

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

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

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

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## INTRODUCTION

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

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

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

beyond Jerusalem. The location of Israel's eastern frontier is the heart of debates about the status of Israel's presence in the West Bank.<sup>3</sup>

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

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

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

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

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

6. *Id.* at 123–25.

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

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

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

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

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

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

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

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

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

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

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

15. See *id.* at 181.

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

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

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

two new states (one Jewish and one Arab), Israel was the only state to emerge from the Mandate of Palestine.<sup>19</sup>

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

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

19. *Id.*

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

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

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

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

24. See *supra* note 22.

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

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

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

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

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

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

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

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

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

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

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

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

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

## I. THE DOCTRINE OF *UTI POSSIDETIS JURIS*

### A. *Development of the Doctrine*

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

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

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

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

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

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



their borders, the new states soon adopted a rule of *uti possidetis* to establish their boundaries.<sup>34</sup>

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

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

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

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

35. *Id.*

36. *Id.* at 33.

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

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

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

40. *Id.* at 23.

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

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

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

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

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

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

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

45. *Id.* at 565.

46. *Id.*

47. *Id.* at 566.

48. *Id.*

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

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

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

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

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

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

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

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

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

52. Shaw, *supra* note 5, at 141–47.

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

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

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

### B. Applying the Doctrine

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

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

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

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

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

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

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

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

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

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

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

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59. *Id.* at xxii.

60. *Id.*

61. *Id.*

62. *See* Decision Regarding Delimitation of the Border between the State of Eritrea and the Federal Democratic Republic of Ethiopia, Eritrea–Ethiopia Boundary Commission, 12 ¶ 2.11 (Apr. 13, 2002).

63. Pellett, *supra* note 50, at 185.

64. Shaw, *supra* note 58, at xxii.

65. *Id.*

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

## II. *UTI POSSIDETIS JURIS* AND MANDATORY BORDERS

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

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

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

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

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

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

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

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

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

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

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

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

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

74. *Infra* Part III.

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

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

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

#### A. *The Mandate of Mesopotamia*

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

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

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

78. See *infra* Section II.C.

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

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

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



### 1. *The Mosul Question*

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

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

The question of the Iraqi-Turkish frontier was reopened during negotiations in Lausanne in November 1922.<sup>90</sup> The British agreed that a peace treaty with Turkey would need to determine the “southern frontier of the Turkish

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

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

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

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

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

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

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

89. See *Request of the Kingdom of Iraq for Admission to the League of Nations: Memorandum from the Iraqi Government*, League of Nations Doc. A.171932.VII, §1 ¶ 2 (1932), [http://www.ringnebulab.com/Oil/Iraq\\_1932\\_LeagueofNations.htm](http://www.ringnebulab.com/Oil/Iraq_1932_LeagueofNations.htm).

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

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

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

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

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

92. *Id.* at 13.

93. See FROMKIN, *supra* note 90.

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

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

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

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

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

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

## 2. Iraqi-Kuwaiti Border

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

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

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

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

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

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

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

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

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

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

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

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

### ***B. The Mandate of Syria***

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

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

107. *Id.*

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

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

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

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

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

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

### 1. Lebanon

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## 2. *Alexandretta/Hatay*

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

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

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124. *Id.*

125. *See id.* at 7–17.

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

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

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

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

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

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

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

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

These arrangements were affirmed in the next few years in the Treaty of Lausanne, as well as other agreements.<sup>134</sup>

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

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

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134. See generally OFF. REPS. & ESTIMATES, U.S. CENT. INTELLIGENCE AGENCY, THE HATAY QUESTION 15 (1947) [hereinafter CIA, HATAY QUESTION], [http://www.foia.cia.gov/sites/default/files/document\\_conversions/89801/DOC\\_0000256977.pdf](http://www.foia.cia.gov/sites/default/files/document_conversions/89801/DOC_0000256977.pdf). A final demarcation of the Turkish-Syrian border by a commission took place in 1926. See Majid Khadduri, *The Alexandretta Dispute*, 39 AM. J. INT'L L. 406, 408 (1946).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

148. See *id.*



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

### C. Togoland

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

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

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

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

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

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

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

small bits, and it would be found that half of a tribe was under a mandate, and the other half was not.”<sup>154</sup>

After World War II and the collapse of the League, these Mandates became trusteeship territories under the oversight of the United Nations and its Trusteeship Council.<sup>155</sup> The British trusteeship territory (known as Togoland’s Gold Coast) became part of the new independent Republic of Ghana in 1957, after its population voted in favor of an independent state.<sup>156</sup> The French territory gained independence as the Togolese Republic in 1960.<sup>157</sup>

British Togoland was by far the less economically developed of the two. The UK administered the Mandate from its neighboring Gold Coast colony, integrating it with the rail and commercial system. The British long favored the notion of ultimately incorporating Togoland into the Gold Coast. Yet during World War II, questions arose about the fate of British Togoland. The division of Togoland split the Ewe people between the French and British sections. (Some also lived on the Gold Coast.) The Ewe organized into a national movement that favored a single political entity for the people. They pressed this issue at the UN Trusteeship Council, in what for a decade would be known as the “Togo Question.”<sup>158</sup> The Ewe argued for “Ewe Unification,” while other ethnic groups argued this would lead to “disintegration.” In particular, “pan-Ewe” groups argued that division of the German colony between the British and French in 1919 was arbitrary and could not be made permanent—the “natural” or historic political boundaries were those of all of Togoland(s).<sup>159</sup>

The Trusteeship Council summarily ruled out any plan to combine the two different territories.<sup>160</sup> In 1954, Britain announced that it would promptly be granting independence to the Gold Coast, and ending its trusteeship of Togoland.<sup>161</sup> This led to intensive discussions in the Trusteeship Council on the future of the territory. Because of its administrative and economic integration with the Gold Coast, it was widely thought Togoland could not stand alone and would have to choose unification with the newly independent former British colony.<sup>162</sup>

After sending a mission of experts to the territory and studying their report, the Council decided on conducting a referendum to determine Togoland’s

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154. *Id.*

155. CRAWFORD, *supra* note 151, at 742.

156. *Id.*; G.A. Res. 1044 (XI) (Dec. 13, 1956).

157. CRAWFORD, *supra* note 151, at 742; G.A. Res. 1416 (XIV) (Dec. 5, 1959).

158. GEORGE THULLEN, PROBLEMS OF THE TRUSTEESHIP SYSTEM: A STUDY OF POLITICAL BEHAVIOR IN THE UNITED NATIONS 131–32 (1964). The Ewe were approximately one-third to one-half the population of British Togoland, and half the population of the French Togoland.

159. For a history of pan-Ewe unification efforts under the Mandate, see D.E.K. Amenumey, *The Pre-1947 Background To The Ewe Unification Question: A Preliminary Sketch*, 10 TRANSACTIONS HIST. SOC’Y GHANA 65 (1969).

160. See THULLEN, *supra* note 158, at 142–43.

161. *Id.* at 150–51.

162. *Id.*

future. The crucial questions were the geographic scope of the plebiscite and the options to be presented in the plebiscite. Upon British insistence, the referendum question would only offer two choices—unification with the newly independent Gold Coast, or a continuation of trusteeship. Unification with French Togoland was not an option, though it might be the ultimate result of the second option. The Mission report recommended that the territory be divided into four units for the plebiscite, so that majorities in each could decide that unit's future. It envisioned the possible division of the territory.<sup>163</sup> The Council rejected this proposal on the grounds that the future of the territory had to be determined “as a whole.”<sup>164</sup>

The results of the plebiscite supported union with the Gold Coast, and the General Assembly approved the dissolution of trusteeship “on the date that the Gold Coast becomes independent and the union with it of the Territory of Togoland under British administration takes place.”<sup>165</sup> This took place on March 6, 1956, with the new unified state being known as Ghana. Thus, British Togoland's merger with the neighboring Gold Coast—and the elimination of the northern 1919 border—was simultaneous with the end of the international regime. In the 1960s and 70s, following the independence of French Togoland—now simply called Togo—a new Ewe nationalist movement arose in the former British Togoland. Ewe groups, organized as “Tolimo,” sought secession from Ghana and union with Togo on the grounds that the Anglo-French partition was illegitimate.<sup>166</sup> These efforts attracted no international support and had no effect on the borders.

#### D. Cameroon

The Cameroon area was part of the German colony of Kamerun until occupied by British, French, and Belgian forces during World War I. The League issued two “Class B” Mandates in 1922 covering different parts of Kamerun, which, like Togoland, was partitioned between the British and French. Britain received a Mandate for a long narrow sliver on the western end of the territory,<sup>167</sup> while the French received a Mandate for the bulk of Cameroun (defined as the French West Africa).<sup>168</sup> The British divided their Mandatory territory into two sections, Northern and Southern Cameroons, which were administered separately—the latter directly as an autonomous province, and the former as part of Nigeria. British Northern Cameroons was predominantly Muslim (like French Cameroun), while the Southern Cameroons was predominantly Christian.<sup>169</sup>

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163. *Id.* at 157.

164. *Id.* at 158.

165. G.A. Res. 1044 (XI), *supra* note 156, at ¶ 2.

166. See David Brown, *Borderline Politics in Ghana: The National Liberation Movement of Western Togoland*, 18 J. MOD. AFR. STUD. 575, 575–605 (1980).

167. See generally *British Mandate for the Cameroons*, art. 1, 17 AM. J. INT'L L. 138 (1923).

168. *French Mandate for the Cameroons*, art. 1, League of Nations Doc. C.449M.345(e) 1922 VI (1922); CRAWFORD, *supra* note 151, at 742–43.

169. See generally Edwin W. Ardener, *The Nature of the Reunification of Cameroon*, in AFRICAN INTEGRATION AND DISINTEGRATION: CASE STUDIES IN ECONOMIC

The reunification of the arbitrarily partitioned territory of German Kamerun by the Mandates became a prominent political cause after World War II.<sup>170</sup> The British, however, resisted and marginalized calls for reunification. Similarly, South Cameroonian efforts at independence of one or both of the British Cameroons were ignored by the British.<sup>171</sup>

The French-mandated territory declared independence as the Republic of Cameroon in 1960.<sup>172</sup> The U.N. General Assembly and Trusteeship Council then called for a referendum in the British territories. As a result of the referendum in 1961, Southern Cameroons joined the Republic of Cameroon, while the Northern territories joined Nigeria.<sup>173</sup> In the British referendum, each administrative unit—North and South—voted as a separate unit. Thus the referendum arrangement, like the British administration of the Mandate, effectively partitioned the Mandate into two separate territories. Moreover, in the referendum, the British Cameroons were not given a choice of independence, only of union with Nigeria or the Republic of Cameroon.<sup>174</sup>

Thus, the British and French Mandates for Cameroon gave rise to numerous potential objections to the borders as they stood at the end of the Mandates—objections to the impairment of territorial sovereignty by the Republic of Cameroon, and objections to the denial of self-determination and improper annexation by South Cameroonian secessionists. In the early 1960s, the Republic of Cameroon objected to the outcome of the referendum process, noting that had the vote of the British Cameroons been counted in a single district, the union with the Republic would have prevailed.<sup>175</sup> The International Court of Justice refused to issue a judgment on the merits in the case, because the Republic of Cameroon itself agreed that the union of Northern Cameroons and Nigeria had been “consummated,” and that, therefore, the union could not be reversed. Instead, the Republic of Cameroon requested a purely declaratory finding that such an action, though irreversible, was wrongful. The Republic of Cameroon’s admission was therefore a strong confirmation of the *uti possidetis juris* principle.<sup>176</sup> There was no question that even the wrongful administration and partition of the Mandate against the sovereign rights of the Republic of Cameroon could not revise

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AND POLITICAL UNION 285–337 (Arthur Hazlewood ed., 1967); E.J. Arnett, *The French Mandate in Cameroons*, 37. J. ROYAL AFR. SOC’Y 191 (1938) (discussing French administration of the Mandate).

