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ISRAEL'S BORDERS
UNDER INTERNATIONAL LAW

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ISRAEL'S BORDERS

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by Anthony D'Amato

ABSTRACT: Israel cannot obtain legal title to any territory by conquest. Thus Israel's borders were legally established by the United Nations Partition Resolution of 1947, which ended Great Britain's power as a trustee on condition that an Arab State and a Jewish State would be established with borders as demarkated in the text of the resolution. Those borders remain the legal boundary of the State of Israel.

This is an essay on the legal boundaries of the State of Israel. It is based entirely on my understanding of international law. I have no first-hand experience of the Middle East, and I speak entirely from law books and the documentary record. I am not a Jew. I am not an Arab. In trying to assess my internal biases, I must disclose that I feel a huge debt to the cultural and intellectual enrichment flowing to me from the contributions of Jews: in Broadway musicals (my especial passion), movies, theatre, law, and the philosophy of science. I have also been a steadfast supporter of the State of Israel as it was established, and under the boundaries it was given, on May 15, 1948.

1. Palestine was a Mandate under Article 22 of the League of Nations Covenant; in our parlance, a trust. The beneficiaries were the people residing in Palestine. The Mandatory Power (trustee) was Great Britain. Palestine was defined in Article 22 as one of those Mandates that was "provisionally" recognized as an independent nation but

nevertheless needed on its road to statehood the “administrative advice and assistance” of a Mandatory Power.

2. The League of Nations was dissolved in 1946. Its duties regarding Mandates were assumed by the new United Nations that had been established in 1945. The Palestinian Mandate, of course, remained intact, just as a trust remains intact even though the supervising judge or even the trustee may change or be replaced.

3. Great Britain informed the UN of its intention to relinquish its trusteeship. By then a great deal of common law regarding Mandates had developed through the years of the League of Nations. Under that law, Great Britain could not simply abandon its responsibilities to the people of Palestine. It could only relinquish its trusteeship responsibilities if it left the people of Palestine in a viable self-governing position.

4. In consultation with the Trusteeship Council of the United Nations, Great Britain argued that it could not leave Palestine as a unitary self-governing state, but it should be able to relinquish its trusteeship if the territory were divided into two states, a Jewish State and an Arab State. The question then turned to the allocation of Palestinian land between the two new entities. Great Britain argued that the division should not reflect the actual numbers of Jews and Palestinians living in the territory because the Jews, as an ethnic/religious entity, had a right to invite the surviving victims of the Holocaust to come and live in the new Jewish State. As a result, the proposed “partition plan” would give substantially more territory to the Jewish State than was warranted by the number of Jews living in Palestine. (I might add that I have always believed that the British decision was both morally and legally justified under the circumstances.)

5. On November 29, 1947, the General Assembly adopted the key "partition" resolution, Resolution 181, ratifying the British proposals. It also provided for an independent international mixed status for the city of Palestine. In my opinion, this Resolution constitutes the *first, last, and only legally authorized demarkation of the Israeli-Palestine borders*. It was legally authoritative not because it took the form of a UN Resolution, but solely because the UN Resolution itself served as a ratification of the British proposal to divide the Mandate and leave its governance to the people. In other words, the alpha and omega of the legal power resided in Great Britain as the trustee and not in the United Nations. As trustee, it had the power to partition the territory if and only if that was the best way to provide for its future self-government. The General Assembly did not derive its legal powers directly from the Charter of the UN, but rather as surrogate for the League of Nations. It was the League as a supervisory authority over the British Mandate that devolved its powers of mandate supervision to the UN and, through the UN, to the General Assembly itself. Legal title to the land was not conferred by Resolution 181 alone but rather by Great Britain's acceptance of the terms of Resolution 181. The State of Israel owes its entire legal existence to the proper exercise by Great Britain of its League of Nations' Mandatory Power over the territory of Palestine. It owes nothing to the United Nations as a separate entity and, by the same token, cannot claim any additional rights from the United Nations. Instead, as soon as Resolution 181 was passed (Great Britain abstained), the legal borders between Israel and Palestine were forever fixed. Those borders henceforth could only be changed by one of two processes: first, explicit agreement between Israel and the authorized representatives of Palestine, and second, in the few cases of limited disputed areas where the verbal description contained

in Resolution 181 was ambiguous in terms of existing maps or surveys, by international arbitration. The Security Council had and has no power to change international borders.

