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UTI POSSIDETIS AND A PAX PALESTINIANA: A PROPOSAL*

Sanford R. Silverburg**

INTRODUCTION

Justice Oliver Wendell Holmes demonstrated his juridical insight when, in his dissent in *Northern Securities Co. v. United States*,¹ he declared that "[g]reat cases like hard cases make bad law." There was, of course, no way Justice Holmes could have anticipated the tortuous development of law regarding the use of force or its application to the Arab-Israeli conflict. Anxiety and bitterness all too often follow from the legal implications rendered by this sensitive world issue. Much of the world's concern in the seemingly continuous turmoil arises from the lack of agreement by regional states as to the disposition of certain territories presently occupied by Israel as the result of armed conflict. Although much attention has been given to the legality of continued Israeli occupation of, and the establishment of sovereignty over, Syrian, Jordanian, and Egyptian territories,² the applicability of *uti possidetis* has not been overly discussed. This principle is considered outdated because it conflicts with the current trend in international law of refusing to recognize acquisition of territory by force or aggression. It is suggested, how-

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¹ 193 U.S. 197, 400 (1904) (Holmes, J., dissenting).
ever, that the legal principle of *uti possidetis* should be employed to bring about a peaceful settlement of the dispute.

**UtI POSSIDETIS AND ITS DEVELOPMENT**

The doctrine of *uti possidetis* originated in the Roman law remedies for recovery of lost property, primarily immovables. The *Interdictum uti possidetis* was set forth in Hadrian's Edict as: "Uti nunc eas aedes, quibus de agitur, nec vi clam nec precario alter ab altero possidetus, quo minus ita possideatis, vic fieri veto." In modern usage, the doctrine has been described by Sir Gerald Fitzmaurice as:

the immediate governing factor at the end of a war [which] is the status quo, the positions which the respective belligerents have by that date taken up or occupy. From this it follows that a belligerent in occupation of the enemy country or part of it at the close of hostilities, or enemy colonial or overseas territory, would, in the absence of any provision to the contrary in the peace treaty, be entitled to remain there.

Early diplomatic expressions of the doctrine are found in various treaties: Article III of the Treaty of Münster (1648), Articles IV and VI of the Treaty of Breda (1667), Articles III and IV of the Treaty of Aix-la-Chapelle (1668), the Treaty of the Hague (1669), and Article II of the Treaty of Gulistan (1813). It was customary diplo-

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5. Fitzmaurice, *The Juridical Clauses of the Peace Treaties*, 73 *Recueil des Cours* 279 (II, 1948). Fitzmaurice goes on to qualify his definition by noting the requirement of formal annexation of the territory so that the conqueror does not remain as a military occupant. Id. at 279 n.1.
7. 10 *Id.* 235 (in Latin), 251 (in English) (treaty between England, France, the States General, and Denmark).
8. 11 *Id.* 16 (in Latin) (treaty between France and Spain).
9. 11 *Id.* 189 (in Latin) (treaty between Portugal and Holland).
10. 62 *Id.* 436 (in French) (treaty between Russia and Persia).
matic practice to handle the post-war disposition of territory by cession, annexation, or other stipulated method; if, however, a treaty did not mention the territorial situation, it was accepted that the status quo post bellum applied. The vanquished nation could reestablish sovereignty over lost territory only through treaty negotiations. The widest recognition of uti possidetis occurred in resolving boundary disputes among the Latin American republics in the first half of the nineteenth century. The controversies originated in the Papal Bulls Inter Caetera and Dudum siquidum issued by Pope Alexander VI in 1493 and 1494. The first demarcated the discovered world along an imaginary line running north to south 370 leagues west of the Cape Verde Islands. All territory to the west of the line was given to Spain, while territory to the east was given to Portugal. The second bull expanded upon this earlier declaration, covering all islands and mainlands which were to be discovered later. This line was eventually discarded and the principle of uti possidetis was recognized by the signing of the Treaty of Tordesillas (1750). The independence of the Latin American republics provoked serious consideration over the demarcation of boundaries, first in South America and soon after in Central America. There was no documentary evidence indicating that the newly created republics should follow the Spanish colonial administrative divisions. The doctrine of uti possidetis of 1810 thus became the manner of adjudicating boundary disputes and was formally recognized as such at the Congress of Lima in 1848.

This widespread use of the doctrine in Latin America led some jurists to regard its application and interpretation as essentially an American hemisphere contribution of international law.

11. For a list of applicable treaties and referenced articles, see C. Phillips, TERMINATION OF WAR AND TREATIES OF PEACE 223-27 (1916).