170. See Martin Z. Njeum, *Reunification and Political Opportunism in the Making of Cameroon’s Independence*, 41 PAIDEUMA: MITTEILUNGEN ZUR KULTURKUNDE 27, 29–33 (1995) (Ger.).

171. See CARLSON ANYANGWE, *IMPERIALISTIC POLITICS IN CAMEROUN: RESISTANCE & THE INCEPTION OF THE RESTORATION OF THE STATEHOOD OF SOUTHERN CAMEROONS* 33–34 (2008).

172. G.A. Res. 1349 (XIII), ¶ 11 (Mar. 13, 1959).

173. G.A. Res. 1608 (XV), ¶ 6 (Apr. 21, 1961).

174. ANYANGWE, *supra* note 171, at 34–35.

175. See Northern Cameroons (Cameroon v. U.K.), 1963 I.C.J. 15, 17–18 (Dec. 2).

176. See *id.* at 20.

Nigeria's borders as established at the end of the Mandate.<sup>177</sup> Indeed, in subsequent border disputes between Nigeria and the Republic of Cameroon, the International Court of Justice has confirmed that the border follows the Anglo-French partition of German Kamerun under the Mandates.<sup>178</sup>

A secessionist group emerged in southern Cameroon challenging the unification with the Republic of Cameroon in 1961. It has apparently gained strength in recent years and has reportedly faced violent suppression from the Cameroonian government.<sup>179</sup> Today, a wide body of nationalist sentiment in southern Cameroon still argues that the local population has never been allowed to exercise its right of self-determination and that its land has been colonized by the Republic of Cameroon.<sup>180</sup>

Southern Cameroonians challenged their incorporation into the Republic of Cameroon to the African Commission of Human Rights,<sup>181</sup> which concluded that the complainants represent a distinct people entitled to self-determination.<sup>182</sup> In the oral arguments, the *uti possidetis* issue was raised by the commissioners. The petitioners responded that South Cameroon was not part of the Republic of Cameroon when the *latter* attained independence, which is certainly true,<sup>183</sup> but it is the date of the termination of the Mandate and independence for the former that matters for purposes of *uti possidetis juris*.

The South Cameroonian secessionists also argue that the plebiscite procedure by which South Cameroon was incorporated upon the conclusion of the British Mandate was improperly conducted in a way that did not allow for the

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177. *Id.* at 33–35.

178. *See* Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nig.; Eq. Guinea Intervening), Judgment, 2002 I.C.J. Rep. 303 (Oct. 10).

179. *See* Oscar Rickett, *The Ignored Struggle for an Independent English-Speaking Cameroon*, VICE (Nov. 7, 2013), <http://www.vice.com/read/english-speaking-cameroonians-are-being-persecuted-for-wanting-a-state-of-their-own>.

180. *See generally* Fonkem Achankeng, *Betrayal and Abandonment: Memory, History, and Conflict Emotions in the Narratives of British Southern Cameroonians' Nationalists*, in NATIONALISM AND INTRA-STATE CONFLICT IN POSTCOLONIAL AFRICA (Fonkem Achankeng ed., 2014).

181. *See also* the Nigerian court decision on this subject, discussed in Nelson Enonchong, *Foreign State Assistance in Enforcing the Right to Self-Determination Under the African Charter: Gunme & Ors v. Nigeria*, 46 J. AFR. L. 246 (2002), which ordered Nigeria to institute an International Court of Justice action to determine whether Southern Cameroon was properly incorporated into Cameroon in 1961.

182. African Union, *26th Activity Report of the African Commission on Human and Peoples' Rights (ACHPR) Submitted in Accordance with Article 54 of the African Charter on Human and Peoples' Rights*, Mgwanga Gunme v. Cameroon, Annex 4, 266/2003 (2009), [http://www.chr.up.ac.za/images/files/documents/ahrdd/theme02/african\\_commission\\_26th\\_activity\\_report.pdf](http://www.chr.up.ac.za/images/files/documents/ahrdd/theme02/african_commission_26th_activity_report.pdf).

183. *See generally* MARTIN AYONG AYIM, *FORMER BRITISH SOUTHERN CAMEROONS JOURNEY TOWARDS COMPLETE DECOLONIZATION, INDEPENDENCE, AND SOVEREIGNTY: A COMPREHENSIVE COMPILATION OF EFFORTS AND HISTORICAL DOCUMENTATION* (Martin Ayong Ayim ed., 2010).

exercise of self-determination.<sup>184</sup> Nonetheless, the South Cameroonians' challenges to British South Cameroon's joinder with Cameroon at the expiration of the Mandate over the former have not won any international acceptance, despite their colorable self-determination claim.<sup>185</sup>

The Cameroons Mandates illustrate several relevant points. Most importantly, *uti possidetis juris* applies to Mandatory borders at the time of independence, even when independence does not involve the self-determination of the local people, and even when there is arguable illegality in the establishment of borders and transfer of territory to other states by the Mandatory.

Additionally, Cameroon is an example of the application of *uti possidetis juris* to partitions of a Mandate. The League authorized two Mandates that partitioned German Kamerun. Britain then divided the British Cameroons into two separately administered districts. The relevant *uti possidetis juris* unit was the Mandatory administrative unit at the time of independence. Questions about pre-independence partition, or demands for subsequent partition after the moment of independence, gain no traction.

#### *E. Partitions and Joinders—Ruanda-Urundi*

It is worth noting several further situations involving the partition of mandated territory (Lebanon was arguably a case of partition, and arguably a case of quasi-annexation, as the division did not follow prior boundaries). While partition has been urged in multiple contexts—Togoland for the Ewe; Syria along multiple lines; Iraq for the Kurds—the only “partition plans” that affected subsequent international borders were those that were implemented at or before the moment of independence. This Article focuses here on one more case of partition, namely, Ruanda-Urundi. This Article addresses the partition that created Transjordan later as part of our broader analysis of the Palestine Mandate.<sup>186</sup>

The two kingdoms of Burundi and Ruanda were annexed to German East Africa in the late nineteenth century. They fell under Belgian control in World War I, and a Mandate was approved by the League of Nations in 1922. Belgium thus became the administering State for the unified territory of Ruanda-Urundi.<sup>187</sup> Upon independence, by mutual consent, the territory divided into two new independent Republics of Rwanda and Burundi on June 1, 1962.<sup>188</sup> These remain the undisputed borders,<sup>189</sup> despite their massive failure to accommodate ethnic realities. The partition has made the Tutsis a minority in both countries, and the Hutus a

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184. See generally Piet Konings & Francis B. Nyamnjoh, *The Anglophone Problem in Cameroon*, 35 J. MOD. AFR. STUD. 207 (1997).

185. The African Commission dismissed the case for lack of temporal jurisdiction.

186. See *infra* Part III.

187. MARTIN LAWRENCE, 1 THE TREATIES OF PEACE 1919–1923 xvi (2007).

188. CRAWFORD, *supra* note 151, at 743; G.A. Res. 1746 (XVI), ¶ 1 (June 27, 1962).

189. See U.S. DEP'T STATE, OFFICE OF THE GEOGRAPHER, INTERNATIONAL BOUNDARY STUDY NO. 72, BURUNDI-RWANDA BOUNDARY 5 (1966).

majority, with well-known catastrophic results.<sup>190</sup> Nonetheless, post-genocide suggestions to repartition the two parts of the Belgian Mandate into new ethno-states have been widely considered impossibly radical.<sup>191</sup>

***F. Exclaves: Walvis Bay (Namibia)***

Walvis Bay, on the coast of what is now Namibia, had been established by the Cape Colony in 1878, several years before the establishment of Namibia's predecessor colony, German South-West Africa. Walvis Bay had been explicitly excluded from the borders of German South-West Africa upon its establishment in 1884.<sup>192</sup> When the Union of South Africa was formed in 1910, Walvis Bay and nearby islands became part of the new country.<sup>193</sup>

South African forces captured German South-West Africa during World War I. In 1920, South Africa received a "Class C" Mandate from the League to administer the territory.<sup>194</sup> The mandated territory retained the borders of South-West Africa, which had been established by treaties in the late nineteenth century. Walvis Bay was clearly not included in the Mandate.<sup>195</sup>

Nonetheless, upon taking the South-West Africa Mandate, South Africa "for reasons of expedience,"<sup>196</sup> from 1922 administered Walvis Bay as part of South-West Africa, though the outlying islands continued to be directly administered from the Cape Province.<sup>197</sup> At the same time, the relevant South African legislation made clear that the territory remained an integral part of the Cape Province, rather than South-West Africa.<sup>198</sup>

In 1966, the United Nations General Assembly adopted Resolution 2145 (XXI), asserting that it was terminating South Africa's Mandate over South-West Africa and creating its own direct administration.<sup>199</sup> The Resolution was highly controversial as a legal matter, and its effect on the ground was limited because South Africa refused to yield power and it continued its administration of the

190. See generally GERARD PRUNIER, *THE RWANDA CRISIS: HISTORY OF GENOCIDE* (1995).

191. See, e.g., GODFREY MWAKIKAGILE, *CIVIL WARS IN RWANDA AND BURUNDI: CONFLICT RESOLUTION IN AFRICA* 588–89 (2013).

192. C. Hedlam, *The Race for the Interior*, in *THE SOUTH WEST AFRICA/NAMIBIA DISPUTE: DOCUMENTS AND SCHOLARLY WRITINGS ON THE CONTROVERSY BETWEEN SOUTH AFRICA AND THE UNITED NATIONS* 18, 20 (John Dugard ed., 1973).

193. John Dugard, *Namibia-South Africa: Treaty on Walvis Bay*, 33 *INT'L LEGAL MATERIALS* 1526, 1526 (1994).

194. *Mandated Territory*, *ENCYCLOPEDIA BRITANNICA ONLINE*, <http://www.Britannica.Com/Topic/Class-C-Mandate> (last visited Jan. 12, 2016).

195. Ronald Dreyer, *Dispute over Walvis Bay—Origins and Implications for Namibian Independence*, 83 *AFR. AFF.* 497, 503 (1984).

196. See *South Africa: Act to Provide for the Transfer to Namibia of the Territory of and Sovereignty Over Walvis Bay and Certain Islands*, 22 *I.L.M.* 1573, 1574 (1993).