6. Although Israel proclaimed itself as a state within six months of Resolution 181, the Palestinians—for convoluted internal reasons plus the land-grabbing ambitions of surrounding Arab states—did not seriously entertain the idea of a State of Palestine for almost another forty years. In any event, as is well known, neighboring Arab states, proclaiming that the United Nations had sold out the Palestinians, attacked Israel. To the world’s astonishment, Israel not only prevailed in the war, but beat back the Arab invaders and in the process doubled the previously partitioned territory of Israel. Israel then ousted the Palestinians who were living in the conquered area, and they have ever since been remitted to conditions of squalor in refugee camps that are black dots on the map of the Middle East.

7. The six-day war of 1967 further increased the size of Israel at the expense of the Palestinians. In the direct aftermath of the war, the Security Council of the United Nations, exercising its Chapter 7 powers under the UN Charter, passed Resolution 242 calling for the withdrawal of Israeli forces “from territories of recent conflict” and “achieving a just settlement of the refugee problem.” Israel and the U.S. interpreted the Resolution’s call for "withdrawal from territories," and not "the" territories, as a less than complete withdrawal because the word “the” was not mentioned. The mild joke in circulation at the time was that anyone opposed to the U.S.-Israeli interpretation was "anti-semantic". Israel took the position that it was therefore not legally required to

withdraw from the West Bank and the Gaza Strip that it had just conquered, and indeed that it could erect Israeli settlements in those territories.

8. But semantics aside, in my view the Security Council simply does not have the power to take land from A and give it to B, irrespective of its undoubted legal power in the event of a threat or breach of the peace to restore international peace and security. The sanctity of international borders is a principle of international law that antedates the Charter of the United Nations; in fact it goes back five thousand years. No smaller nation would have supported the UN Charter at the San Francisco Conference in 1945 if the draft Charter had given to the five permanent members of the Security Council—the United States, Great Britain, France, Soviet Union, and China—the legal power to change international frontiers. After all, the five permanent members at the time had been wartime allies, and in concert they could reshape the world at will if they had been given such an unprecedented power. Moreover, there is nothing in the Charter of the United Nations that even remotely hints of a power or entitlement in the Security Council to change international borders. Even Resolution 242 only calls for a withdrawal of forces, and makes no mention of a permanent change in boundaries. As far as the Israeli settlements are concerned, they are clearly illegal; an occupying power has no right to engage in de facto annexation of portions of the occupied territory by way of population transfers.

9. Overshadowing the arguments in Paragraph 8 above is the undeniable fact that the Kellogg-Briand Peace Pact of 1928, as definitively interpreted by the International Tribunal at Nuremberg in 1948, has abolished forever the idea of acquisition of territory

by military conquest. No matter who was the aggressor, international borders cannot change by the process of war. Resort to war is itself illegal, and while self-defense is of course legal, a successful campaign of self-defense cannot extend so far as to constitute a new war of aggression all its own. And if it does, the land taken may at best be temporarily occupied, but cannot be annexed. Thus after all the Middle East wars, the bloodshed, aggressions and counter-aggressions, acts of terror, reprisals, and attendant UN resolutions, nothing has changed the legal situation as it existed after Resolution 181 was passed in 1947. The legal boundaries of Israel and Palestine remain today exactly as they were delimited in Resolution 181.