15. For a discussion of the development of the doctrine of the uti possidetis of 1810 in Latin America, see G. Ireland, Boundaries, Possessions, and Conflicts in South America, Appendix B, 321-29 (1938); 1 C. Hyde, INTERNATIONAL LAW 498-510 (2d rev. ed. 1947).

less, uti possidetis seems to have been employed in the contemporary regional policies of Africa, as a basis for settlement of border disputes. Among modern scholars, however, the doctrine has been appealed to sparingly; Gerson, for example, claims it is simply no longer acceptable. Berman, on the other hand, has applied it to Jerusalem, and Benkler to the West Bank.

**THE USE OF FORCE IN WORLD POLITICS**

Since the creation of the United Nations, a trend has developed in positive international law to build a world community based upon peaceful relations; this requires outlawing the acquisition of land through the use of force, or at least a policy based on the legal maxim ex injuria non oritur. Perhaps because of the bono intendo of writers and policy makers who support this trend, uti possidetis has fallen into a legal abyss. Nevertheless, as the Soviet jurist Tunkin has pointed out, disuse of a legal principle is not always a cogent argument for abandoning it.

Textbook writers are not in complete agreement as to the modes of acquiring territory. Brierly and Briggs both note five methods of territorial acquisition, though they are not the same, and von Glahn lists seven. The classical notion of acquisition of territory by conquest is interpreted by contemporary writers to be "the acquisition of the territory of an enemy by its complete and final subjugation and a declaration of the conquering state's intention to annex

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17. Resolution AGH/RES. 16(I) passed at the First Ordinary Session of the OAU's Assembly of Heads of State and Government, in Cairo, United Arab Republic, in 1964, stated inter alia that "[c]onsidering further that the borders of African States, on the day of their independence, constitute a tangible reality . . . [the OAU] solemnly declares that all Member States pledge themselves to respect the borders existing on their achievement of national independence." OAU, ASSEMBLY OF HEADS OF STATE AND GOVERNMENT, RESOLUTIONS AND DECLARATIONS OF ORDINARY AND EXTRAORDINARY SESSIONS 31-32. Touval notes, however, that African colonial-administrative boundaries were far more precise than in Latin America. Touval, The Organization of African Unity and African Border, 21 INT'L ORGANIZATION 122-24 (1967).

18. Gerson, supra note 2, at 1 n.6, 16.


it." In addition to the conquest of the territory, thereby establishing *ex facto ius oritur*, the territory occupied must be formally ceded or annexed to obtain title. Some writers condemn the acquisition of territory by conquest because they abhor the aggressive use of violence and regard it as an unlawful means to acquire title. But before condemning aggressive behavior by a state, one must distinguish between *animus belligerandi* and *animus occupandi* on the one hand, and the right of self-defense on the other. Schwebel makes the distinction between "aggressive conquest" and "defensive conquest." This distinction, albeit hazy and complicated, is necessary to the polyglot international legal order; it is in effect a compromise. Professor Bull, in theorizing on a similar situation, maintains:

The state which at least alleges a just cause, even where belief in the existence of a just cause has played no part in its decision, offers less of a threat to international order than one that does not. The state which alleges a just cause, even one it does not believe in, is at least acknowledging that it owes other states an explanation of its conduct in terms of rules that they accept.

The prohibition on the use of force in international relations, while it has recently received much attention, has been developing throughout this century. At the Second Hague Peace Conference, the use of force to redress a claim was the subject of the 1907 Porter Proposition prohibiting force in the collection of debts. This was followed by the concept of "no fruits of aggression" which originated with American Secretary of State Stimpson. Stimpson enunciated a doctrine which was to take his name directed against Japan's

25. BRIEPLY, supra note 22, at 171.
29. 36 Stat. 2241 (1907), 2 W. Malloy, Treaties 2248. See also E. Borchard, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD OR THE LAW OF INTERNATIONAL CLAIMS 318-29 (1915). This principle is partially the result of the Drago Doctrine. 1903 U.S. FOREIGN RELATIONS 4; Drago, State Loans in Their Relation to International Policy, 1 AM. J. INT'L L. 692 (1907).
30. 1 U.S. FOREIGN RELATIONS, JAPAN, 1931-1941, at 76. See also R. LANGER, SEIZURE OF TERRITORY: THE STIMPSON DOCTRINE AND RELATED PRINCIPLES IN LEGAL THEORY AND DIPLOMATIC PRACTICE (1947); Briggs, Non-Recognition of Title by Conquest and Limitation on the Doctrine, Proceedings, 36 AM. J. INT'L L. 72-82, 82-99 (1940); Wright, THE LEGAL FOUNDATIONS OF THE STIMPSON DOCTRINE, 8 PACIFIC AFFAIRS 439 (1933).
occupation of Manchuria in 1931, viewing the occupation as a violation of Japan’s obligation under the Kellogg-Briand Pact.\textsuperscript{31} The League of Nations accepted the Stimpson Doctrine and held that Japan’s occupation violated Article 10 of the League’s Covenant.\textsuperscript{32} A series of Pan-American agreements followed,\textsuperscript{33} eventuating in the passage of the United Nations Charter and its Article 2(4).\textsuperscript{34} With this Article as the background, the delegates to the 1969 Vienna Convention on the Law of Treaties articulated a similar view in Article 52: “A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principle of international law embodied in the Charter of the United Nations.”\textsuperscript{35}

