, p. 2.

(137) See e.g. VERHOEVEN, J., *la reconnaissance internationale dans la pratique contemporaine,* Paris, 1975, p. 164; FISHER, R.A., *op. cit.,* p. 247-249; ROUSSEAU, Ch., *op. cit.,* III, 1977, p. 611; SILVERBURG, S.R., *the Palestine Liberation Organization in the United Nations,* 12 Israel L.R., 1977, p. 365-392; VERDROSS A. und SIMMA, B., *Universelles Völkerrecht,* Berlin, 1976, p. 213-214.

Nevertheless, MCCLEARLY H. SANBORN, *op. cit.,* p. 463-472, favours a « quasi-state » standing of « Palestine » based on a very progressive approach of international law. See also BERTELSEN, J.S., *op. cit.,* p. 25-35, who states that since the Six Day War the possibility is present for the Palestine People to become a « nation state ». According to the author, however, two basic obstacles have not been obviated as yet : doubts about the all-representative character of the P.L.O., and the territorial delineation of such a Palestinian state; PRILL, N.J., *die Anerkennung der P.L.O. durch die Vereinten Nationen,* 59 Die Friedenswarte, 1976, p. 208-225, in which he states that especially since the P.L.O. has been invited to participate in Security Council debates on the « Palestine question » from January 1976 on, the P.L.O. status in the United Nations can be equated with that of a « state » which is a non- U.N. member. The S.C. implemented thereby the « equal footing » principle for *all* parties involved in the Middle East conflict, including the Palestine non-state nation, as put forward by the G.A. in Res. 3375 (XXX) of 10.11.1975. The author argues also in support of a state in « statu nascendi » status for « Palestine », presently endowed with a « sui generis » form of international legal personality. For this « equal footing » principle, see also the recognition of the P.L.O.'s right to reply in the G.A. debates on the Palestine question, which clearly exceeds a normal observer status, U.N. Chronicle, 10, 1977, p. 72. The first U.N. instance to grant the P.L.O. a full member status is the Economic Commission of the U.N. for West Asia, see E/Res/20/89 (LXIII), 1977.

territorial title of the Palestinians. The recent U.N. practice and more specifically the proposals of the U.N. Committee on the Inalienable Rights of the Palestinian People to a great extent confirm our findings, with that difference nevertheless, that the pre-June 1967 borders would be considered as the « de jure » delineation of the State of Israel. This would mean a second partition of « Palestine » which cannot this time be effected within the framework of the mandate system, consequently, the Palestinians must agree to it.

« Palestine » may as yet not be a state in « statu nascendi », its people's right to sovereignty and independence is not « in suspension » anymore, but is more alive than ever.

B. THE CONSEQUENCES FOR ISRAEL'S STATUS IN ALL OCCUPIED « PALESTINE » TERRITORIES

As « neutral » belligerent occupant vis-à-vis Jordan and Egypt, Israel's position was « frozen » by the cease-fire agreements, consequently, no withdrawal from occupied territories was necessary as long as no peace treaty had been concluded.

The important new factor of the revival of the Palestinians' right to sovereignty obviously compels us now to change our legal appraisal of Israel's status in the West Bank, including East Jerusalem and Gaza. Israel has indeed become the main impediment for the realization of that right. A continuing occupation of these territories constitutes a violation of international law, not as such on the basis of the belligerent occupation, but because it prevents a people to exercise their inalienable rights to sovereignty, national independence, and return, consequently, international law requires an immediate withdrawal (138). While Israel's status as « de facto » sovereign in West Jerusalem (although it claims « de jure » sovereignty) is not as such affected seen the continuing U.N. commitment for internationalization, Israel's position as « trustee » in the territories seized in the 1948-1949 War (it equally claims outright sovereignty here) cannot be maintained either. However, in this case we are practically confronted with a « fait accompli » of annexation (139). If we draw the strict conclusions from our legal assessment, we cannot but submit that Israel has to withdraw to its borders as delineated in the 1947 partition plan. In practice, however, this would lead to the dismemberment of Israel with far-going consequences as to the future viability of the « Jewish » State. Nevertheless, the legal principles are clear and render a hard verdict in the case of Israel's continuing presence in the « Palestine » territories seized or occupied in excess of the 1947 partition plan, its presence constitutes a breach of international law.

(138) This is clearly stated in the report of the U.N. Cttee on the Inalienable Rights of the Palestine People (endorsed by the General Assembly), see supra (135) and (136).

(139) It has not been the purpose of this study to present a detailed examination of Israel's non-compliance with its legal status of « trustee » or « de facto » sovereign.

Although the Israeli Government has now accepted the principle of the respect for the « legitimate rights » of the Palestine People in the West Bank and the Gaza Strip (140), two principal factors still fail to appear in this « framework » for a Middle East peace as worked out during the September 1978 Camp David summit. Firstly, these « legitimate rights » are too vaguely described as a right to full autonomy during a transition period of 5 years, but no commitment has been made for the period thereafter. Moreover, Israel's Prime Minister M. Begin declared that, after the transition period has lapsed, Israeli troops will remain stationed in these regions and that no other military presence will be tolerated (141). This interpretation has been given with in the background the still not effected Israeli renunciation of ultimate sovereignty over the area. On the other hand, President Sadat, who agreed to the fact that this was the major concession on behalf of the Arabs, adheres to a very strict interpretation of the Camp David documents, stating that only on the basis of multilateral negotiations between the parties involved, nl. Egypt, Israel, Jordan, and the Palestinians, an ultimate status for the West Bank and Gaza can be worked out, based on the « legitimate rights » of the Palestine People (142). Secondly, the concept of « Palestine People » lacks the necessary precision, the Camp David documents only refer to a « representation » consisting of the Palestinians living in Gaza and the West Bank or also outside these territories. No mention whatsoever is made of the P.L.O. as such, nevertheless, the widely recognized official representative of the Palestine People. This does, however, not exclude that individual P.L.O. representatives can participate in the negotiations. Seen the fact now that all the four parties must find a consensus for the way in which the negotiation process has to be conducted, Israel retains a right to veto any too strongly P.L.O. oriented Palestinian representation (143). This is definitely a great weakness in the Camp David agreements since peace without the P.L.O. is not possible (144).