10. Is the Palestine Mandate still in existence? I think it is. Although the Mandate was dated to expire in August 1948, an essential term, namely the creation of an "Arab state," was not fulfilled. Of course this was the fault of the neighboring Arab countries, but one still has to protect the beneficiaries of the trust, namely, the people living in the area. The Jewish people were protected by the creation of their state, but the Palestinian people were not protected. Therefore I would argue that the Mandate survives until its substantive terms are fulfilled. The most important substantive requirement still unmet is the creation of an Arab State (Palestine). Another important requirement, which is an issue for another Forum, is the Partition Plan's provisions for the establishment of an international city of Jerusalem.

11. Many things have changed "on the ground" since 1948. Mass population movements have made it impractical to return to the legal boundaries set forth in the Partition Plan of 1947. In the protracted peace process, Israel has been offered its pre-

1967 boundary in return for normalized relations with Palestine and the neighboring Arab states. This deal would give Israel more than double the territory specified in the Partition Plan. If I were an Israeli, I would take the deal. But maybe if I were an Israeli *living in Israel*, I might have second thoughts.

FOLLOWING ARE EXCERPTS FROM THE LENGTHY DISCUSSION POSTED ON JURIST:¹

LEERON KOPELMAN: Do the treaties signed by Israel and Egypt, Jordan and most importantly between Israel and the Palestinian Authority modify the legal status in accordance with what is written at the end of point 5 in Professor D'Amato's essay?

SAMEH MOBAREK: Can the majority approving UN GAR 181 justify the authoritative nature of the resolution?

ANTHONY D'AMATO: Mr. Kopelman, the first thing to note is that only states can sign treaties. Thus the Palestinian Authority is excluded. Second, a treaty between A and B cannot change the territorial rights of C. So, my answer to your question would be "no."

As for Mr. Mobarek's question, United Nations General Assembly Resolution (UNGAR) 181 was not, in my view, a "resolution" in the normal sense of a nonbinding expression of attitude or policy by the General Assembly. Rather, in this special case, it was a surrogate for an authoritative finding by the Trusteeship Council which should have had jurisdiction over the Palestine question but was not given jurisdiction over it in the transition between the League of Nations and the United Nations. The "mandates" regime of the League had to go somewhere, and in my view it went to the UN as a whole, which means that it went to the General Assembly.

As a general matter—and in response to questions whether the Israel-Palestine conflict is similar to many others—I think we're dealing here with a unique situation. That's why it's even misleading to use words like "treaty" and "resolution" in this context, because they

¹ For the full debate, see <http://jurist.law.pitt.edu/world/israelborders.php>

obscure more than they disclose. The essence of the situation is that this is a mandate, a trusteeship if you will, that cannot be wholly conceptualized within the framework of law courts. It takes a certain amount of familiarity with the rise of the Chancery court system in England and the idea of equitable jurisprudence to get a handle on what the framers of the Covenant of the League of Nations had in mind. Palestine is the last remaining mandate, and we probably will not have a chance to use this ancient learning again, but it has turned out to be a very important mandate. We scholars do not have the time or talent to go to the Middle East and get on a soapbox or help distribute food to the refugees or network at great length with distressed Israeli citizens, but we can do what we do best, which is to dig below the surface of the arguments and charges and invective that characterize debates on this subject, and see if doing the "legal thing" might in some small way possibly help.

SAMEH MOBAREK: Professor D'Amato, thank you for your elaboration. I've always believed that the UN had authority over the mandate by virtue of Article 22 of the Covenant of the League of Nations and Chapters 11 and 12 of the subsequent UN Charter. Great Britain, as mandatory power, had authority over the mandate as a proxy for the League of Nations. When they abandoned the mandate, they lost any *special* authority, aside from their power as a voting member of the General Assembly, to approve or disapprove any changes to the mandate (partition would certainly be one) as detailed in Article 79 of the UN Charter. When the mandate was terminated, sole authority over the underlying trust territory reverted to the General Assembly (reference Article 85(1)). The Trusteeship Council's purpose was to render assistance to the General Assembly in carrying out its (the General Assembly's) duties in the trust territories (reference Article 85(2)). Consequently, the General Assembly had jurisdiction over the trust territory to pass UN GAR 181 and did so to discharge its duties in Article 76.