197. Dugard, *supra* note 193, at 1526.

198. Dreyer, *supra* note 195, at 503.

199. G.A. Res. 2145 (XXI), at 2–3 (Oct. 17, 1966).

territory for several more decades.<sup>200</sup> In 1970, the International Court of Justice ruled that Pretoria must withdraw from Namibia (the new name for South-West Africa) to satisfy the latter's right to self-determination. Faced with the possibility of losing its administration of Namibia, South Africa in 1977 placed Walvis Bay under the administration of the Cape Province.<sup>201</sup>

Namibia's independence movement demanded a complete South African withdrawal from the territory of South-West Africa—and also claimed Walvis Bay as an integral part of the territory.<sup>202</sup>

Some observers argued that the Namibian arguments were more political than legal. Walvis Bay, though tiny in size, was of extraordinary economic and strategic significance. It was Namibia's only natural harbor and an important transit point for trade and fishing. Some went so far as to argue that Namibia would not be viable as a country without the harbor.<sup>203</sup> Moreover, South Africa's naval base there would allow for it to dominate the new State of Namibia.<sup>204</sup>

But Namibian nationalists made legal arguments as well. In particular, they claimed that Namibia had rights to the coastal enclave as part of Namibian "territorial integrity."<sup>205</sup> They also claimed that since South Africa had administratively treated Walvis Bay as part of South-West Africa, it had functionally joined it to the Mandate, or, at the least, created a situation in which it was estopped from arguing against such a claim.<sup>206</sup>

South African sovereignty over Walvis Bay received significant international acceptance, notwithstanding Namibian claims.<sup>207</sup> Moreover, the United Nations Committee on South-West Africa regarded Walvis Bay as not being part of the territory of South-West Africa, but rather a sovereign part of South Africa.<sup>208</sup> Similarly, the U.S. Department of State's International Boundary

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200. See CARSTEN STAHN, *THE LAW AND PRACTICE OF INTERNATIONAL TERRITORIAL ADMINISTRATION: VERSAILLES TO IRAQ AND BEYOND* 103–106 (2008); BERNHARD KNOLL, *THE LEGAL STATUS OF TERRITORIES SUBJECT TO ADMINISTRATION BY INTERNATIONAL ORGANIZATIONS* 96–108 (2008).

201. "Walvis Bay Municipality," *WHERE TO STAY*, <http://walvisbaymunicipality.wheretostayonline.com> (last visited Jan. 12, 2016).

202. See RICHARD DALE, *THE NAMIBIAN WAR OF INDEPENDENCE* 117 (2014).

203. See *id.* at 176.

204. See VICTOR L. TONCHI ET AL., *HISTORICAL DICTIONARY OF NAMIBIA* 458 (2012).

205. SURYA PRAKASH SHARMA, *TERRITORIAL ACQUISITION, DISPUTES, AND INTERNATIONAL LAW* 32 (1997).

206. See Gregory P. Goeckner & Isabelle R. Gunning, Note, *Namibia, South Africa, and the Walvis Bay Dispute*, 89 *YALE L.J.* 903, 909 (1980).

207. See JOHN DUGARD, *THE SOUTH WEST AFRICA/NAMIBIA DISPUTE: DOCUMENTS AND SCHOLARLY WRITINGS ON THE CONTROVERSY BETWEEN SOUTH AFRICA AND THE UNITED NATIONS* 531, 533 (1973) (George Kennan observing that the Bay's "status . . . as a complete South African coastal enclave has never been questioned" and it would "remain under South African administration" upon Namibian independence).

208. Comm. on South West Afr. to the Gen. Assembly, Rep. and Observations of the Comm. on South West Africa Regarding Conditions in the Territory of South West



Study for South Africa/Namibia in 1972 concluded that “since annexation [in 1878] Walvis Bay has remained an integral part of Cape Colony or its successor, the present Cape of Good Hope Province of the Republic (formerly Union) of South Africa.”<sup>209</sup> Indeed, from after World War II until the mid-1970s, as the dispute over South-West Africa intensified, “South Africa’s sovereignty in respect of Walvis Bay was never questioned.”<sup>210</sup> A series of International Court of Justice advisory opinions and judgments about the territory treated Namibia as territorially congruent with South-West Africa, and did not challenge the exclusion of Walvis Bay from Namibia.

However, when South Africa put Walvis Bay back directly under its administration in 1977, much of the world reacted unfavorably. A concerted effort was made to give legal backing to Namibian claims to the enclave. This effort found its greatest success in a General Assembly resolution which “declare[d] that Walvis Bay is an integral part of Namibia” and “categorically condemn[ed] South Africa for the decision to annex Walvis Bay, thereby attempting to undermine the territorial integrity and unity of Namibia.”<sup>211</sup>

In the General Assembly meetings, African, Soviet-bloc, and Third World nations overwhelmingly denounced the “colonialism” of the “racist regime” in Pretoria and insisted that Walvis Bay was an integral part of Namibia. Western nations, however, made clear that Namibia’s claim was not primarily a legal one, and voiced their disagreement with the General Assembly Resolution, making clear that their support for unification was due to “moral and pragmatic” rather than legal reasons.<sup>212</sup>

One major argument for Namibian control over Walvis Bay was that South Africa had administered it as part of Mandatory South-West Africa until 1977. This created a kind of estoppel—South Africa had treated Walvis Bay as

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Africa, ¶ 10, U.N. Doc. A/291, supp. 12 (1955) (concluding that in international law “the area remains nevertheless an integral part of the Province of the Cape of Good Hope”); Comm. on South West Afr., Rep. and Observations of the Committee on South West Africa Regarding Conditions in the Territory, ¶ 59 n. 28, U.N. Doc. A/3906 (1958) (noting that the territory is “an integral part of South Africa” despite being “administered as part of South West Africa”).

209. OFF. OF THE GEOGRAPHER, U.S. DEP’T OF STATE, INT’L BOUNDARY STUDY NO. 125: SOUTH AFRICA–NAMIBIA (SOUTH-WEST AFRICA) BOUNDARY 2 (1972). U.S. Government maps clearly indicated Walvis Bay as part of South Africa, unlike Namibia. See *Namibia and Walvis Bay* (1978), <http://babel.hathitrust.org/cgi/pt?id=pur1.32754073481727;view=lup;seq=1>.

210. Albert J. Hoffman, *Walvis Bay* ¶ 9, MAX PLANCK ENCYCLOPEDIA (2009).

211. G.A. Res. 32/9(D), ¶¶ 7–8, 22–23 (Nov. 4, 1977).

212. See Statement by Representative of Austl., U.N. GAOR, 32nd Sess. 57th plen. mtg. at 992, U.N. Doc. A/32/PV.57 (Nov. 4, 1977). Practical considerations were also emphasized by African states, which spoke of “the impracticability of maintaining a foreign presence in a country,” and recalling the recent “experience of India with Portuguese Goa.” Of course, whether South Africa would be “in” Namibia was precisely the question to be answered, and Goa cuts against Namibia, as Lisbon’s sovereignty was not questioned until India’s 1962 conquest.

“part” of Namibia and could no longer reverse that treatment. The argument, however, is quite weak as South Africa always insisted that the administration did not change the legal status of Walvis Bay, and was purely a matter of expedience. Moreover, South-West Africa was a “Class C” Mandate, which the Mandatory could administer as an integral part of its own territory—thus administering its own territory with Mandatory territory should not change the status of the latter absent express cession. Indeed, while Pretoria’s administrative status for Walvis Bay certainly weakened the perceived legitimacy of its sovereignty in certain quarters, it did not ultimately undermine it.

One point bears emphasizing: even the strongest argument against South African sovereignty was principally an *uti possidetis juris* argument about Mandatory borders. The Namibian argument took for granted that the only possible lines for new states would be those of their Mandatory borders—and the only question, therefore, was whether the pre-independence borders of Namibia were properly understood to include Walvis Bay.<sup>213</sup>

While in 1977 the General Assembly endorsed Namibian legal claims to the territory—in a marked reversal of the Assembly’s position for the preceding three decades—the Security Council rejected this approach. Instead, the Security Council passed a resolution calling for the “reintegration” of Walvis Bay into Namibia while it was under South African control.<sup>214</sup> The Security Council resolution pointedly failed to repeat the legal conclusions of the Assembly, leaving sovereignty over the territory “for negotiation between South Africa and Namibia.”<sup>215</sup> More importantly, the Council did not include Walvis Bay in Resolution 435, the major UN resolution promoting plans for Namibian independence.<sup>216</sup>

As the United States made clear when it voted on Security Council Resolution 432, the Council specifically decided to avoid adopting the Assembly position on “disputes of a legal character concerning the various claims as to the status of Walvis Bay.”<sup>217</sup> The United States and other major powers further made clear that they did not understand the resolution to prejudice South Africa’s legal claims to the territory. Indeed, Cyrus Vance’s statement made clear that the call to integrate Walvis Bay was based on policy considerations, not legal entitlement, and did not involve accepting Namibia’s view that “Walvis Bay must be part of an

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213. There were some Namibian writers who nevertheless argued strenuously against the application of the doctrine of *uti possidetis juris*, apparently in recognition of the weakness of Namibian claims that the pre-independence administrative boundaries included Walvis Bay. See, e.g., SAKEUS AKWEENDA, INTERNATIONAL LAW AND THE PROTECTION OF NAMIBIA’S TERRITORIAL INTEGRITY: BOUNDARIES AND TERRITORIAL CLAIMS 46–47, 50–53 (1997).

214. S.C. Res. 432, ¶ 1 (July 27, 1978).

215. ROBERT JENNINGS & SIR ARTHUR WATTS, I OPPENHEIM’S INTERNATIONAL LAW 307 n.43 (9th ed. 2008).

216. See S.C. Res. 435 (Sep. 29, 1978).

217. *United Nations Security Council: Resolutions and Statements on Namibian Independence*, 17 I.L.M. 1308.

independent Namibia.”<sup>218</sup> The effect of these resolutions was to weaken South Africa’s moral, but not legal claim, according to Ian Brownlie, who in 1979 saw South African sovereignty as a straightforward proposition.<sup>219</sup>

When a newly democratizing South Africa agreed to end its presence in Namibia, the question arose of whether this would include Walvis Bay. Namibia strongly insisted on its sovereignty over Walvis Bay, and even included its territorial claim in its Constitution.<sup>220</sup> South Africa strongly disagreed. In practice, Namibia achieved independence in March 1990 without Walvis Bay. South Africa retained control over the territory and the two countries agreed in 1991 to establish a joint committee to discuss the future of the area.<sup>221</sup> Finally, in 1994 South Africa agreed to transfer Walvis Bay and the nearby islands by treaty to Namibia. Notably, the treaty contained parallel language reflecting the position of each side about the legal status of the transfer of control: “Walvis Bay shall be reincorporated/integrated in the Republic of Namibia . . . .”<sup>222</sup>

The Walvis Bay episode demonstrates both the primacy of *uti possidetis juris* and its functional flexibility. Both South Africa and Namibia asserted title to the territory based on *uti possidetis juris* with the primary arguments concerning the location of the administrative boundaries and the time of independence. And while both sides asserted these legal arguments for decades, they ultimately resolved the dispute on pragmatic grounds while paying lip service to the contradictory legal claims.

### III. THE PALESTINE MANDATE

Having looked at other Mandates we now turn to the Palestine Mandate. The Palestine Mandate was one of the three “Class A” Mandates created out of the colonial and imperial possessions of the Ottoman Empire.<sup>223</sup> Palestine was

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218. *Id.*; see also U.N. SCOR, 33d Sess., 2082nd mtg. at 6, U.N. Doc. S/PV/2082 (July 27, 1978) (statement by representative of Federal Republic of Germany endorsing views expressed by Vance).

219. IAN BROWNLIE, *AFRICAN BOUNDARIES: A LEGAL AND DIPLOMATIC ENCYCLOPEDIA* 1287 (1979).

220. THE NAMIBIAN CONSTITUTION (1990), art. 1(4), <http://unpan1.un.org/intradoc/groups/public/documents/cafrad/unpan002607.pdf>.

221. See Agreement on the Joint Administration of Walvis Bay and the Off-Shore Islands, Namib–S. Afr., 32 I.L.M. 1152, 1155 (1993).

