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The United Nations
-
**From the Vantage Point of the
Palestine Question**

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Preface

Since my childhood I have been fascinated by the idea of an organization, as the UN, with the primary objective of safeguarding peace and security for all mankind. Every nation is supposed to protect the well-being of its citizens but an international organization promoting the equality of everybody in the world has greater moral aspirations. I was told that the UN and its Charter form part of international law and that the law forbids the use of force – war. The states of the world had agreed to outlaw war and accordingly the UN would stop a nation that resorted to the use of force. It all seemed fairly uncomplicated to me; at the outbreak of war the community of states would stand united and demand that the parties lay down their arms. The interdependence among states as well as a basic respect for the life of all men and women would lead to a peaceful solution.

In time I have found that my confidence in the UN, international law and the reasonability of man to a large extent lack grounds. Instead of upholding international law and the UN as an organization working for everybody, politics have come to govern the actions in the international arena. To me the Palestine Question is the most apparent example of this harsh reality. For approximately six decades the international community have proven unable to enforce the law and bring the conflict to an end. Political considerations have been given supremacy to the implementation of law. With this thesis I have had the opportunity to investigate this problem area further, seeking an answer as to how my childhood vision could prove to be so far from the reality.

I would like to thank my supervisor Gregor Noll for his kind last minute involvement in this project and the UN Publications Board for granting me the permission of supplementing my thesis with some UN-documents. Especially I would like to express my deepest gratitude towards my mother, Renée Tunbjer, for her invaluable intellectual inspiration.

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Abbreviations

AJIL	American Journal of International Law
BJIL	British Journal of International Law
GA	General Assembly
HILJ	Harvard International Law Journal
ICJ	International Court of Justice
RdC	Recueil de Cours
SC	Security Council

1 Introduction

Public international law consists of various components, of which the UN Charter forms one of the most important elements due to the wide adherence it has received among the states of the world. For nearly six decades it has served as a source of public international law with unparalleled importance. However, recently the significance of the UN and the provisions of its Charter have been increasingly questioned. The Organization has found itself incapable of upholding its principles in several conflicts. Unilateral acts by the member states, in areas where the UN normally has exclusive competency, without express endorsement from the Organization, are becoming more and more common.¹ Voices are being raised, claiming that the Charter presents basic values and ideas for the international community, but that fundamental changes in the world order have made parts of the Charter non-applicable to situations of today. Therefore the UN would have to adapt to the current situation. Certain actions, not expressly proclaimed by the articles of the Charter, could accordingly be accepted as an inevitable evolution of international law. Others withhold that the Charter must be seen as binding to the word and could not be subject to constant change through sudden variations in state practice.

The Palestine Conflict, rooted in the decades prior to the creation of the UN, has been an ongoing struggle between two peoples that has remained unsolved throughout the Organization's entire lifespan. Innumerable attempts have been made by the UN and its organs to find peaceful solutions to the conflict. The Palestine conflict may therefore constitute a productive object of study to examine some of the strengths and weaknesses of an international organization whose major purpose is to uphold peace and security.

Many scholars argue that the Charter presents adequate regulations to function as a preserver of peace and security, even in a complex conflict as the one regarding Palestine. In their views, the major obstacle to obtain a settlement to the conflict is the unwillingness by the parties to actually apply what international law requires. The conduct of the member states are seemingly no longer guided by what has been agreed upon to be lawful in accordance with the Charter. Other considerations are given priority, giving actuality to the question whether adaptations of the Charter are needed. The rule of law provides the very basis for effectiveness of the UN concept of upholding peace and justice. If compliance with the elementary principles of the Organization cannot be expected from its members, the relevance of the Charter will be limited. To what extent have the basic principles and purposes of the UN Charter and specific resolutions by the Organs been respected by the parties in conflict? A brief historical exposé of the origins

¹ For example the US interference in Nicaragua, Afghanistan and Iraq as well as the interference by Russia in Chechnya.

of the Palestine Question is essential to be able to grasp the significance it has been granted in discussions on international law. Examples as to how the UN and its Charter has been disregarded can be found in the history of the Palestine conflict.