In addition to addressing the use of “force,” the Convention spoke to the issue of “aggression” in formulating Article 75: “The provisions of the present Convention are without prejudice to any obligation in relation to a treaty which may arise from an aggressor State in consequence of measures taken in conformity with the Charter of the United Nations with reference to that State’s aggression.”\textsuperscript{36} Finally, in 1974, the United Nations agreed on a formal definition of

\begin{itemize}
  \item \textsuperscript{31} Formally known as a “General Treaty for Renunciation of War as an Instrument of National Policy of August 27, 1928,” 46 Stat. 2343, T.S. No. 797, 2 Bevans 732, 94 L.N.T.S. 59 (1929).
  \item \textsuperscript{32} \textit{League of Nations O. J., Spec. Supp.}, 101, at 87-88 (1932).
  \item \textsuperscript{36} \textit{Id.}
\end{itemize}
“aggression” in General Assembly Resolution 3314, an agreement which was not without a number of “loopholes.”

The United Nations Charter’s Article 2(4) has been a touchstone for debate, especially when juxtaposed with its Article 51, an article which accepts the use of force as sometimes necessary to protect the territorial integrity and sovereignty of a state. The generally recognized interpretation of Article 51 has been qualified, however, by the views of what now constitutes a majority voting bloc in the General Assembly; actions are more frequently labeled “aggression” although the new interpretation is applied neither equally nor universally. Legalists in socialist countries have made it almost a fetish to decry the use of force. Furthermore, their reference to

40. Obradovic, Prohibition of the Threat or Use of Force, in PRINCIPLES OF INTERNATIONAL LAW CONCERNING FRIENDLY RELATIONS AND COOPERATION 51-128 (M. Shaovic ed.1972); Diaconu, Iliescu, Negrea, & Pucuretu, Renunciation to the Use and Threat of Force—A Fundamental Principle of International Law, REVUE ROMAINE D’ÉTUDES INTERNATIONAL 175 (1973); Zourek, La Définition de L’agression et le Droit international—Developments récents de la question, 92 RECUEIL DES COURS 834 (II, 1957).
force is far more inclusive than simply the employment of the military, as held by western jurists, and includes all forms of "pressure," whether economic or political.41 However, the socialist view on the use of force maintains that the "[r]enunciation of the use or threat of force does not impair the right of peoples, including the oppressed colonial countries, to fight against aggression and for the elimination of its consequences, for their legitimate interests with all the means at their disposal."42 The question is further obfuscated by several General Assembly resolutions which, ironically, condemn the use of force by incumbent governments against colonial entities which have achieved independence and membership in the United Nations. This asymmetrical application and interpretation has had an impact upon the commensurate norms and values as expounded in international forums.43 Nevertheless, the justification appears to


be grounded less in any school of law than in blind loyalty to an ideology.

Other developments in world politics, such as the changing notion of power from its traditional meaning of force to the more recently accepted definition focusing on the degree of economic self-sufficiency, have led to further examination of the use of force. Thus, sufficient ambiguity exists in these international legal principles on the use of force, to give pause to an outright condemnation of Israeli occupation of Arab territory. Furthermore, acquisition of territory by conquest has been an accepted pattern of behavior in the culture of the Middle East, and Islamic law accounts for such practice with the notion of fa'i or war booty, which includes the territory of the conquered. Discussions during the United Nations' partition resolution demonstrate this traditional thinking. Abd al-Rahman Azzam Pasha, the then Secretary-General of the League of Arab States, reportedly suggested to representatives of the Palestinian Jewish community at the United Nations that "the claims of the Jews should be established in the way history has dealt with all such claims: by victory and defeat."

Moreover, there is a serious question as to the legality of the prior Arab occupation of certain territories now controlled by Israel. Although it is generally assumed that the Sinai, the Gaza Strip, the

purposes, see Payne, Sub-Saharan Africa: The Right of Intervention in the Name of Humanity, 2 Ga. J. Int'l & Comp. L. 89 (1972).

44. Still other developments in world politics, such as the changing notion of power from its traditional meaning of force made preponderant to a more recently accepted definition focusing on the degree of economic self-sufficiency, have led to the examination of this extrapolation of the meaning of force. The Arab oil boycott of 1973 had a devastating effect upon the traditional notion of power qua military force. Although this situation, it can be argued, was long in coming, i.e., the U.S. dollar began to fall in strength, as well as the Arab-Israeli conflict.