(140) See Camp David Agreements, « framework » for peace in the Middle East, Document 1, art. 1 (c), le Monde, 20 September 1978, p. 6; Neu Zürcher Zeitung, 21 September 1978, p. 4 (in German).

(141) See TATU, M., *« les premières dissonances israélo-américaines »*, le Monde, 20 September 1978, p. 4. On the Israeli side this interpretation is considered to be in accord with the S.C. resolutions 242 and 338 since the Israeli troops will be withdrawn to zones agreed upon by the parties, hereby failing to recognize the fact that the aforementioned resolutions do not deal with the « type » of withdrawal but with the withdrawal « tout court », unless the parties agree otherwise.

A much clearer interpretation of these « legitimate rights » has been given by hte European Community in the declaration of 27 June 1977, the nine E.C. governments spoke out in favour of a « homeland » for the Palestinians, they reiterated the same policy statement after the Camp David summit in a joint declaration of 19 September 1978, see le Monde, 21 September 1978..

(142) See TATU, M., *« les premières dissonances israélo-américaines »*, le Monde, 20 September 1978, p. 4.

(143) Neue Zürcher Zeitung, 20 September 1978, p. 1.

(144) See the very negative reaction of the P.L.O., le Monde, 21 September 1978, p. 3.

The Camp David peace « framework » pretends to rely on the principles embodied in the S.C. resolutions 242 and 338. This is not fully in accordance with the truth, especially not as regards the « Palestine » occupied territories. It is surely a positive development that Israel pledges to withdraw a part of its troops in these regions, to redeploy the rest in specific « security zones » (145), and to guarantee the local inhabitants a full internal autonomy, hereby « de facto » relinquishing its administration over the area. Nevertheless, this is still far from a complete withdrawal and renunciation of title — be it with the necessary security arrangements —. Whether this will ever take place is still uncertain, cf. Premier Begin's views as stated above.

Finally, an often overlooked point is the fact that the 1949 armistice boundaries are not the « de jure » borders of the State of Israel as we have amply proved. The Camp David documents consider the delineation of Israel based on these 1949 armistice agreements (or the pre Six Day War borders) as a « de jure » self-evident fact which is out of discussion. As we have extensively proved, this 1949 delineation can only be established on a « de jure » basis with the consent of the Palestinians, this indispensable consent has not been given up to now.

CONCLUSION

This study has basically been conceived as a global and critical answer to all these theories which try to argue in favour of Israel's territorial sovereignty beyond the borders foreseen for the Jewish State in the Partition Resolution of the General Assembly of 29 November 1947.

A prominent part in this study has in that regard been reserved for a closer examination of the legal status of the Palestine People. In the beginning they only possessed a non-exercisable right to sovereignty, a right « in suspension ». In the actual state of affairs, however, they are clearly vested with an exercisable right to statehood. Israel's legal status in « Palestine » would have been much more easily definable if the Palestinian fact had simply not existed, or at least if the Palestinians had ceased to possess an own national identity, absorbed by the neighbouring Arab countries, silently acquiescing in Israel's territorial title to « Palestine ». However, this not being the case, and confronted with one of the juridically best established cases of recognition of a people's right to statehood, a « regularization » or « legalization » of Israel's presence in « Palestine » is more necessary than ever in order not to end up in a lingering and most undesirable violation of the international legal order. In this regard we refer especially to the unpalatable consequences of South Africa's illegal presence in Namibia.

(145) See Camp David Agreements, « framework » for peace in the Middle East, *Document one on the West Bank and the Gaza Strip*, art. 1 (b), le Monde, 20 September 1978, p. 6, Neue Zürcher Zeitung, 21 September 1978, p. 4.

A « legalization » can only be based on a just appraisal of the political realities in the Middle East, and in that case, without going into a political assessment of the situation since this is not within the scope of this study, we can, nevertheless, submit that there exists a clear necessity to « regularize » Israel's status in the territories seized outside the terms of the Partition Plan and delineated by the 1949 armistice agreements. In order to bestow a sovereign title on Israel in these territories, the present holder of sovereign title, the Palestine People, has to agree to it by means of a recognition, or even a simple acquiescence.

Such an adjustment can of course only be reached within the framework of a global and durable peace settlement between Israel on the one hand, and its Arabs neighbours and the Palestine People on the other hand. In the Camp David peace « framework » for the Middle East this basic point was not even subject of the discussion as it was deemed to be self-evident that Israel is entitled to full sovereignty in these territories. Besides that, the ultimate status of the West Bank and the Gaza Strip remains unclear, if Israel does not renounce all « better title » claims, does not commit itself to a full military withdrawae, taken into consideration the necessary security precautions as for example worked out for the Sinai, and finally if the Palestine People, in the first place represented by the Palestine Liberation Organization, does not participate in the peace process, no final, just, and durable settlement will be reached. In an ultimate settlement one principle must occupy a central place, namely the inalienable right of both peoples, Jewish and Palestinian, to freely determine their political status and to pursue their economic, social, and cultural development on Palestine soil.

Concluded on September 21, 1978.