The UN has two principal organs, the Security Council and the General Assembly. In relevance to specific conflicts they can communicate their views through resolutions. What binding effects can the resolutions of the Security Council and the General Assembly be considered to have? The Palestine question has been the object of a vast amount of resolutions promulgated by the two organs. The parties have nonetheless refused to adopt several of these resolutions. Two resolutions, General Assembly Resolution 181 and Security Council Resolution 242, which have remained among the most central issues in the conflict, will be more thoroughly studied.²

Are the actions taken by the international community and the parties to the conflict in coherence with the basic principles and purposes of the UN? The Question of Palestine is very complex and far-reaching; various aspects of the UN-Organization could be fruitfully examined from its perspective. Therefore I limit my studies to some of the fundamental principles of the Charter. The Palestine Conflict has its basic foundation in competing claims for territory. In regards to the expanding territorial gains by Israel as results to armed conflicts in the area, the *principle of the inadmissibility of the acquisition of territory by war* has a central position, together with the basic *prohibition of the use of force* stipulated in Article 2 (4) of the Charter. To examine what party that can be granted the authority to decide, under what rule Palestine should be, the principle of *self-determination* is discussed. The UN was not created to have powers over all areas of the member states' actions. The *principle of non-intervention* in Article 2 (7) of the Charter imposes a restriction on the competence of the Organization. What implications can this restriction have in relevance to the Palestine Conflict?

At the time for the origin of the UN, 50 states were involved in the making of the Organization and became members to the Charter. In the following decades a vast amount of the states of the world applied for membership, eventually a majority of states have won admission to the UN. What legal status has the UN Charter obtained with such a wide acclamation?

As you would expect, the members of a large organization such as the UN are not in unanimous support of every single action taken by the Organization as a collective. Sometimes the UN is regarded as too rigid in its application of the Charter to situations of a wide diversity. What motives can be found to remain true to the values that are advocated by the UN instead of adjusting the application to the issues of every given situation?

² Both GA Resolution 181 and SC Resolution 242 can be found as supplements to this thesis.

The picture emerging from examining these questions points to the issue whether the UN should adapt to the current world development in state practice, or function as an advocate of internationally acclaimed principles, until universal agreements have been reached on revising these principles, for the maintenance of peace and security. I end my thesis with this discussion.

1.1 Studying complex international lawmaking issues

To perform this study I have applied what one might call a traditional juridical method, with a top-down perspective. Perhaps a traditional juridical method is easiest applicable when studying a body of law with distinctly defined and rather narrow boundaries.

To work with a traditional juridical method implicates normally that you start by identifying a judicially complex or problematic area of interest. If this area happens to be regulated by law you study the aims, interests and method that were considered in the lawmaking process and led to the final body of law. By doing so the intention behind the lawmaking clarifies, and guidelines for the interpretation of the regulation can be concluded on. The next step is to evaluate how the law has been applied and followed in practice. Have the primary intentions behind the law de facto been fulfilled?

Perhaps the study will show that the drafters' aims have not been realized. The issue at hand, applying a traditional juridical method, would be to reason as to why this divergence between theory and practice has appeared. The reality may have presented the implementing bodies with obstacles that were not or could not be foreseen at the time for the lawmaking process. Would the problem be solved if the law was adjusted to the requirements of the "reality" or are there other issues at hand?

Using a traditional juridical method, I seek to evaluate some fundamental purposes and functions of the UN-organization. With regards to the Palestine Question certain aspects of the UN's role in practice can be assessed. Further, conclusions about the shortcomings of the Organization in relation to what can be seen in the Palestine Question are attempted.

The Palestine Question is often found to be the object of animated discussions among laymen as well as scholars and politicians. Frequently the discussions enclose political, religious and ethnical values rather than factual and juridical assessments of the conflict. In my description of the emergence of the Palestine Conflict I make an effort to avoid the more speculative opinions on the conflict that have been stated by the parties. Instead I base my portrayal to a large extent on the research made by *The*

Committee on the Exercise of the Inalienable Rights of the Palestinian People. In 1975 the General Assembly established the Committee on the basis of its resolution 3376. The Committee has 24 representatives of states as members and 25 observers; probably this guarantees a high level of reliability to its reports.

When applying this method to a wider sphere, as I do, comprising the UN Charter and its general position in international law, substantiating the Organizations work with the complex conflict of Palestine, naturally unambiguous conclusions are not easily drawn. However, I find it reasonable that the logical structure of a traditional juridical method can bear fruit even when studying complex international lawmaking issues.