45. The American jurist of Egyptian background, Bassiouni, has written that "a recognized principle in international law [is] that annexing of a territory occupied by a military force can have legal effects only if the state of war ends by the conclusion of a peace treaty." Bassiouni, Some Legal Aspects of the Arab-Israeli Conflict, in The Arab-Israeli Confrontation of June 1967: An Arab Perspective 116 (1970). Admittedly taken out of context—Bassiouni was arguing for Egypt's refusal to permit Israel to use the Suez Canal—the observation applies to the West Bank as well because Jordan's sovereignty can only be based upon its military conquest and subsequent annexation. It should be added that the facts as to the legality of the manner of occupation of certain Arab territories are in greater dispute than the reality of Israeli occupation. But in either case the question at hand deals with any proposed transfer of sovereignty. At present the Israelis control certain parts of the Sinai, the entire Gaza Strip, the West Bank, and the Golan Heights.

46. Koran, LIX, 6-7.

47. J. Kimche, Seven Fallen Pillars 315 (1953).
West Bank, and the Golan Heights were under legitimate sovereign control of Egypt, Jordan, and Syria, these areas have been historically shuttlecocks with no real ties to any single state. A brief look at the recent history of these territories illustrates the lack of true claims.

"THE OCCUPIED TERRITORIES"

The Sinai Peninsula

After the defeat of Mehmet Ali, a separate act to the Convention of London, 1841 was signed as part of British diplomacy in the Eastern Question. The Sublime Porte demarcated the Sinai by a line running along what is now the Suez Canal and the northern coastline until El Arish. Egypt gained sovereignty west of the line while the Ottomans retained control over the areas to the east. In 1892, the Turkish Sultan took the initiative to issue a firman of investiture, changing the nature of control over the Sinai from mere possession to direct control. In subsequent diplomatic dealings between Britain and Turkey the frontiers of the Sinai were discussed, with the question becoming a source of increasing irritation among the two powers. Great Britain sought to break the deadlock in 1905 by dispatching troops to Aqaba to establish a military barracks. The Turks reacted with a military occupation of the disputed area. They then put forth a claim to a boundary line from El Arish to Suez to Aqaba, a triangular portion of the peninsula. A compromise offer was also made with a line to be drawn from El Arish to Ras Mohammed, thus slicing the peninsula in half.

The following year, Britain issued an ultimatum to Turkey to change the boundary, extending British territory from Rafah to Bir Taba. Turkey complied with the British demand but qualified it


49. To the south of the Suez-Bir Taba line lay the Villayet of Hedjaz while to the north and east was the Villayet of Damascus and the Mutasariflik of Jerusalem.

50. 5 Documents on British Foreign Policy, 1919-39, at 189-95 (1st ser., E. Woodward & R. Butler eds. 1952); R. Storrs, Orientations 49 (1943); 2 J. Spender, Life of Campbell-Bannerman 264-68.

51. Egypt No. 2, Correspondence Respecting the Turko-Egyptian Frontier in the Sinai Peninsula, CMD 38 (1906).
with a statement referring to an "administrative dividing line" rather than a "boundary." The question of a boundary between Egypt and Palestine was mooted by the dissolution of the Ottoman Empire subsequent to World War I. It was then that Great Britain was given a mandate over Palestine and was able to maintain de facto occupation over Egypt. Throughout this period, however, the Egyptian-Palestine boundary was never delimited. It was not until 1948, in the Egyptian-Israeli Armistice Agreement, that a boundary was set.

The Gaza Strip

The Gaza area was a portion of the Ottoman Turkish Empire that was placed under British administration in October, 1918. Subsequently, in 1947, the area was placed in the proposed Arab State by the United Nations Partition Commission.

As a result of the hostilities of 1948 and the Egyptian-Israeli Armistice Agreement, Gaza came under the control of the Egyptians. All authority was vested in the military office of the Egyptian governor-general. His decisions were subject to ratification by a Legislative Council, a group of leading citizens appointed by the governor-general and completely dependent upon Egypt. The Strip was used by the Egyptians to relocate Palestinian refugees who fled the Palestinian combat zone for Egypt. Thus, Egypt could claim to be providing assistance to the refugees and they would not be a threat to the government in Cairo. The lack of Egyptian sincerity towards the Palestinian Arab refugees and the lack of Egyptian interest in maintaining the Strip was made clear by the agreement between the Arab League and Egyptian officials during the truce negotiations in 1949; the Egyptian representatives privately agreed to give up the Strip to Israel if the latter assumed responsibility for the refugees.