222. Treaty Between the Government of the Republic of South Africa and the Government of the Republic of Namibia with respect to Walvis Bay and the Off-Shore Islands, Namib.–S. Afr., art. 2, May 20, 1994, [http://peacemaker.un.org/sites/peacemaker.un.org/files/NA-ZA\\_940228\\_WalvisBayTreaty.pdf](http://peacemaker.un.org/sites/peacemaker.un.org/files/NA-ZA_940228_WalvisBayTreaty.pdf). Similarly, the implementing South African legislation said that Walvis Bay was “part of” South Africa, which it “deems desirable to transfer . . . to the Republic of Namibia.” See *South Africa: Act to Provide for the Transfer to Namibia of the Territory of and Sovereignty over Walvis Bay and Certain Islands*, 33 INT’L LEGAL MATERIALS 1573, 1574 (1994) (emphasis added).

223. UPTHEGROVE, *supra* note 68, at 17.

awarded to Britain with the charge of reconstituting a national home for the Jewish people.<sup>224</sup>

Both the boundaries and the status of the Palestine Mandate developed over several years. Britain seized control of the land that would eventually become Palestine during the latter half of World War I, consolidating its control by 1918, before the idea of creating Mandates had crystallized.<sup>225</sup> In April 1920, with a British military administration already in place, the allied powers (Britain, France, and Italy, together with representatives of Japan, Greece, and Belgium) met in San Remo, Italy and decided to divide Ottoman imperial territories between Britain and France, with Britain receiving the Mandates of Palestine and Mesopotamia, and France being awarded Syria and the Lebanon.<sup>226</sup> At the time, negotiations with Turkey (successor to the vanquished Ottoman Empire) had not yet been concluded. Nonetheless, while the territories of Palestine, Mesopotamia, and Syria were still technically within Turkey's sovereign territory, Britain and France instituted Mandatory rule. By July 1, 1920, Britain had appointed the first High Commissioner of the Palestine Mandate.<sup>227</sup> But the formalities of the Mandate's legal personality and territory would not be fully sorted out until 1923.

In Sèvres, Switzerland, in August 1920, Turkey signed a treaty of peace with the 13 allied powers, including Britain, in which Turkey surrendered sovereignty over Palestine, Mesopotamia, and Syria, and agreed to the establishment of a Mandate in Palestine charged with establishing a national home for the Jewish people. The Treaty of Sèvres did not delineate the boundaries of Palestine, and it did not propose a charter for the Palestine Mandate, leaving this to be determined by the principal allied powers and approved by the League of Nations.<sup>228</sup> Unfortunately, the Treaty of Sèvres was never ratified by Turkey. In the midst of civil war and war with its neighbors (Greece, Armenia, and French Syria), the ruling parties in Turkey changed, and the new government repudiated the Treaty of Sèvres.<sup>229</sup> War in Asia Minor continued for several years before negotiations upon a replacement treaty were concluded.

#### A. Boundaries

Notwithstanding this hiccup, Britain and France set about establishing the borders of the new Mandates. As a preliminary matter, it is useful to see the map of the Mandate of Palestine, shown in Figure 1.<sup>230</sup>

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224. See British Mandate for Palestine, 17 AM. J. INT'L L. 164, 164, 170 (Supp. 1923) [hereinafter Palestine Mandate].

225. ISAIAH FRIEDMAN, THE QUESTION OF PALESTINE: BRITISH-JEWISH-ARAB RELATIONS, 1914-18, at 129 (2d ed. 1973).

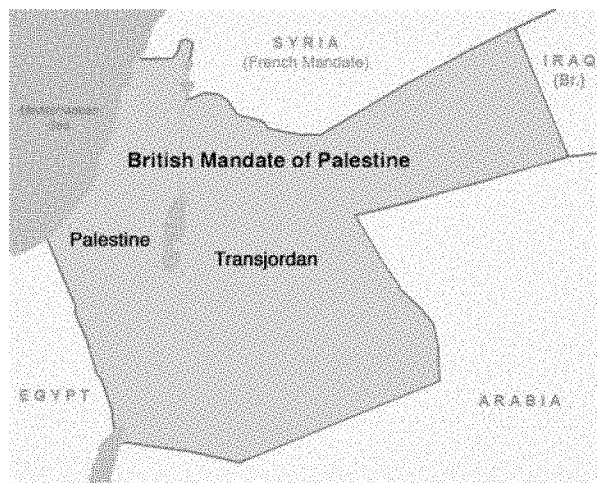
226. See FROMKIN, *supra* note 90, at 10-11.

227. *Id.*

228. Treaty of Sèvres, *supra* note 84.

229. See generally KIESER, *supra* note 85.

230. Note: Figure is copied from <https://upload.wikimedia.org/wikipedia/commons/6/69/BritishMandatePalestine1920.png>, which indicates it is in the public domain.



**Figure 1**

As the map illustrates, the territory of the Mandate of Palestine, as initially established and approved by the League of Nations, includes all of modern day Jordan, Israel, and areas under Palestinian control, including the areas subject to conflicting Israeli and Palestinian claims. The figure, however, is misleading, because while the general contours of the Mandate were known, the precise boundaries had not been drawn.

One of the first tasks of the Mandatory, therefore, was to draw up the boundary between Palestine and Syria-Lebanon, as well as the boundaries between Palestine and Mesopotamia (Iraq) and between Palestine and Arabia. By the end of 1920, the two countries reached agreement on the first of the so-called Paulet-Newcombe Agreements—the Anglo-French Convention of December 23, 1920—fixing the borders of Syria with Mesopotamia and with Palestine.<sup>231</sup> This set the northern border of Palestine, although the border was modified subsequently by the Anglo-French Agreement of March 7, 1923.<sup>232</sup> The eastern border of Palestine with Mesopotamia/Iraq was an internal British matter (since both Mandates were British), and the border remained a matter of controversy for some time.<sup>233</sup> The eastern border of Palestine with the Hedjaz and ultimately with Saudi Arabia

231. Agreement between His Majesty's Government and the French Government Respecting the Boundary Line between Syria and Palestine from the Mediterranean to El Hamme, Gr. Brit.-Fr., No. 1, Mar. 7, 1923, [http://treaties.fco.gov.uk/docs/fullnames/pdf/1923/TS0013%20\(1923\)%20CMD-1910-AGREEMENT%20BETWEEN%20GOV%20&%20FRENCH%20GOV%20RESPECTING%20BOUNDARY%20LINE%20BETWEEN%20SYRIA%20&%20PALESTINE%20FROM%20MEDITERRANEAN%20TO%20EL%20HAMME.pdf](http://treaties.fco.gov.uk/docs/fullnames/pdf/1923/TS0013%20(1923)%20CMD-1910-AGREEMENT%20BETWEEN%20GOV%20&%20FRENCH%20GOV%20RESPECTING%20BOUNDARY%20LINE%20BETWEEN%20SYRIA%20&%20PALESTINE%20FROM%20MEDITERRANEAN%20TO%20EL%20HAMME.pdf).

232. Franco-British Convention on Certain Points Connected with the Mandates for Syria and the Lebanon, Palestine and Mesopotamia, 122 AM. J. INT'L L. (No. 3 Supp. 1922), [https://archive.org/stream/jstor-2213236/2213236\\_djvu.txt](https://archive.org/stream/jstor-2213236/2213236_djvu.txt).

233. See generally FROMKIN, *supra* note 90.

likewise remained in flux for several years, eventually being settled by a series of agreements during the 1920s.<sup>234</sup>

Palestine's western border, on the other hand, was a straightforward matter—in the northwest, the Mediterranean Sea served as a natural boundary, and in the southwest, Palestine inherited the border of the Ottoman Empire with Egypt, which had been a *de facto* protectorate of Britain.<sup>235</sup> Because Palestine was a new entity, the southwestern border was the only one to have been previously demarcated. While it was still formally part of the Ottoman Empire during the nineteenth century, Egypt achieved *de facto* independence in the 1830s as a result of the rebellion of Muhammed Ali.<sup>236</sup> The Ottoman Empire thus began mapping the border between Egypt and the remainder of the Ottoman Empire as early as 1841.<sup>237</sup> After Britain acquired control of Egypt, it pressed for rectification of the border, and increasing tension led to a British demand in 1906 that the Ottomans accept a Rafah-Dead Sea border, as surveyed by the British.<sup>238</sup> The two sides signed a formal boundary agreement on October 1, 1906.<sup>239</sup> This boundary continued to serve as the basis of the subsequent Palestine-Egypt border.

While negotiations with Turkey dragged on, Britain brought its Palestine Mandate to the League of Nations for approval, and on July 24, 1922, the Council of the League of Nations formally approved the Mandate.<sup>240</sup> As approved by the Council, the Mandate recognized the grounds for the Jewish people reconstituting their “national home” in Palestine, and charged Britain with establishing the same.<sup>241</sup> However, the Mandate included an important exception. Article 25 of the Mandate permitted Britain to “postpone or withhold” the provisions of the Mandate recognizing Jewish rights “[i]n the territories lying between the Jordan and the eastern boundary of Palestine as ultimately determined,” subject to the approval of the Council of the League of Nations.<sup>242</sup>

The explanation for this curious proviso lay in tension between Britain and its Hashemite Arab allies. The Hashemites understood the British to have promised them control over an Arab state comprising the Hedjaz, Mesopotamia, and Syria (excluding Lebanon). However, the British had also agreed to French control of the Syria Mandate, and the French had made clear that they were not going to honor Hashemite claims in Syria.<sup>243</sup> When the French made good on their

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234. *See generally id.*

235. *See* OFF. GEOGRAPHER, U.S. DEP'T OF STATE, INT'L BOUNDARY STUDY NO. 46 ISRAEL—EGYPT (UNITED ARAB REPUBLIC) BOUNDARY 2 (1965) [hereinafter INTERNATIONAL BOUNDARY STUDY NO. 46].

236. *See generally* ARTHUR GOLDSCHIDT JR., HISTORICAL DICTIONARY OF EGYPT (4<sup>th</sup> ed. 2013).

237. *See generally id.*

238. *See generally* NURIT KLIOT, THE EVOLUTION OF THE EGYPT-ISRAEL BOUNDARY: FROM COLONIAL FOUNDATIONS TO PEACEFUL BORDERS 1–2 (1995).

239. *See* INTERNATIONAL BOUNDARY STUDY NO. 46, *supra* note 235, at 2.

240. Palestine Mandate, *supra* note 224, at 171.

241. *Id.* at 164.

242. *Id.* at art. 25.

243. *See* FROMKIN, *supra* note 90, at 438.

threats and deposed the Hashemite ruler in Damascus (the Emir Feisal), the Hashemites dispatched a small armed force northward under the command of Abdullah (the Emir Feisal's brother). However, Abdullah's forces—numbering only 300—had no chance of driving the French out of Syria, and they stopped their northward march midway through eastern Palestine, in the city of Ma'an without ever confronting French forces. Abdullah's forces remained in place for some time, as all considered their next steps.<sup>244</sup> Ultimately, the British decided to award the eastern three-quarters of Palestine—better known as Transjordan or Transjordania—to Abdullah. On April 1, 1921, Britain appointed Abdullah the Emir of Transjordan.<sup>245</sup> Thereafter, Britain functionally treated Transjordan as an entirely separate governing area, distinct from Palestine. Article 25 provided the legal hook for Britain to ratify this arrangement; Transjordan was the area described in Article 25 of the Mandate. Thus, under Article 25, Britain could treat Transjordan as exempted from the duty to reconstitute a Jewish national home in Palestine.