2 The emergence of the Palestine conflict

2.1 The Husain-McMahon correspondence

At the end of the nineteenth-century the Arab world was divided; both under the control of the Ottoman Empire and the European colonial powers. Palestine was a Syrian province and therefore constituted a part of the Ottoman Empire. In the 1880's a minority of Arab intellectuals voiced demands for autonomy within the Empire. Parallel to the decline of the Ottoman Empire, the wishes of self-determination grew stronger among the Arab population. At the Pan-Arab Congress in Paris 1913, an agreement about the need for establishment of a separate Arab nation, was reached.³

While the First World War was at its height, the Allied Powers were already negotiating about rival territorial ambitions concerning areas belonging to the Ottoman Empire. These negotiations led to the secret Sykes-Picot agreement in 1916, which determined how the Ottoman Arab Territories should be ruled if the European powers were to defeat the Turks.⁴

Certain efforts were being made during the war to gain support by the Arabs in the fight against the Turks. In 1915-1916 a correspondence between Sir Henry McMahon, the British High Commissioner in Egypt, and Sharif Husain, Emir of Mecca, as representative of the Arab peoples, dealt with the issue. McMahon's object was to obtain the Arab requirements for a revolt in order to open a southern front to occupy Turkish troops so that they could not be deployed in Europe.⁵ Husain demanded independence of the Arab countries and specified the boundaries of the territories in question, which included Palestine.⁶ McMahon stated:

“Great Britain is prepared to recognize and uphold the independence of the Arabs in all the regions lying within the frontiers proposed by the Sharif of Mecca”⁷.

³ Schild, Tscheulin, Schillhorn and Kenny: *Conflicts, Middle East*, in Wolfrum (ed.): *United Nations: Law, Policies and Practice*, C.H. Beck Verlag, 1995, pp 286-287.

⁴ The Committee on the Exercise of the Inalienable Rights of the Palestinian People: *The origins and evolution of the Palestine problem 1917-1988*, United Nations, New York, 1990, p 4.

⁵ Geddes, Charles L: *A Documentary History of the Arab-Israeli Conflict*, Praeger Publishers, New York, 1991, p 24.

⁶ The Committee on the Exercise of the Inalienable Rights of the Palestinian People: *The origins and evolution of the Palestine problem 1917-1988*, United Nations, New York, 1990, p 4.

⁷ Letter from McMahon to Sharif Husain, Cairo, October 24, 1915, in Geddes, Charles L: *A Documentary History of the Arab-Israeli Conflict*, Praeger Publishers, New York, 1991, p 27.

France, a British ally, had special interests in the area. The British sought to recognize these interests, why they wanted to exclude specific areas from the territories that were to be granted independence. Sharif Husain found himself forced to accept this compromise for the time being, stating that further discussions would be in place after the war. McMahon described the area excluded from independence as “portions of Syria lying to the west of the districts of Damascus, Homs, Hama and Aleppo”.⁸ The area described seems to correspond with the coastal areas of present-day Syria and the northern part of Lebanon, thus not including Palestine.⁹

McMahon's pledge that the British were to assist in the Arab struggle for independence, following the victory of the Allies, convinced Sharif Husain to declare war against the Ottomans on 5 June 1916.¹⁰

2.2 The Balfour Declaration

The Balfour Declaration is a statement of policy from the British Cabinet, sent by the Foreign Secretary Arthur James Balfour to a private citizen, Baron Lionel Rothschild on 2nd November 1917. The declaration was issued in the middle of the First World War. The need for allies characterized the period and in a way constituted the very basis for forming the declaration.

By 1917 the Allied Powers had suffered great losses and were in desperate need of assistance in their conflict with the Central Powers. The loss of men had been terrible and the financial situation of both Britain and France were grave. They were hoping for support with capital from the USA, and the military participation of the Russians was essential so that the Germans would have to fight on several fronts. The British cabinet believed that if they were to officially state their support of Zionist immigration and settlement in Palestine, the Jews of the world would support the British needs. The plan was that the Jews in the USA and Russia would return the favour by placing political pressure on their governments for greater support of the war effort. To achieve this condition the British formulated the Balfour Declaration.¹¹

The Declaration stated as follows:

“His Majesty’s Government view with favour the establishment in Palestine of a national home for the Jewish people, and will use their best endeavours to facilitate the achievement of this object, it being clearly

⁸ See supplemented map over discussed area.