Perhaps what I am still a bit unclear about is the force behind UN GAR 181. This comes back to the definition of an 'authoritative finding'. As I understand it, a finding requires a high level of consensus among UN members for it to become an 'authoritative' finding and part of international law. From explanations given, am I correct in assuming that a finding, in the context of UN GAR 181, is more like an 'administrative' finding by an authority with subject matter jurisdiction and not so much an 'authoritative' finding within the context of international law? Also, if the issue were ever brought before the ICJ, what weight would the court give to such a finding? What would be the key issues that the court would have to decide on?

ANTHONY D'AMATO: An authoritative finding in the context of an international Mandate or Trust is a mixed question of law and fact, or more precisely, a factual determination made under the aegis of the mandate instrument. When I worked on the South West Africa cases in the early 1960s, it was my job to draft the portions of the brief (for the plaintiff states Ethiopia and Liberia) on the devolution of the South West African mandate as if it had been supervised by the Trusteeship Council. (Like the Palestine Mandate, the South West African Mandate was never negotiated with the Trusteeship Council and so did not fall under the Trusteeship Council's actual jurisdiction.) I made a

number of proposed intermediate findings of fact concerning the situation in South West Africa—the degree of participation of the inhabitants in local government, the degree and universality and relevance of education, the economic well-being of the people, opportunities for advancement, etc. All of these led up to my proposed ultimate authoritative finding: that an extension of the apartheid system into South West Africa would contravene the terms of the Mandate. The Mandate would be contravened because the well-being of the inhabitants would in all the particularities examined, be worsened rather than promoted by racial discrimination. Except for the apartheid system, South West Africa by the 1960s was prepared to stand alone. And indeed, in due course it became the independent nation of Namibia. It had come a long way from its Class C Mandate status. Palestine began as a Class A Mandate. The obstacle was not apartheid or any other overarching system; rather, it was the personal antagonism between Jews and Arabs, fueled not by the Palestinians but by the neighboring Arab states. This was an unprecedented situation for the UN. Palestine was clearly ready to become an independent state and get rid of its status as a Mandate, except for the fact that a democratic government would be divided pretty much down the middle, and waves of Jewish immigrants from Europe would upset whatever political balance might have been drawn between Arabs and Jews in a new government. In other words, but for the Arab-Jew division, Palestine could have been given its independence. Under this unique circumstance, it would not have made much sense for the UN to continue the Mandate. The situation wasn't going to get any better; indeed, immigration would make it more volatile. The people weren't going to get any closer to standing alone than they already were; they did not need more tutelage in self-government, for example. Thus the Mandate was all but ready to expire on its own--except for the conflict between Arabs and Jews. Thus, the reasonable solution led to an authoritative finding by the UN General Assembly (acting for the UN as a whole, including the Trusteeship Council which did not have jurisdiction over Palestine) that splitting the country into two new nations would fulfill the terms of the Mandate. Thus independence would come to Palestine not as a unitary state but as two states. As I said earlier, Great Britain for political reasons did not want to endorse this proposal, but they had a lot to do with thinking it up, and they did not vote against it. Thus Resolution 181 in November 1947 said, basically, that the two-state solution would terminate the Mandate, and that the partition should be thus-and-so (taking into account projected Jewish immigration), along specified geographical lines and markers. Now, in fact, the UN's solution has been only half fulfilled. Israel became a state in 1948 but there was no comparable Arab state (although of course, as has been mentioned in this forum, a number of Arab entrepreneurs gave it a good try in the hopes of installing themselves as the new government of the Arab state.) So what we were left with after Israel became a state in May, 1948, was a UN boundary line between the Israeli state and the forthcoming Arab state. In my opinion, nothing since then has changed as a matter of law. Nothing Jordan has done, or Israel has done, or the UN Security Council has resolved (whether in Resolution 242 or any other), has affected the international legal boundary. In particular, international boundaries do not change as a result of the use of force, for reasons previously given. What about the territory underlying the proposed Arab state? What is its status today? If you accept my argument, it follows that the "Arab" portion of Palestine is still a UN Mandate. It will cease to being a mandate if an Arab state comes into being. Obviously, the negotiations for an Arab