Egypt maintained the area under military administration until 1955. During this period, the Arab League was permitted to establish a Palestine government-in-exile headed by the ex-Mufti of Jerusalem, Al-Haj Amin al-Husayni. In 1955, Egypt passed "A Law Concerning the Issue of a Fundamental Law for the Region Placed

Under the Supervision of the Egyptian Force in Palestine," but the area was never formally annexed, merely administered. Thus, the Egyptian desire to hold onto the area never appeared to be especially strong.

A Palestine National Union was set up in Gaza in 1959 and two years later free elections were conducted. The elections created a semblance of local autonomy, although there was actually strict Egyptian supervision. The following year Egypt gave the Strip a constitution. Article I declared that "the Gaza Strip is an indivisible part of the Land of Palestine." Thus Egypt, in effect, gave up its claim to the territory, even though the state of Palestine did not exist at the time.

In the negotiations in Lausanne as part of the Palestine Conciliation Commission's activities, Israel suggested a solution to the Palestinian Arab refugee—Israel agreed to accept a number of Arab refugees within the Gaza Strip if the area was ceded to Israel. The formal Egyptian position, however, was now quite negative, based on paragraph 11 of General Assembly Resolution 194 and the map attached to the Lausanne Protocol. The Gaza Strip continued to be administered by the Egyptians with brief periods (1956 and 1967) of involvement by the United Nations Emergency Force (UNEF).

The West Bank

After the hostilities of 1948, both the Jews and the Arabs effectively controlled, or at least occupied, sizeable portions of mandated Palestine, including Jerusalem, that were beyond the areas allocated by the General Assembly partition resolution. The military gains and losses resulting from those hostilities were recognized by separate armistice agreements made by Israel with Jordan, Syria,

55. The Lausanne Protocol was signed under the auspices of the United Nations Conciliation Commission. Third Progress Report of the Palestine Conciliation Commission, 4 U.N. GAOR, Ad Hoc Political Committee, Annex. col. II, at 6, U.N. Doc. A/927 (1949). Israel signed the protocol stressing, however, that the attached map was only one basis for discussion. Israel thereby added a reservation that it could use other bases as it saw fit. U.N. Doc. A/1367/Rev. 1, at 3 (1950). Israel's position regarding boundaries was that the boundaries of the British mandate where contiguous with Egypt, Lebanon, and Syria were to be recognized. Special consideration was to be made with Jordan on the Rafa-Gaza area, with all changes to be made by negotiation. 1 Divrei ha-Knesset 729 (June 15, 1949).
Egypt, and Lebanon. After Israel had withstood the military attack by the Arabs, the Arab states were willing to return to the United Nations’ partition resolution as a basis for negotiations. However, the Israelis were far better off territorially and militarily, and it was their turn to refuse.

King Abdullah of Jordan, in a calculated move to advance his personal ambition and territorial desires, made several moves toward incorporating the military successes of the Arab Legion into Jordan. By April 1950, Abdullah had annexed the West Bank of the Jordan to Transjordan. On April 27, 1950, the British Government, speaking through Kenneth Younger, Minister of State, announced de jure recognition of the Transjordan-Central Palestine unification and de facto recognition of its rule in East Jerusalem. Pakistan was the only other country to tender de jure recognition. The paucity of national recognition, however, must be qualified. Since other countries have maintained diplomatic relations with Jordan in its new geographical configuration, it can be argued that de facto recognition followed ipso facto.

Although the West Bank was occupied by Jordan and then Israel, it may be contended that the territory from 1948 to date, is res nullius since Britain was the last legal sovereign. If the Jordanian argument for possession, based upon effective occupation, is valid,
it would seem that the Israeli occupation is blessed with similar legitimacy. The establishment of Jordanian sovereignty on the West Bank represented an instance of acquisitive prescription, given added validity by default since no alternative claim was in evidence.65

Jerusalem

There is no greater stumbling block to Arab-Israeli peace negotiations than Jerusalem. In the United Nations' partition plan, Jerusalem was to be internationalized—a corpus separatum with an international regime. That having failed, the United Nations' Trusteeship Council drafted a statute66 for the city, reinstating internationalization in the post-conflict period. The General Assembly failed to accept the proposal and the Palestine Conciliation Commission (PCC) started anew, basing its deliberation upon General Assembly Resolution 194. But even this did not work, since Jordan was opposed to the idea of internationalization.67 The PCC, therefore, sought some other form of accommodation,68 but never succeeded.

Although Jerusalem has been reunified as a single city and district, it remains one of the disputed “territories.” It may be necessary to devise an entirely new concept of negotiations to achieve a settlement agreeable to all.