⁹ The Committee on the Exercise of the Inalienable Rights of the Palestinian People: *The origins and evolution of the Palestine problem 1917-1988*, United Nations, New York, 1990, p 5.

¹⁰ Geddes, Charles L: *A Documentary History of the Arab-Israeli Conflict*, Praeger Publishers, New York, 1991, p 28.

¹¹ *Ibid*, p 35-37.

understood that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country.”

The Zionist Organization had been involved in the creation of the Declaration, but their proposal included a somewhat different wording, speaking of *the* national home of the Jewish people. In addition the Zionists did not include any safeguard of the rights of the existing population in Palestine.¹²

The meaning of “a national home” in the Declaration is vague and has been much debated. The British have on several occasions declared their aspirations concerning a national home for the Jews in official statements and reports, in which they repeatedly state that the Declaration did not contemplate that Palestine as a whole should be converted into a Jewish National Home, but that such a Home should be founded in Palestine.¹³ This Home did not necessarily have to imply a political sovereignty. The crucial point was rather to acknowledge the Jewish people to have a recognized legal position and the opportunity to develop their cultural, social and intellectual ideals in the country.¹⁴

Even if the Declaration did not impose a transformation into a Jewish state on the people of Palestine, it supported other Jewish aspirations, such as mass-immigration as a part of the establishment of a national home. In the Husain-McMahon correspondence, as mentioned, promises had been made by the British, supporting Arab aspirations of sovereignty - thereby winning advantages in the conflict with Turkey. The promises in the Balfour Declaration can therefore be viewed as incompatible to both prior and later statements of the British towards the Arabs. A matter of dispute is whether the British Government had the legal capacity to make any promises whatsoever, concerning the future government of Palestine.¹⁵

At the time for the Balfour Declaration, Palestine was a part of the Turkish Empire. It was by no means under the control or jurisdiction of the British Government. It is not possible to give away what you do not possess, why no promises from the British could be valid concerning the development in Palestine. International law does not grant states the possibility to extend its own competence at the expense of other states and other peoples. Neither was the indigenous and sovereign inhabitants of the country, the Palestinians, ever asked for their consent to the establishment of a Jewish national home. Thereby the natural and legitimate rights of the People of

¹² Cattan, Henry: *Palestine and International Law*, Longman Group Ltd, London, 1973, p 12.

¹³ *Ibid*, p 15.

¹⁴ Bentwich, Norman: *Palestine*, E Benn, London, 1934, p 101.

¹⁵ Cattan, Henry: *Palestine and International Law*, Longman Group Ltd, London, 1973, p 17-18.

Palestine were violated, contributing to the invalidity of the Declaration as a legal document.¹⁶

Devoted supporters of the Jewish establishment in Palestine, for instance Feinberg, argue that alleged rights of the Palestinians such as self-determination¹⁷ cannot be seen as anything more than political principles or moral postulates at the time for the mandate over Palestine. These principles had yet to become binding rules of international law and could accordingly do nothing to safeguard the inhabitants' influence over their own future government.¹⁸

The lack of respect and concern for the Arab population of Palestine is evident and best shown in the words of Arthur James Balfour, the author of the declaration:

“In Palestine we do not propose even to go through the form of consulting the wishes of the present inhabitants of the country ... The four great Powers are committed to Zionism. And Zionism, be it right or wrong, good or bad, is rooted in a long traditions, in present needs, in future hopes, of far profounder import than the desires and prejudices of the 700 000 Arabs who now inhabit that ancient land.”¹⁹

It has been argued that the lack of legitimacy to the British promises in the Balfour Declaration were remedied when reference to it was embodied in the treaty of the Mandate for Palestine by the Council of the League of Nations. The League of Nations, as an international organization expressing the approving opinion of its member states, would make the Declaration valid. But, according to Cattán, if the British government did not possess any sovereignty over Palestine legitimising its conduct, the latter approval of other countries that also did not possess sovereignty over Palestine cannot validate the Balfour Declaration. An accumulation of nullities cannot generate a valid juridical act.²⁰

2.3 Britain's mandate over Palestine

The victorious Allied Powers in the First World War formed the Covenant of the League of Nations, signed in 28 June 1919, as an integral part of the

¹⁶ Ibid, p 18-19.