Accordingly, in September 1922, Britain formally notified the Council that it was exercising its Article 25 authority to withhold application of nearly all the provisions of the Palestine Mandate in Transjordan.<sup>246</sup> This ratified the functional division of the Mandate into two distinct administrations—Transjordan and western (or Cisjordanian) Palestine, the latter generally referred to simply as “Palestine.” In Transjordan, the British Mandatory administration cooperated with Abdullah; in Palestine, the British cooperated with the Jewish Agency, as required by the Mandate.

Functionally, Article 25 of the 1922 Mandate, together with the subsequent September 1922 memorandum, cut Transjordan away from the Palestine Mandate.<sup>247</sup> The functional eastern boundary of (western) Palestine, for the remainder of the Mandatory period, was the administrative border with Transjordan—the Jordan River, and a line extending south from the Dead Sea (into which the Jordan River empties) to the Red Sea, near Aqaba.

Interestingly enough, while the Mandate did not define boundaries, it did establish in Article 5 that Britain “shall be responsible for seeing that no Palestine territory shall be ceded or leased to, or in any way placed under the control of the Government of any foreign Power.”<sup>248</sup>

And, indeed, once the British and French concluded their demarcation of the northern border of Palestine in 1923, the external boundaries of (western) Palestine remained stable for the remainder of the Mandatory period.

In 1923, the Turks finally concluded their negotiations for a peace treaty to replace the Sèvres agreement. The 1923 Treaty of Lausanne left in place the

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244. MARY CHRISTINA WILSON, KING ABDULLAH, BRITAIN AND THE MAKING OF JORDAN 44 (1990).

245. *Id.* at 73.

246. Palestine Mandate, *supra* note 224, at 171.

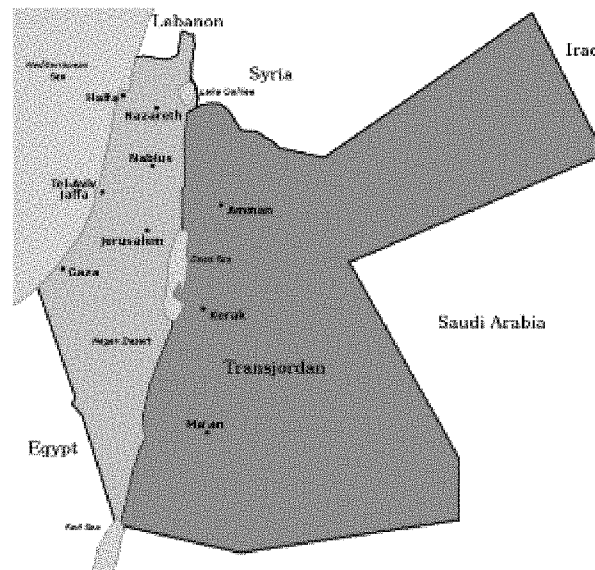
247. *See infra* Section III.B.

248. Palestine Mandate, *supra* note 224, at art. 5.

existing Mandatory arrangements and did not contain any special provisions concerning Palestine. The treaty sufficed with a general Turkish renunciation of sovereignty to all its possessions beyond Turkey's borders, acknowledging "the future of these territories and islands [outside Turkish sovereignty had been] settled or [should] be settled by the parties concerned."<sup>249</sup>

### *B. Transjordan*

As noted, the Mandate for Palestine given by the League to Britain encompassed within its territory the area now known as the Hashemite Kingdom of Jordan. However, Britain divided the Mandate, turning more than 70% of the territory into a separate administrative unit that would become the Emirate and then the state of Transjordan. The functional division is shown in Figure 2.<sup>250</sup>



**Figure 2**

The Palestine Mandate was not the only Mandate partitioned by the Mandatory.<sup>251</sup> Nonetheless, because our concern is the Palestine Mandate, it is worth paying particular note to the partition authorized by the terms of the Mandate, and then by the League of Nations.

The idea to partition the Mandate was born early in the British administration of Palestine. In 1920, Herbert Samuel, first High Commissioner of the Palestine Mandate, gave a speech in Transjordanian Palestine in which he promised that Transjordan would not be governed under the administration of

249. Treaty of Lausanne, *supra* note 86, at art. 16.

250. Note: Figure is copied from <https://upload.wikimedia.org/wikipedia/commons/3/3d/PalestineAndTransjordan.png>, which indicates it may be reused under a GNU Free Documentation License.

251. See *supra* Part II.



Palestine.<sup>252</sup> The arrival in Transjordanian Palestine of Abdullah al-Hussein, a son of the Emir of Mecca in 1921, and the head of a small army, strengthened this conviction. In April 1921, Britain named Abdullah Emir of Transjordan, granting him governing authority in the three Transjordanian districts of Palestine, subject to British supervision.<sup>253</sup> By 1922, the British were committed to partition, and they ensured that Article 25 of the Mandate, adopted in July 1922, allowed Britain “to postpone or withhold application of such provisions of this mandate as he may consider inapplicable to the existing local conditions, and to make such provision for the administration of the territories as he may consider suitable to those conditions.”<sup>254</sup> Britain availed itself of this prerogative, and in September, 1922, it dispatched a memorandum to the Secretary General of the League,<sup>255</sup> notifying him that the Mandate would not be applying several of the provisions of the Mandate to Transjordan—the listed provisions included all the parts of the Mandate that established Jewish rights (such as the right to reconstitute a national home,<sup>256</sup> to immigrate and acquire citizenship,<sup>257</sup> to “close settlement on the land,”<sup>258</sup> to participate in the administration of the Mandate,<sup>259</sup> etc.). The Palestine Order in Council, adopted in August of 1922, likewise provided for separate administration of Transjordan.<sup>260</sup>

The British went further in 1928, entering into a formal agreement with Emir Abdullah that referred to Transjordan as an “independent state.”<sup>261</sup> Nonetheless, while Transjordan enjoyed complete local autonomy and minimal actual British oversight, Transjordan remained formally part of the Mandate of Palestine.<sup>262</sup> Britain never requested, nor did it ever receive authority from the League to formally partition the Mandate.<sup>263</sup> Britain continued to report to the Council of the League of Nations on its administration of Transjordan as part of its Palestine Mandate annual report until 1943.<sup>264</sup>

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252. WILSON, *supra* note 244, at 46–47.

253. *Id.* at 47.

254. Palestine Mandate, *supra* note 224, at art. 25.

255. *Palestine Mandate: Memorandum by the British Representative*, League of Nations Doc. C.529.M.314.1922. VI 7 (1922).

256. Palestine Mandate, *supra* note 224, at preamble and art. 2.

257. *Id.* at art. 6–7.

258. *Id.* at art. 6.

259. *Id.* at art. 4.

260. See The Palestine Order in Council, part VIII, art. ii, § 86, (Aug. 10, 1922), <https://unispal.un.org/DPA/DPR/unispal.nsf/0/C7AAE196F41AA055052565F50054E656>; see also Benjamin Azkin, *The Palestine Mandate in Practice*, 25 IOWA L. REV. 32, 39 (1939).

261. Agreement between His Majesty and the Amir of Trans-Jordan, Gr. Brit.–Jordan, p. 2, Feb. 20, 1928, T.S. No. 7 (1930).

262. See Leonard Stein, *The Jews in Palestine*, 4 FOREIGN AFF. 415, 415–16 (1926) (“The Mandate remains in force in Trans-Jordan.”).

263. See Official Journal of the League of Nations 1452–53 (1928); see also Azkin, *supra* note 260, at 40.

264. For example, Britain continued to treat Trans-Jordan as part of Palestine for purposes of foreign relations. See MUTAZ M. QAFISHEH, *THE INTERNATIONAL LAW*

While the British were clearly intent on establishing Transjordan as a separate, Hashemite-ruled state, the Mandate did not authorize the removal of any territory from the Mandate of Palestine; it only allowed for the nonapplication of certain provisions. Thus, while it allowed for the separate administration of eastern Palestine, it did not allow for partition; rather, Article 5 stated that “no Palestine territory shall be ceded or leased to, or in any way placed under the control of, the government of any Foreign Power.”<sup>265</sup> The French Mandate for Syria and the Lebanon contained an identical Article 5, but also had clear language providing for the establishment of two distinct states in the Mandated area, making clear that Syria and the Lebanon were viewed as two Mandates.<sup>266</sup> Moreover, Article 5 was not included among the provisions of the Palestine Mandate suspended by Britain pursuant to Article 25.<sup>267</sup> Zionist groups pushed this argument quite strongly in the 1930s and 1940s, and insisted on independence for the complete Palestine, including Transjordan. And the British seemed to be aware of the force of this argument, formally insisting throughout the period that the territories were under a single Mandate.<sup>268</sup>

Having withheld the applicability of certain provisions of the Mandate in 1922 and granting Jordan autonomy in 1928, Britain went the rest of the way in 1946, recognizing the independence of the Hashemite Kingdom of Jordan, and the termination of the Palestine Mandate there, in 1946. At this point, arguments about the violation of the Mandate could no longer be glossed over.<sup>269</sup> For the last two years of the Palestine Mandate (until May 1948), it did not include Transjordan.

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FOUNDATIONS OF PALESTINIAN NATIONALITY: A LEGAL EXAMINATION OF PALESTINIAN NATIONALITY UNDER THE BRITISH RULE 47 n.235 (2008).

265. See Azkin, *supra* note 260, at 40.

266. See Gidon Gottlieb, *From Autonomy to a Framework State, in CONTEMPORARY ISSUES IN INTERNATIONAL LAW: ESSAYS IN HONOR OF LOUIS B. SOHN* 493, 496 (Thomas Buergenthal ed., 1984) (distinguishing Lebanon and Syria, which were always two Mandates for two territories, from Transjordan under the Palestine Mandate); *French Mandate for Syria and the Lebanon*, 17 AM. J. INT’L LAW (SUPP.) 177, 177 (1923) (“The Mandatory shall further enact measures to facilitate the progressive development of Syria and the Lebanon as independent *states*.”) (emphasis added).

267. One might wonder whether establishing a state in eastern Palestine under the Emir would constitute putting it under a foreign power, a point which is not obvious. The Emir was not foreign to Transjordan, but the Jordanian government could be said to be foreign to Palestine. On this point, it is worth considering the judgment of the Supreme Court of Palestine in a 1945 case about visa requirements for Jordanians. The Court addressed whether Transjordan was a separate territory within Palestine, or a separate state, and concluded “Trans-Jordan must be regarded as a foreign state in relation to Palestine.” See *generally* *Jawdat Badawi Sha’ban v. Commissioner for Migration and Statistics*, 12 L. REP. PALESTINE 551 (1945). The Supreme Court was an institution staffed by British judges, who sometimes, as in this case, sat alongside local ones. See ASSAF LAHOVSKI, *LAW AND IDENTITY IN MANDATORY PALESTINE* 51–52, 75–76 (2006).

268. See Gottlieb, *supra* note 266, at 496 (“There never were two mandates, one west of the Jordan and the other east of the River.”).

269. Britain addressed these objections, which were raised in the United Nations, by arguing that the international community had acquiesced in “setting up Transjordan as an independent state.” See CRAWFORD, *supra* note 151, at 579.