The Golan Heights

The Golan Heights was included in February, 1919 in the official Zionist claim to Biblical Palestine.69 In 1920, the British and French came to a settlement of the issue in accordance with their imperial interests.70 As a result of their negotiations, an Anglo-French bound-

65. Jordanian military occupation was followed by the establishment of a civil administration except for competing Palestinian Arab notables.
70. France-British Convention of 23rd December 1920 on Certain Points Connected with the Mandates for Syria and the Lebanon, Palestine and Mesopotamia, CMD 1195 (1921); 22 L.N.T.S. 353.
ary commission was established to delimit the boundary between French-mandated Syria and British-mandated Palestine. When their work was completed, a triangular piece of territory, from Banias-Dan to Quneitra to Lake Kinneret, was given to the French and later to Syria when it became independent.¹¹

THE TERRITORY OF THE STATE OF ISRAEL

The territorial limits of the State of Israel originated with the United Nations’ partition resolution.¹² The plan was accepted by the Jewish authorities but rejected by the Arab states.¹³ It seems, therefore, unreasonable for Arab jurists to suggest, as they did in the negotiations following the Israeli War for Independence, and have ever since, that Israel should consider the 1947 partition plan lines the basis for Israeli territory. The argument that an Israeli advance beyond those lines constitutes illegal aggression or expansion is specious. At least two Arab perceptions of Israeli policy result in polemical inferences of Israeli territorial “expansion”: 1) territory is acquired as the result of conflict; 2) Israeli expansion may be attributed to cultural, qua Zionist, manifest destiny. The first perception requires one to make a judgment regarding the intent of the state, in this case Israel, acquiring territory, while the second premise

¹¹ Agreement Between H.M. Government and the French Government Respecting the Boundary Line Between Syria and Palestine from the Mediterranean to El Hamme, CMD 1910 (1923); 22 L.N.T.S. 364. Frischwasser-Ra’anan notes that the “change was made in order to avoid dividing the lands of the Amir Mahmud el-Faour el Fadl, an influential landowner and sheikh of a bedouin tribe.” Frischwasser-Ra’anan, supra note 69, at 138. See also U.S. DEP’T OF STATE, THE GEOGRAPHER, JORDAN-SYRIA BOUNDARY (Int’l Boundary Study No. 94) (1969).

¹² G.A. Res. 181, 2 U.N. GAOR, Resolutions 131, 132, U.N. Doc. A/519 (1947). Upon termination of the Mandate on May 14, 1948, the Declaration of the State of Israel was issued by the Provisional Council of State and the Provisional Government, 1 Off. Gaz. (May 14, 1948); 1 L.S.I. 3. The Proclamation of Independence did not define the boundaries of the State of Israel. According to opinio juris, “the area of the State of Israel” refers to the Jewish State called for in the partition resolution. This is the view of Justice Landau in Attorney-General v. El Turani, I.L.R. 164, 166-67 (Sup. Ct., Israel 1951).

¹³ 2 U.N. GAOR 1425-27 (1947). Arab jurists continue to argue that the partition plan was an illegal act. The PALESTINE QUESTION (Seminar of Arab Jurists on Palestine, Algiers, 22-27 July 1967) 73-80 (E. Rizk trans. 1968). H. CATTAN, PALESTINE AND INTERNATIONAL LAW: THE LEGAL ASPECTS OF THE ARAB-ISRAELI CONFLICT Chap. 5 (2d ed. 1976). An attempt was made, however, by some of the Arab states which were members of Committee II of the Ad Hoc Committee on the Palestine Question to obtain an advisory opinion on a number of legal questions dealing with the dissolution of the Mandate. The draft request is in U.N. Doc. A/AC. 14/32 (1947). For a fuller discussion, see 2 U.N. GAOR, Ad Hoc Committee on the Palestine Question 203 (1947).
provides the proverbial grist for the historian's mill.\textsuperscript{74} Polemics aside, the complexity of the opposing arguments remains and can be seen in the various designations employed to refer to the areas under consideration: the Arab states refer to them as "occupied territories,"\textsuperscript{75} while the Israelis use terms such as "liberated territories,"\textsuperscript{76} and "conquered territories."\textsuperscript{77}

The 1947 boundaries of Israel changed somewhat as a result of the ensuing hostilities between Israel and neighboring Arab states. The armistice agreements that followed established another set of boundaries that have generated further discussion. Wright argues that a cease fire or armistice line may establish a de facto boundary or territory for purposes of administration.\textsuperscript{78} But these boundaries are not de jure by the principles of either prescription or general recognition. Prescription can be a valuable argument only so long as it is not challenged by the adversely affected. On the other hand, Israel does enjoy a general recognition of control over the territory, but only that which was allocated by the United Nations' partition plan. While Israel agrees that the 1949 armistice lines are valid lines from which to work,\textsuperscript{79} they are not necessarily the lines Israel is willing to accept. The demilitarized zone with its three subsectors (northern,\textsuperscript{80} central,\textsuperscript{81} and southern\textsuperscript{82}) notwithstanding, the 1949 armistice agreements serve as the delineated administrative boundaries. Each of the armistice agreements, however, contains a provision which precludes an ultimate territorial settlement.\textsuperscript{83}