state -- now called the Palestinian State -- will deal with the boundary questions. But a sovereign state always has the right to cede portions of its territory. I imagine that the US and Israel and other negotiators will ask for a final "closing" that establishes a Palestinian State at the same moment that it fixes the boundaries of that new state. The Arabs have already proposed that these boundaries can be the pre-1967 boundaries which give Israel more than double the land that was allocated under the 1947 Partition. As I said at the outset, I think that's a pretty good deal for Israel. However, Israel has to decide for itself, just as the new Palestinian state has to decide for itself, whether it's a good deal. Like a successful labor negotiation, both sides have to walk away unhappy.

MIKE ANDERSON: Neither Professor D'Amato nor Mr. Mobarek have addressed the issue of continuing residual British sovereignty in the Palestine Mandate after the mandatory power abandoned the Mandate on 15 May 1948. It must be noted that even though Japan abandoned her Pacific Islands Mandate after World War Two, and even though the UN Security Council awarded the Pacific Islands mandate to the United States as a Trust Territory on 2 April 1947, Japan still formally ceded her sovereignty over the Pacific Islands mandate in article 2, paragraph (d) of the San Francisco Peace Treaty of September 1951, indicating that she still possessed residual sovereignty over the mandate until this date. This in turn would indicate that Britain, the mandatory power, continued to exercise residual sovereignty over the Palestine mandate until her formal declarations of 29 January 1949, in which she recognized the State of Israel, and 27 April 1950, when she recognized Israeli and Jordanian annexations up to the 1949 armistice demarcation line. It should also be noted that the PLO found it necessary to declare the independence of Palestine a second time in Algiers on 15 November 1988, shortly after Jordan ceded the west bank to her in July 1988, and that the UN General Assembly did not recognize the PLO as "Palestine" until December 1988. This would indicate that the first Palestinian declaration of independence, in Gaza in October 1948, was illegal because it was not recognized by Britain, that Palestine did not have any lawful sovereignty within the former Palestine mandate until Jordan formally ceded the West Bank to her, and that the 1949 armistice line is the legal international boundary between Israel and Palestine.

ANTHONY D'AMATO: Japan's formal cession in the San Francisco Peace Treaty ending World War II does not necessarily mean that Japan "possessed residual sovereignty over the mandate" up to then. Rather it was just as likely a lawyer's caution to cover everything and to give the Japanese representatives the sense that there were quids pro quo in the treaty. With an American lawyer like John Foster Dulles handling the peace treaty negotiations for the United States, you can assume there was an excess of caution.

MS. LU YI LING: First thanks to Leeron Kopelman for asking about the 1949 Armistice Agreement, as a variation of the GAR 181. Second thanks to Professor Anthony D'Amato for his clarification. Third thanks to Professor Sameh Mobarek for his asking of the authoritative level of the GAR 181. Lastly thanks to Mike Anderson for his pointing out that "UN General Assembly did not recognize the PLO as "Palestine" until December 1988." As a lay person, I thought that the 1949 Armistice Agreement, with the signature