Upon the independence of Transjordan, the administrative boundary between it and Palestine became the new international boundary, consistent with the doctrine of *uti possidetis juris*. This is despite very strong legal arguments against the severance of the territory from Palestine. Thus, while Jewish nationalist parties continued to claim Transjordan throughout the 1940s and 1950s,<sup>270</sup> and Transjordan (and later Jordan) claimed legal rights to territory in Palestine that it captured during its 1948 invasion, neither set of claims received any serious recognition. Indeed, the Jewish authorities of Palestine recognized Transjordan's borders despite any scruple they may have had about its formation.

### C. Other Administrative Lines

After the separation of Transjordan, what remained of Palestine functioned under a single Mandatory administration until the termination of British rule in 1948. Throughout the Mandatory period Palestine was divided into several districts for various purposes.

The earliest set of divisions was that left over by the Ottoman Empire. Since the Ottoman Empire did not recognize any entity by the name of Palestine, most of what became the Mandatory territory was organized within Syrian districts (vilayets), with Jerusalem receiving separate status as a Mutasarrifate.<sup>271</sup> These divisions were reflected in the earliest British military administration, but the British authorities soon developed their own district administration. The military administration eventually divided western Palestine into thirteen administrative districts, which it then recombined in 1919 into ten districts. With the onset of the Mandatory period came a rapid and bewildering series of changes in district administration. The year 1920 began with nine districts, soon changed to thirteen, and then seven. By October 1922, Palestine was divided into four districts, further divided into eighteen subdistricts. Thereafter, for most of the 1920s and 1930s, Palestine was divided into three districts and eighteen subdistricts, though the borderlines changed. The years 1937, 1938, and 1939 saw three more reshufflings, resulting, ultimately, in six districts and eighteen subdistricts. A final reshuffling came in 1945, when the British authorities redivided Palestine into six districts and sixteen subdistricts.<sup>272</sup>

In all of the reshuffling, the role of district government remained limited. Districts were used for certain kinds of municipal governance, including municipal taxation, as well as for census data.<sup>273</sup> While they sometimes reflected municipal or other lines that could render them useful for purposes of partition, they did not constitute lines that separated any fundamental differences in administration. Unsurprisingly, in the many proposals for a second partition of the Palestine

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270. See NADAV GERSHON SHELEF, *EVOLVING NATIONALISM: HOMELAND, IDENTITY, AND RELIGION IN ISRAEL, 1925–2005*, at 83–93 (2010).

271. GIDEON BIGER, *THE BOUNDARIES OF MODERN PALESTINE, 1840–1947* 15, 184 (2004).

272. *Id.* at 216.

273. *Id.*

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

#### *D. Proposals for Altering Palestine's Boundaries*

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

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

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

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

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

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

277. *Id.* at 193.

278. *Id.*

279. *Id.* at 206.

280. See *PALESTINE PARTITION COMMISSION, REPORT 1938* (UK), [https://archive.org/stream/WoodheadCommission/Woodhead-abby\\_djvu.txt](https://archive.org/stream/WoodheadCommission/Woodhead-abby_djvu.txt).

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

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

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

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

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

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

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

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

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

287. *United Nations Partition Plan for Palestine*, WIKIPEDIA.ORG, [https://en.wikipedia.org/wiki/United\\_Nations\\_Partition\\_Plan\\_for\\_Palestine](https://en.wikipedia.org/wiki/United_Nations_Partition_Plan_for_Palestine) (last visited July 25, 2016).

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

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

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

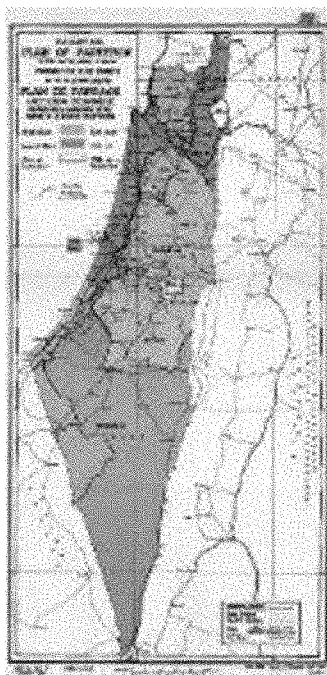


Figure 3

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

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

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

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

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

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

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293. *Id.*

294. *Id.* at 178–79.

295. *Id.* at ch. 5.

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

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

298. *Id.*

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

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

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

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

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

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

### UN ARMISTICE LINES 1949



Figure 4

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

305. *Id.* at art. II–III, V.

306. *Id.* at art. V.

307. U.N. Armistice Lines 1949, WIKIPEDIA, [https://upload.wikimedia.org/wikipedia/commons/0/0b/UN\\_armistice\\_lines\\_1949.jpg](https://upload.wikimedia.org/wikipedia/commons/0/0b/UN_armistice_lines_1949.jpg) (last visited July 26, 2016).



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

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

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

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

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

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

309. See, e.g., C.K. Johnson, *U.S. Policy on Jerusalem: Memorandum Discouraging Nations from Recognizing Jerusalem as the Capital of Israel* (May 31, 1962), [http://www.jewishvirtuallibrary.org/jsource/US-Israel/FRUS5\\_31\\_62a.html](http://www.jewishvirtuallibrary.org/jsource/US-Israel/FRUS5_31_62a.html).

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

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

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

that could lay claim to using internal Palestinian district lines as the basis of borders. At the same time, while considerable efforts had been invested in creating and advancing proposals for altering the borders of the ultimate Jewish state and a contemplated companion Arab state, no such efforts were crowned with the success of implementation. Thus, it would appear that *uti possidetis juris* dictates recognition of the borders of Israel as coinciding with the borders of the Mandate as of 1948.

Having seen the workings of the doctrine of *uti possidetis juris* and the prima facie case for applying the doctrine to establish the borders of Israel along the boundaries of the Palestine Mandate, a final question remains: are there any unusual features about Israel's independence that would undermine the conclusion that Israel's borders at independence were the borders of the Palestine Mandate?

This Article considers, first, unusual features of Israel's independence that might undermine the application of *uti possidetis juris*. This Article then considers if the subsequent actions of the affected parties shed any evidence contrary to the understanding that *uti possidetis juris* would apply. Finally, we briefly consider the implications of establishing the borders on the basis of *uti possidetis juris* and potential alterations of the borders in the years since 1948.

Overall, the record shows no reason for rejecting the application of *uti possidetis juris*. It shows that Israel, in various ways, offered to accept the smaller partition borders before independence and that it renewed these offers after independence, as well. However, for purposes of determining the original borders of Israel, the doctrine of *uti possidetis juris* inquires only into the borders as they stood at the time of independence. In making this determination, Israel's subsequent acts are relevant only as they bear on the question of what the pre-Israel borders were understood to be. There is no unequivocal evidence that Israel understood the borders of Palestine to have changed prior to Israel's independence.

The evidence of actions post-independence that might have changed the borders is more equivocal. For the most part, there is insufficient evidence to show any consensual transfer of territorial sovereignty or acquiescence in the creation of new de jure borders. The potential exception to this general rule is the Israeli withdrawal from the Gaza Strip in 2005,<sup>313</sup> which might be seen as an abandonment. Additionally, the growing maturity of Palestinian-Arab claims of self-determination, and several Israel-Palestine Liberation Organization agreements that provided for Palestinian-Arab autonomy,<sup>314</sup> will no doubt prove relevant in the creation of a future boundary when, if ever, an Arab-Palestinian state<sup>315</sup> achieves independence.

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313. See DAVID MAKOVSKY, ENGAGEMENT THROUGH DISENGAGEMENT 22–31 (2005).

314. See generally BARRY RUBIN, THE TRANSFORMATION OF PALESTINIAN POLITICS: FROM REVOLUTION TO STATE-BUILDING (rev. ed. 2001).

315. "Palestine" has since Roman times been a geographic name without an ethnic connotation. Thus under the Mandate for Palestine, "Palestinians" included Jews, Arabs, and all other residents of the territory. Since at least the 1960s, the term "Palestinian"

### *A. Israel's Independence*

The independence of Israel took place in the middle of an armed conflict and political controversy. Together, the events surrounding Israel's independence raise several interesting issues for discussion.

#### *1. Termination*

First is the matter of the termination of the Mandate of Palestine. The Mandate did not follow an orderly pattern of termination in which the Mandatory determined to bestow independence upon the Mandate, won approval for its action from the League of Nations, and then terminated the Mandate by agreement. Britain simply abandoned the Mandate on May 15, 1948. The League of Nations no longer existed at the time, and the United Nations, which played a substitutive role of disputed legality,<sup>316</sup> never voted to accept the abandonment as a termination. The General Assembly did vote to recommend a particular means of terminating the Mandate, but it left implementation of its recommendation to Britain and the Security Council, neither of which chose to follow the recommendation.

Despite all these anomalies, it is difficult to dispute that the Mandate was terminated on May 15, 1948. Disorderly terminations were the norm for the "Class A" Mandates. All of the other "Class A" Mandates were terminated without prior approval of the League of Nations, and in some cases they were terminated without any orderly process at all. The Mandate of Syria and the Lebanon, for instance, "disappeared 'with graceless reluctance.'" In 1941, during World War II, the "Free French" (the opposition French exiles who attempted to exert authority over French interests after the Nazi takeover of France) declared Syrian and Lebanese independence, but the declaration was not universally accepted, even by allies such as the United States. The League, which was no longer functioning, neither approved nor disapproved. France later attempted to reassert its authority in Lebanon without success, and it continued to maintain that the Mandate was in force. Nonetheless, when the League reassembled following the war for its final session, it "welcomed the termination of the mandated status of Syria [and] the Lebanon."<sup>317</sup>

Even Transjordan, granted independence by Britain in 1946, failed to make a smooth exit from the Mandate system. Britain did not request permission from the League of Nations or from the General Assembly (after the League ceased to function) to terminate Mandatory rule in Transjordan. As a result, Poland challenged Transjordanian independence in 1946 when Transjordan applied for UN membership; Jordan was not finally accepted until 1955.<sup>318</sup>

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has overwhelmingly been used to refer to the area's Arab population, and a "Palestinian state" to mean an exclusively or overwhelmingly ethnic Arab state within the territory of the former Mandate.

316. CRAWFORD, *supra* note 151, at 576–77.

317. *Id.* at 577.

318. *Id.* at 578–79.

The failure of the League of Nations formally to terminate the Mandate of Palestine is thus neither surprising nor legally significant. It is not necessary to interpret General Assembly Resolution 181 as an implied termination in order to reach the conclusion that the Palestine Mandate was terminated in 1948.<sup>319</sup>

## 2. *Self Determination*

Another set of problems related to the Palestine Mandate concerns questions of self-determination. From the outset, the Palestine Mandate was anomalous in that it recognized a particular people as entitled to express their self-determination on the territory of the Mandate, even though that people was not at that time the majority population of the Mandate. Over the years, Palestinian advocates have argued that this portion of the Mandate was ultra vires, and that the Jewish people were not entitled to receive a grant of the legal right to self-determination.<sup>320</sup> The argument has little to recommend it.<sup>321</sup> But even if the argument were well founded, it would have little effect on the outcome of the *uti possidetis juris* analysis, as we have seen. Even unlawful treatments of the right of self-determination have not been seen as grounds to undermine the *uti possidetis juris* borders of other Mandates.