\textsuperscript{74} See, e.g., S. ROBERTS, SURVIVAL OR HEGEMONY? THE FOUNDATIONS OF ISRAELI FOREIGN POLICY (1973).
\textsuperscript{75} J. STONE, NO PEACE—NO WAR IN THE MIDDLE EAST 12 (1970).
\textsuperscript{77} Dinstein, Zion Shall be Redeemed in International Law, 27 Ha Praklit 5-6 (1971) (in Hebrew).
\textsuperscript{78} Wright, supra note 61, at 26-27. For a discussion of the Arab-Israeli armistice, see D. BROOK, PREFACE TO PEACE: THE UNITED NATIONS AND THE ARAB-ISRAELI ARMISTICE SYSTEM (1964). See also Gervais, Les Armistices Palestiniens, Coréen at Indochinois et Leurs Enseignements, 2 ANNuaire Francais De Droit International 7 (1956).
\textsuperscript{80} See note 58 supra.
\textsuperscript{81} See note 51 supra.
\textsuperscript{82} See note 59 supra.
\textsuperscript{83} Article V(2) of the Israel-Egyptian armistice agreement is the basic statement, similar
The question of legality in the acquisition of territory and subsequent establishment of sovereignty has been brought before a number of international tribunals. Arguments to justify such action have included prescription, occupation, and customary practice. Contemporary consuetude among states most certainly includes the national use of force to acquire territory, even among those states whose opposition to the practice is the most vociferous. For example, India's military attack on Hyderabad and Kashmir in 1948 was, according to Indian spokesmen, based upon the principle of popular self-determination. Korea forcefully occupied the tiny islands of Tok-do in June 1953 in a dispute with Japan. India again employed the argument of popular self-determination in 1961 when its military forces moved to take over the Portuguese enclave of Goa and their exclaves of Dadra and Nagar-Aveli. The Soviet Union's absorption of the Baltic states was given de facto recognition by the United States, Canada, and thirty-three European states with the signing of the Final Act of the Conference on Security and Cooperation in Europe, held in Helsinki on August 1, 1975. Most recently

but not identical to all the others. The relevant portion reads, "The Armistice Demarcation Line is not to be construed in any sense as a political or territorial boundary, and, is delineated without prejudice to the rights, claims and positions of either Party to the Armistice as regards ultimate settlement of the Palestine question." The correlative articles are Article II(1) of the Israel-Jordan Agreement, Article II(2) of the Israel-Lebanon Agreement, and Article II(2) of the Israel-Syrian Agreement.

86. Case concerning Right to Passage over Indian Territory (Portugal-India), [1960] I.C.J.
we have also had the Moroccan takeover of the Spanish Sahara;\textsuperscript{91} the Turkish military invasion and occupation of Cyprus;\textsuperscript{92} and Indonesia's military intervention in East Timor in December, 1975 and the subsequent incorporation of East Timor into Indonesia in July, 1976.\textsuperscript{93} All are contemporary examples of the use of military coercion as national policy.\textsuperscript{94}

These examples of state foreign policies which include the use of force resulting in the acquisition of territory do not justify the practice, but rather indicate that, while verbal support is given to the condemnation of "aggression" \textit{de lege ferenda}, the customary practice is often to the contrary. Thus, external suggestions and criticisms, \textit{i.e.}, United Nations resolutions, appear to be secondary to a nation's real basis for deciding upon its policies. Ultimately, it is recognized by all that a state's leadership is responsible to its population, not that of the region or the world. This responsibility, however, is often misunderstood and viewed as a conscious effort to direct a state's policy in defiance of world law. Professor Oliver characterizes this pristine sense, held by many, when he writes of Americans that "[f]or all of their trials of patience and conscience


as to the amoral cosmos of international relations, the American people are not comfortable with *Realpolitik*. And in time, as we have seen, even our own masters of Metternichian diplomacy begin to utter idealistic, moralistic—even legalistic—thoughts.”

The analyst must always make an objective decision whether the criticism of a policy is directed against a particular state or the practice itself. The question in the present context becomes: Is Israeli occupation of Arab territory illegal because it is Israel occupying Arab territory or is the question in fact one of higher abstraction with global implications?

The application of the principle of *uti possidetis*, I am arguing here, is not to justify or rationalize the violation of the legal principle of *ex iniuria non oritur ius*. Such a violation is to be recognized for what it is: self-defeating. Rather, the principle is introduced as a notion that could add to the stability of negotiations.