of the then leader of Jordan on the UN Map of Middle East (as well as the signature of the Army leader of the Jewish state of Palestine) per this web site http://www.un.org/Depts/dpa/qpal/maps/arm_1948.jpg is sufficient proof of the Arab world acceptance of Israel's borders as pre 1967. Palestine as a statehood concept is a new construct that probably emerged just before the 1967. Thus the War of 1947-1948 ended with the sharing of the remaining Arab state of Palestine, amongst the Jews, Egypt and Jordan. Maybe more than law (international GAR 181 or multi lateral or bilateral agreements after the cease fire) may be the Arab world notion of honor and gentlemen's agreement, and that may be why, hardly anyone holding political office in the Arab world (save for the minority not in power, who wish to eradicate Israel) raises this issue of going back to the 1947 borders, especially after Oslo (aborted) began. Even now all talks are based on pre 1967 borders. Professor Anthony D'Amato raised the legal construct of the GAR 181 as being a continuity of a Mandate, and thus it was unlike any other GAR. Unless I have grossly misunderstood (which I may have as a lay person) Professor Anthony D'Amato, this begs the serious question whether this 'powerful/empowering' Mandate still 'persists' whereby it can give any GAR thereafter (apart from the 'Founding' GAR 181) on the Question of Palestine, an elevated 'mandate' status beyond that of a usual GAR. If all GARs when dealing with the Question of Palestine have this "elevated and empowering special status", then does the GAR in December 1988 declaring PLO as Palestine, legally vest statehood on Palestine? Secondly, even in 1947, I assume as a lay person, that the UN Security Council had more power than UN General Assembly as is the case in contemporary times and now. So why is the GAR 181 considered by international law to be the effective instrument and not a resolution from the UN Security Council? If it were the UN Security Council resolution that we should be looking at, should it be an independent resolution deciding the same or at least affirming separately GAR 181? Thus Professor Anthony D'Amato's legal thesis of the supremacy and invincibility of GAR 181 begs more unanswered questions, which I would be pleased to be receive answers/advice.

SAMEH MOBAREK: Mr. Anderson, I agree with your conclusion that returning to the 1947 partition plan would require Israeli consent. However, my reasons for reaching this conclusion are likely to be different than yours. I believe it was Professor D'Amato that first said that any state can consent to the annexation of its own territory to another state. In giving such consent, the annexation becomes an acceptable action under international law. In the Oslo Accord, the Palestinians accepted to limit the scope of peace negotiations to the pre-1967 border and to recognize Israel within borders established by the 1949 armistice. In this respect, they consented to Israeli annexation of territory earmarked for the 'Arab' state of UN GAR 181. It was Professor D'Amato's original contention, which I agreed with, that such position was obviously favorable to the Israelis. If the Palestinians had not consented to this annexation, it is highly unlikely that the UN would have stepped in and enforced UN GAR 181. The UN has proven itself completely ineffective when it comes to issues dealing with Israel. Therefore, I agree with your statement that Israel would have to willingly consent and withdraw to the partition line for the partition plan to become a reality.

ANTHONY D'AMATO: Yi Ling, you say that as a layperson you assume that the Security Council has more power than the General Assembly. I think you've answered your own question. Although laypersons may so think, a careful reading of the UN Charter in its entirety shows that the powers of both organs are limited. Indeed, the "range" of GA jurisdiction is much broader than the SC, while the military power of the SC is stronger within the Charter's specified limits. But in either case, the mandate power resided in the League of Nations, and when the League was extinguished in 1946, the mandate power devolved to the UN which had been established in 1945. It was contemplated that the Trusteeship Council would take over the mandate supervision, and for the most part that is what happened, but it did not happen with respect to Palestine nor with respect to South West Africa. Except for the fact that these are class A and C mandates respectively, much of the same legal analysis applies to both. As I argue, it is the GA, not the SC, which inherits the mandate supervisory power, as its power is much broader than that of the Security Council. The latter properly stepped in when there was a threat to the peace in resolution 242, but it had no power to redraw the lines of the mandate, and in fact, did not attempt nor purport to do so.

YI LING: Professor has endeavored to elucidate the trust issue from the international law point of view and I have endeavored to elucidate the trust issue from the commercial and corporate law point of view, based on our different legal exposure. Initially, being untutored in international law, I too was swayed, over whelmed, enticed, distracted by the UN SCR and the precise terms in the UN GAR 181, where the latter in the same breath of partitioning also set a date for termination of the Mandate. However when I read the clues that the Professor gives from international law point of view and relate them to my own ground experience in commercial law practice, I can appreciate the Professor's sound international law argument, that the Mandate exists until the Arab state of Palestine is created.

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