A potentially more serious matter is the question of whether the Jewish people were the only nation entitled to self-determination in the Mandate of Palestine. The Mandate itself gives no indication of there being another entitled nation, describing only a Jewish national home and no other national home or national expression. The Mandate provides for a single partition (the separation of Transjordan from the remainder of the Mandate), but no other. The Mandate of Palestine was not, of course, the only Mandate to encompass populations who would not be granted the right to self-determination and an independent state (consider, for instance, the Kurds in the Mesopotamian Mandate). However, the Mandate of Palestine was the only one in which the majority population (the Arabs of Palestine) was impliedly denied a right of self-determination by the founding documents. It may be argued that, notwithstanding the silence of the founding documents of the Mandate, the Palestinian Arabs did have a claim to self-determination. General Assembly Resolution 181 of 1947 would have given both the Palestinian Jewish and Palestinian Arab peoples independent states.

The rights of multiple nations to self-determination on a given territory should not, *prima facie*, disturb application of the doctrine of *uti possidetis juris*.

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319. Cf. *id.* at 430. (James Crawford oddly argues that the Resolution must be read as having the legal effect of termination because a “[m]andatory could not by its own unilateral act resile from its responsibilities.”). Unilateral acts of that sort—discussed by Crawford elsewhere in his book—were exactly what terminated the Mandates of Syria and the Lebanon, Transjordanian Palestine, and Mesopotamia (Iraq). See generally *id.*

320. E.g., HENRY CATTAN, *PALESTINE AND INTERNATIONAL LAW: LEGAL ASPECTS OF THE ARAB-ISRAELI CONFLICT* 45 (1973); see also QUIGLEY, *supra* note 27, at 66.

321. See Nathan Feinberg, *The Arab-Israel Conflict in International Law: A Critical Analysis of the Colloquium of Arab Jurists in Algiers*, in NATHAN FEINBERG, *STUDIES IN INTERNATIONAL LAW* 433 (1979); CRAWFORD, *supra* note 151, at 178.

This is not simply because the doctrine of *uti possidetis juris* does not rely upon the existence of a prior claim of self-determination for the new state. Nor is it simply because *uti possidetis juris* may actually conflict with and override the demands of self-determination, as the International Court of Justice stated explicitly in the Burkina Faso case.<sup>322</sup> The most important reason for rejecting the idea that multiple claims of self-determination forbid application of *uti possidetis juris* is that many of the states that have had their borders established by *uti possidetis juris* have, in fact, been subject to multiple claims of self-determination; in no case has the existence of an additional nation with a right of self-determination defeated application of the doctrine of *uti possidetis juris*. This is true even when the new state that claimed the benefit of *uti possidetis juris* was later itself driven apart by new internal claims of self-determination. Yugoslavia and the U.S.S.R. provide several examples of this. Consider, for instance, Serbia (later subject to the secession of Kosovo) and Ukraine (later subject to the highly controversial secession of Crimea).

If an Arab-Palestinian state had achieved independence in 1948, alongside the Jewish one, this would have doubtlessly affected the application of *uti possidetis juris*. With two states having achieved independence at the same time within the Mandate of Palestine, it would obviously not be possible for both states to share the borders of the Mandate. Different lines would have to serve as the basis of the borders of each state—if the new states could not reach agreement on mutually acceptable boundaries, the borders of districts or subdistricts would have to do. But, despite the potential self-determination claim of the Arab population of Palestine, only one state was born in 1948 at the termination of the prior administration. As the Palestine Mandate ended, the state of Israel achieved independence. No other state did.

Likewise, if the partition of Palestine envisioned by General Assembly Resolution 181 had been implemented, even if only administratively, the application of *uti possidetis juris* would have changed. Resolution 181 called for a U.N. Commission to take over administration of Palestine as the Mandatory withdrew. The Commission was to “carry out measures for the establishment of the frontiers of the Arab and Jewish States and the City of Jerusalem” and then to assist in the creation of provisional governments before the states achieved independence.<sup>323</sup> However, the Commission never arrived in Palestine. Neither the Commission nor the Mandatory ever sketched out the proposed frontiers. At no time was a separate administration ever set up for the proposed Jewish, Arab, and Jerusalem territories as called for by the resolution.<sup>324</sup> In short, at the time of independence, there was only one administrative unit in Palestine. To attempt to

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322. Frontier Dispute (Burk. Faso/Mali), 1986 I.C.J. 554, 566 (Dec. 22).

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

324. Indeed, the British were quite open in their “attempt[] to forestall the U.N. Assembly’s resolution.” The British Mandate “advanced its withdrawal date from Palestine to 15 May 1948 and did not cooperate with the U.N. Commission.” Asher Maoz, *War and Peace—An Israeli Perspective*, 14 CONSTITUTIONAL FORUM, no. 2, at 36 (2005).

apply *uti possidetis juris* to any borders other than those of the Mandate would leave the remaining Mandatory territories terra nullius, which is exactly the situation the doctrine seeks to avoid.<sup>325</sup>

### 3. Armed Conflict

Israel was born in conflict. The armed conflict surrounding the independence of Israel began in November 1947, with Palestinian Arab attacks on Palestinian Jews, and it continued through Israel's declaration of independence and the invasion of the Arab states in May 1948, until the ultimate end of hostilities in March 1949.<sup>326</sup> At no time during the course of the conflict did Israel ever control all of the territory of the Mandate, and the armistice agreements ending the war did not award Israel possession and forbade non-peaceful changes in the armistice lines.

Armed conflict frequently accompanies the birth of new states, and the workings of the doctrine of *uti possidetis juris* in such cases are perfectly clear. The *status quo post bellum* and the vicissitudes of war do not change boundaries.

### B. Israel's Conduct Following Independence

Post-independence conduct can play a role in *uti possidetis juris* cases in showing how the parties viewed the pre-independence administrative boundaries. As we have already considered the boundaries of Palestine as they existed at the time of independence, it remains for us to examine whether Israel's conduct or that of its neighbors *after* the time of independence might show that they believed that new administrative boundaries had been set before the date of independence. As we shall see, while the record is equivocal, the best view of the evidence points to Israel's sovereignty within the full boundaries of the Palestine Mandate in accordance with the doctrine of *uti possidetis juris*.

In reaching this conclusion, it is important to note the importance of actions within the relevant time frame. For purposes of *uti possidetis juris*, the crucial period is that leading up to and including the time of independence. Post-independence conduct is relevant, but only insofar as it bears on evidence of the borders at the "critical date" of independence. Post-independence conduct helps to "obtain[] a clearer picture of the situation on the ground at the critical date." That is, for purposes of *uti possidetis juris*, post-independence conduct does not affect the borders; at most it can provide evidence of what the administrative boundaries were prior to independence.<sup>327</sup> It is the formal acts of the erstwhile sovereign prior

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325. Cf. CRAWFORD, *supra* note 151, at ii. (considering the possibility that the establishment of Israel gave Israel sovereignty over the territory it actually controlled and left the remaining Mandatory territory terra nullius). Curiously, Crawford does not consider the possibility that Israel acquired sovereignty over the entire Mandatory territory by operation of *uti possidetis juris*. See *id.*

326. See AMNON RUBINSTEIN & BARAK MEDINA, *THE CONSTITUTIONAL LAW OF THE STATE OF ISRAEL* 269–71 (5th ed. 1996) (Hebrew).

327. Giuseppe Nesi, *Uti Possidetis Doctrine*, in *MAX PLANCK ENCYCLOPEDIA OF INTERNATIONAL LAW* (R. Wolfrum ed., 2011).

to independence that have a “paramount role” in establishing borders, rather than the subsequent acts of the new state.<sup>328</sup>

Of course, it is always possible to change borders. Once the original borders have been established—which, according to the doctrine of *uti possidetis juris*, depends on the situation at the critical date of independence—a separate question arises as to whether they have been subsequently modified by cession or other forms of transfer. In these questions, the formal acts of the new sovereign acquire critical importance. The actions of the succeeding power go to cession or modification; the actions of the former power determine initial borders.

The borders of Israel were a matter of great controversy at the time that Israel declared its independence. At the time, the Arab leadership of Palestine (and, likewise, the Arab leaderships of neighboring Arab states) rejected any Jewish state, while the Jewish leadership was committed to a policy of partition.<sup>329</sup> Accordingly, while the Jewish leadership had many objections to the details of the U.N. General Assembly-endorsed partition proposal, it saw the imprimatur of the General Assembly as an important asset, and it therefore endorsed the partition resolution and continued to endorse it, at least provisionally, during the early months of the war.<sup>330</sup> At the same time, the Jewish leadership was open in its doubts about the feasibility of the details of the partition proposal, as well as its reluctance to accept the partition proposal unilaterally.<sup>331</sup> By the time of Israel’s declaration of independence, it was clear that the partition proposal would never be implemented, and a fierce debate broke out concerning the ultimate boundaries of Israel.<sup>332</sup> For this reason, Israel’s Declaration of Independence made no mention of borders. The Declaration did cite General Assembly Resolution 181 but recalled it as one of several sources of legitimacy of a Jewish state and nowhere endorsed the particulars of its partition proposal.<sup>333</sup>

The first legislation adopted by Israel’s new Provisional Council of State—the Law and Administration Ordinance of 5708-1948,<sup>334</sup> published on May 19, 1948—contained several indications of Israel’s presumed adoption of the geographic scope of the Mandate. Article 11 of the Ordinance adopted the laws of the Mandate of Palestine as the new state of Israel’s law (with some exceptions), while Article 15 of the Ordinance amended the newly incorporated laws of Israel to refer to Israel wherever the law referred to Palestine.<sup>335</sup> On the other hand, the Area of Jurisdiction and Powers Ordinance,<sup>336</sup> adopted by the Knesset several

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328. *See id.* at ¶ 10.

329. BIGER, *supra* note 271, at 190–219.

330. *Id.*

331. *Id.*

332. *See id.*

333. DECLARATION OF ESTABLISHMENT OF STATE OF ISRAEL, *supra* note 296.

334. Law and Administration Ordinance, 5708-1948, art. 1 (1948–87) (Isr.), <http://www.israelawresourcecenter.org/israelaws/fulltext/lawandadministrationord.htm>.

335. *Id.* at art. 11, 15.

336. Area of Jurisdiction and Powers Ordinance, 5708-1948, 29, (1948–87), <http://israelawresourcecenter.org/israelaws/fulltext/areajurisdictionpowersord.htm>.

months later, gave a more mixed message. While the Ordinance applied the laws of Israel to all Mandatory areas controlled by the state, in both Articles 1 and 2 of the ordinance, it referred to these areas as “both the area of the State of Israel and any part of Palestine which the Minister of Defense has defined by proclamation as being held by the Israel Defense Forces.”<sup>337</sup>

Likewise, some of the messages transmitted by the state of Israel upon its independence were equivocal. For instance, in his letter to the U.S. government asking for recognition of the new state of Israel, Eliahu Epstein, later appointed Ambassador to the United States, wrote that “the state of Israel has been proclaimed as an independent republic within frontiers approved by the General Assembly of the U.N. in its Resolution of November 29, 1947.”<sup>338</sup> However, other transmissions by Israel, such as its notification to the U.N. Secretary General, made no similar mention of boundaries.<sup>339</sup>

The equivocation was not an accident. Ben-Gurion notified the Provisional Council that the government had decided to be “evasive” on the matter of borders until it saw whether the U.N. intended to implement Resolution 181. Ben-Gurion stated that Israel’s readiness to respect the resolution depended on whether it would be honored and enforced by the U.N.<sup>340</sup> Ultimately, of course, the U.N. took no action to honor or enforce the terms of the partition plan recommended by Resolution 181. While the Resolution called for Security Council action, the partition plan was never brought to a vote in the Security Council.<sup>341</sup>

It is hard to see how this collection of evidence could disturb the conclusion that Israel’s *uti possidetis juris* borders were those of the Palestine Mandate. While the evidence shows that Israel was ready to be held to the much more restrictive borders of the proposed partition, it does not show in any way that Israel believed that the boundaries of the partition had ever been implemented by the Mandatory or had ever become the administrative boundaries prior to Israel’s independence.