In the preamble of the now famous November 22, 1967 United Nations’ resolution 242, the fifteen members of the United Nations Security Council unanimously emphasized “the inadmissibility of the acquisition of territory by war and the need to work for a just and lasting peace in which every state in the area can live in security.” This principle was carried forward in 1967 by the United Nations’ Special Committee on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations. The first principle set forth in the Declaration is that “States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any

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other manner inconsistent with the purpose of the United Nations." An examination of the *travaux preparatoires* indicates that the committee generally agreed on the reference to the general use of force. Nevertheless, a list of exceptions to this prohibition of the threat or use of force was added. Moreover, there was no agreement on the concept of "self-defense of peoples against colonial domination in the exercise of the right of self-determination."

President Johnson, speaking on Resolution 242, agreed that a return to the *status quo ante bellum* would not bring peace to the Middle East. But he also added that "[a]t the same time, it should be equally clear that boundaries cannot and should not reflect the weight of conquest." This apparent contradiction was resolved by a sound and logical prescription: "Each change must have a reason which each side, in honest negotiation, can accept as part of a just compromise." Conquest is an unacceptable form of territorial acquisition when occupation occurs without annexation or without negotiations free from coercion against the vanquished. The American position was stated again on December 9, 1969, when Secretary of State Rogers, seeming to support the principle of *uti possidetis*, called for Israeli withdrawal from Arab occupied territories upon "the establishment of a state of peace between the parties instead of the state of belligerency."

**Conclusion**

The initiation of the current Middle Eastern peace movement began, in 1973, with the passage of Security Council Resolution 338, calling for negotiations to begin "between the parties con-
cerned under appropriate auspices.” This move was reaffirmed when the Security Council passed Resolution 344 which ordered the Geneva Peace Conference on the Middle East. The Conference was convened in Geneva on December 21, 1973—two public sessions and one closed session were held, but the talks were not continued. The Soviet Union and the United States had supported the Conference and Soviet-American cooperation to gain a peaceful settlement of “the Palestine Question” resumed in October 1977, after peace seeking efforts had been held in abeyance for three-and-one-half years.

The benefit of renewed and open negotiations for a peaceful settlement is not only apparent, but essential to the world political observer. Whoever the parties to the settlement are, a politico-cultural gap will undoubtedly create massive difficulties—the parties will likely be talking on entirely different levels. Professor Halpern pointed out some time ago, admittedly from an Israeli point of view, that what the Israelis want is a situation known in Islamic law as a *sulh*. The Arabs, however, are willing to grant only an *aman*. Similarly, while the Israelis talk of “secure and recognized boundaries,” the Arab position appears to be “accepted and recognized” boundaries.

103. *Id.* (para. 3). The call for a peace conference was reaffirmed, to include PLO participation, by the passage of General Assembly resolution 31/61, U.N. Doc. GA/RES/3161 (1976) and resolution 31/62, U.N. Doc. AG/RES/3162 (1976) which called for an early resumption of the conference.


108. An *aman* is a temporary arrangement made between Muslims and non-Muslims to permit normal relations or transactions of business without undue difficulties.


110. See Arab Positions Concerning the Frontiers of Israel (Occasional Paper No. 55, The Shiloah Center for Middle Eastern and African Studies, Tel Aviv University) (A. Hareven ed. 1977) (in Hebrew). For a compendium of Egyptian officials’ views of peace, see *MIDDLE
If the Arab-Israeli dispute is to be solved through negotiations, all the disputants must agree to a *modus vivendi* to bridge the great gulf, not only between the national positions, but also between the cultural approaches to solving their difficulties. In addition, the Geneva peace negotiations have become a multilateral process, and thus the United States and the Soviet Union will continue to influence the situation to protect their interests.

The territories under question here are not subject to historical title. Indeed, no state in the area has had sufficient occupation time to employ such a claim. It is even difficult to ascertain exactly when title could have been entered into, let alone established.

I suggest that composure can be infused into the negotiations with the acceptance of a general principle of law, *uti possidetis*. While a trend in international law and in diplomatic forums of the world community decry the use of force and violence to acquire territory, it is still customary for states to reach their foreign policy goals in this manner. In fact, it remains painfully obvious that much of the world's call for respect for a rule of law has had more to do with the worthy goal of establishing a stable world on the basis of law than it has with political maneuvering and rhetoric of national foreign policy. Therefore, de facto occupation of territory may be a political reality that no amount of legal principle can eliminate, although the violence associated with the occupation may be reduced.

While not consonant with the recent pacifist trend, *uti possidetis* is intended to spur the achievement of a higher goal: the conclusion of a peace treaty. One can even look (perhaps naively) for the opening of diplomatic recognition and interaction.

*Uti possidetis* does not represent a principle that fosters aggressive, coercive, or uncontrolled tyranny. Rather, it is meant to be a procedural remedy for the return of stability to an area that has undergone the trauma of armed conflict all too many times.

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