Partition, cession, and recombination plans were featured prominently in the League and General Assembly discussions over the Togolands, Walvis Bay, Lebanon, and other Mandatory territories during the pendency of the Mandate. In all cases, only those plans actually implemented resulted in a change of borders at the moment of independence. There is little reason to think differently simply due to Israel’s readiness to accept a compromise solution had one been available.

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337. *Id.* at §§ 1–2.

338. *See* A Decade of American Foreign Policy 1941–1949, Independence of Israel Letter from Eliahu Epstein, Agent of the Provisional Gov’t of Isr., to the President of the U.S., Yale L. Sch.: The Avalon Project (May 15, 1948), [http://avalon.law.yale.edu/20th\\_century/decad169.asp](http://avalon.law.yale.edu/20th_century/decad169.asp).

339. Foreign Secretary of the Provisional Government of Israel, Israeli UN Membership Application of 15 May 1948, U.N. Doc. S/747 (May 16, 1948), <http://unispal.un.org/UNISPAL.NSF/0/4733DDFC4D8F4ACF80256499004C9E77>.

340. RUBINSTEIN & MEDINA, *supra* note 326, at 83, 269–71.

341. *See* THE CAMBRIDGE GUIDE TO JEWISH HISTORY, RELIGION, AND CULTURE 269 (Judith R. Baskin & Kenneth Seeskin eds., 2010).



### C. Armistice Agreements

At the conclusion of Israel's War of Independence, Israel held the majority of the territory of the Mandate of Palestine. At this point, Israel again offered to entertain proposals for partition, albeit along new lines.<sup>342</sup> However, no partition agreements were ever reached. Negotiations with Israel's neighbors resulted in limited armistice agreements, rather than general peace treaties. And no negotiations took place at all with the "all-Palestine government" or any other purported representatives of the local Arab population outside Israel's *de facto* control.

Israel reached armistice agreements with each of its four neighbors—Lebanon,<sup>343</sup> Syria,<sup>344</sup> Jordan,<sup>345</sup> and Egypt<sup>346</sup>—and each of the agreements was clear in stating that the armistice lines demarcated the separation of forces (and, therefore, the lines of *de facto* possession), but not the lines of legal entitlement.

Thus, it was clear that there was nothing in the armistice agreements to undermine the application of *uti possidetis juris*.

### D. Subsequent Events

The nearly seven decades since Israel's independence have been full of border controversies, as well as changes in possession of territory. Obviously, a full examination of the legal implications of these many events is beyond the scope of this Article.

*Uti possidetis juris* is a doctrine that establishes boundaries retrospectively to the date of independence. Subsequent conduct can alter those boundaries—not by changing the operation of the doctrine of *uti possidetis juris*, but rather by transferring sovereignty under one of the methods recognized by international law. The traditional list of means of transferring territorial sovereignty include cession (voluntary transfer among states or to a new state) and prescription (long-standing peaceful possession by a non-titleholder).<sup>347</sup> Additionally, states may unilaterally abandon title, and they may acquiesce to the acquisition of title by another state, even without a formal cession.<sup>348</sup>

A full examination of the boundaries of Israel today would require a careful examination of Israel's actions for the past 68 years in order to determine whether any of them succeeded in altering Israel's borders. While it is absolutely clear that Israel has never agreed to any formal cession of its territorial sovereignty to territories within the Palestine Mandate, and that the 19-year Jordanian,

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342. MORRIS, *supra* note 14, at 178; ITAMAR RABINOVICH, *THE ROAD NOT TAKEN: EARLY ARAB-ISRAELI NEGOTIATIONS* (1991).

343. See Lebanese-Israeli General Armistice Agreement, *supra* note 304.

344. See Israeli-Syrian General Armistice Agreement, *supra* note 17.

345. See Armistice Agreement Between the Hashemite Jordan Kingdom and Israel, *supra* note 17.

346. See Egyptian-Israeli General Armistice Agreement, *supra* note 17.

347. MALCOLM N. SHAW, *INTERNATIONAL LAW* 495–521 (6th ed. 2008).

348. *Id.*

Egyptian, and Syrian occupation of parts of the Mandate are insufficient to transfer title by prescription, it is more difficult to make categorical statements about abandonment and acquiescence. While we fail to find sufficient evidence of either abandonment or acquiescence, a full examination of the record is beyond the scope of this Article.

However, it is worth noting that all of Israel's peace treaties with neighboring states to date—its peace treaties with Egypt<sup>349</sup> and Jordan<sup>350</sup>—have ratified the borders between Israel and its neighbor as being based on the boundaries of the British Mandate of Palestine. This, too, reinforces the application of *uti possidetis juris* to establish the boundaries of Israel.

### *E. The State of Palestine*

In 1993, Israel began a structured negotiation process with the Palestine Liberation Organization (“PLO”) that was intended to lead to a negotiated and unspecified “final status.”<sup>351</sup> The agreements set up an interim Palestinian Authority with personal authority over Palestinians in the West Bank and Gaza Strip, but not any part of Jerusalem.<sup>352</sup> In addition, the agreements divided the West Bank and Gaza into several zones, giving the Palestinians territorial jurisdiction in areas A, B, and H1 (the other zones are areas C and H2, which comprise the majority of the West Bank).<sup>353</sup> Israel, however, was to maintain ultimate security control over all areas pending the conclusion of final status talks.<sup>354</sup> Final status negotiations were scheduled to be completed by 1999,<sup>355</sup> but they were unsuccessful, though they have been periodically renewed. It is anticipated that successful conclusion of the final status negotiations would result in the establishment of an Arab state of Palestine within agreed-upon borders.

In 1988, the Palestinian National Council (the legislative wing of the Palestine Liberation Organization) declared an independent state of Palestine.<sup>356</sup> The declared state has since won widespread recognition, including by the U.N. General Assembly as a nonmember observer state in 2012,<sup>357</sup> but it has never

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

350. Treaty of Peace, Egypt–Isr., Mar. 26, 1979, 18 ILM 362 (1979).

351. *See generally* RUBIN, *supra* note 314.

352. The Israeli-Palestinian Interim Agreement (“Oslo II”), Isr.-Palestine (Sept. 28, 1995), <http://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/the%20israeli-palestinian%20interim%20agreement.aspx>.

353. *Id.* at art. XI; Protocol Concerning Redeployment in Hebron, § 2 (Jan. 17, 1997), <http://www.jewishvirtuallibrary.org/jsource/Peace/hebprot.html>; *see generally* GEOFFREY R. WATSON, THE OSLO ACCORDS: INTERNATIONAL LAW AND THE ISRAELI-PALESTINIAN PEACE AGREEMENTS (2000).

354. *See generally* WATSON, *supra* note 353.

355. Israeli-Palestinian Interim Agreement (“Oslo II”), *supra* note 353, at art. V.

356. *See* NEGOTIATIONS AFFAIRS DEPARTMENT OF THE PALESTINIAN LIBERATION ORGANIZATION, PALESTINE NATIONAL COUNCIL DECLARATION OF INDEPENDENCE (Nov. 15, 1988), <http://www.jewishvirtuallibrary.org/jsource/Peace/pncdec.html>.

357. U.N. GAOR, 67th Sess., U.N. Doc. A/Res/67/19 (Nov. 29, 2012), [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/67/19](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/67/19).

fulfilled the legal requirements of statehood, including, most importantly, the existence of a government that exercises control over some territory.<sup>358</sup>

It is assumed that if negotiations between Israel and the PLO reach a successful conclusion, a new Palestinian state will come into existence within some of the territory of the former Palestine Mandate. At that time, the agreement will specify the boundaries of the new state and, accordingly, strip Israel of territorial sovereignty. If a new state of Palestine were able to seize effective control over territory without agreement, this too might divest Israel of some territorial sovereignty. It might even be possible that a new unilaterally created state of Palestine would use the doctrine of *uti possidetis juris* to claim sovereignty over all of areas A, B, and H1.

Israel's treatment of the Gaza Strip adds an important complication. The Gaza Strip was occupied by Egypt from 1948 until 1967, when it was captured by Israel in the Six Day War. Israel imposed a military administration on the Gaza Strip until 1993; thereafter the Oslo Accords granted the newly created Palestinian Authority territorial jurisdiction to govern the entire Strip, except for Israeli settlements.<sup>359</sup> In 2005, Israel withdrew all military forces and expelled all Israeli civilians from the Gaza Strip, relinquishing control over the area.<sup>360</sup> The Palestinian Authority lost control of the Strip less than two years later, when Hamas seized the reins of power in a rapid military action.<sup>361</sup> Hamas has ruled the Gaza Strip since. It has periodically reached agreement with the PLO (or the Fatah organization which is the largest component organization of the PLO) to return Fatah, the PLO, or the Palestinian Authority to the Gaza Strip, but the agreements have never been implemented. Hamas does not subordinate itself to either Israel or the Palestinian Authority, but it does not hold itself out as the government of an independent state either.

The government of the Gaza Strip, therefore, is unique. It is not like the Palestinian Authority administration of areas A, B, and H1 of the West Bank. Nor is it like the Israeli administration of areas C and H2 of the West Bank. The de facto separation of the West Bank and Gaza into three distinct administrations (Hamas in Gaza; the Palestinian Authority in areas A, B, and H1; and Israel military administration in areas C and H2) would potentially affect *uti possidetis juris* borders of a future Palestinian state. Additionally, it is possible to argue that Israel voluntarily abandoned any claims of territorial sovereignty it might have had in the Gaza Strip, although there is no unequivocal documentary evidence of such an abandonment. In any event, developments in the Gaza Strip will no doubt affect future claims of sovereignty in the event of Palestinian statehood.

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358. See, e.g., James Crawford, *The Creation of the State of Palestine: Too Much Too Soon?*, 1 EUR. J. INT'L L. 307 (1990).

359. See Israeli-Palestinian Interim Agreement ("Oslo II"), *supra* note 353, at art. XI.

360. See MORRIS, *supra* note 14, at 178.

361. Steven Erlanger, *Hamas Seizes Broad Control in Gaza Strip*, N.Y. TIMES, June 14, 2007, at A1.

Unfortunately, a full legal examination of the potential boundaries of a future state of Palestine is beyond the scope of this Article.

### CONCLUSION

This Article has explored the doctrine of *uti possidetis juris*, its status in international law, and its application to the boundaries of Israel.

The doctrine is widely accepted as binding under customary international law, and its application to the case of Israel is straightforward, awarding Israel territorial sovereignty of the disputed areas of the West Bank, the Gaza Strip, and East Jerusalem, pending Israeli surrender of such claims through abandonment or cession. This result is contrary to the common political wisdom but fully in line with application of the law in other contexts.

It is likely that a future peace agreement between Israel and the Palestinians will reflect the parties' presumed desire to accommodate Palestinian self-determination, as well as the right of states to modify existing *uti possidetis juris* borders by agreement. *Uti possidetis juris* is not, therefore, the last word on matters.

At the same time, it is likely that any future solution to the boundary disputes of Israel that wishes to take international law seriously will have to take account of the rules of *uti possidetis juris*. The doctrine is an indispensable starting point for legal discussions of borders.