¹⁷ The right of self-determination will be further examined in the following.

¹⁸ Feinberg, Nathan: *The Question of Sovereignty over Palestine*, in Moore (ed): *The Arab-Israeli Conflict*, Princeton University Press, 1974, Vol I, pp 230-231.

¹⁹ Documents on British Foreign Policy 1919-1939, 1st series, Volume IV, HMSO, in Cattán, Henry: *Palestine and International Law*, Longman Group Ltd, London, 1973, p 19.

²⁰ Cattán, Henry: *Palestine and International Law*, Longman Group Ltd, London, 1973, p 21.

Treaty of Versailles, which concluded peace with Germany. The League of Nations was a body sui generis, established to forth bring the victorious states concept of order in international relations.²¹

The League of Nations was designed to respond to the prevailing order.²² By the end of the First World War, colonialism was still very much a part of the international system. At the same time a growing understanding of the right to self-determination in the colonized communities won acceptance in coherence with President Wilson's programme of anti-colonialism. The colonial powers greatly benefited from status quo. The mandate system was the League of Nation's compromising response to two conflicting demands. The development of the mandated territories was to be, according to article 22 of the Covenant, under the tutelage of advanced nations. The extent of the tutelage would be based on the political maturity of the territory in question. The mandatory state was to act as a guardian for the mandated territory and was bound to exercise its powers in accordance with its responsibility towards the League of Nations. The mandated territories were classified from A to C – A signifying the highest level of development and C the lowest.²³

The First World War lead to the demise of the Ottoman (Turkish) Empire and the former Turkish territories were divided among the victorious states at the Conference of San Remo on 25 April 1920. The administration of Palestine was awarded to the United Kingdom.²⁴ This mandate was of the so called A class, article 22 paragraph 4 of the Covenant clarifies its status:

“Certain communities formerly belonging to the Turkish empire have reached a stage of development where their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the mandatory.”

According to the wordings of article 22, the intention with the mandate system was that the tutelage by the more politically mature nations, eventually would come to an end. All, except one, of the communities

²¹ The Committee on the Exercise of the Inalienable Rights of the Palestinian People: *The origins and evolution of the Palestine problem 1917-1988*, United Nations, New York, 1990, p 18.

²² Ibid, p 18-19.

²³ Ermacora, Felix: *Mandates*, in Wolfrum (ed.): *United Nations: Law, Policies and Practice*, C.H. Beck Verlag, 1995, pp 871-72.

²⁴ The Committee on the Exercise of the Inalienable Rights of the Palestinian People: *The origins and evolution of the Palestine problem 1917-1988*, United Nations, New York, 1990, p 19.

formerly belonging to the Turkish Empire eventually achieved full independence – Palestine.²⁵

Every mandate was based on article 22 of the Covenant but a separate draft treaty was formulated with more specific regulations for how each mandated community should be governed. These treaties were subjected to the evaluation by the Council of the League of Nations before they came into force. The draft mandate treaty concerning Palestine was presented to the Council of the League of Nations by the UK, approved on 24 July 1922, and came into force on 29 September 1923.²⁶

In the preamble of the treaty, reference was made to the much-debated Balfour Declaration, compromising an obligation to strive in favour of the establishment in Palestine of a national home for the Jewish people. However, the treaty did not include an explicit acknowledgement of the building of a Jewish state, nor of a historical legal title for the Jewish people to Palestine.²⁷ It was also stated that the Mandatory was bound to safeguard the civil and religious rights of the existing non-Jewish communities in Palestine.²⁸

The validity of the draft mandate treaty has frequently been questioned, not only by the Arab communities, but also by several authorities of international law. The legitimacy of the Mandate was based on article 22 of the Covenant. The first paragraph states the primary considerations, constituting the very foundations of the mandatory system. Protecting the “well-being and development” of the population in the community subjected to a Mandatory power are among the first objectives. At the time of the establishment of the Mandate, Palestine’s population of 750 000 people consisted of approximately 10 percent Jews and 90 percent Arab-Palestinians. Thus, the Arab population constituted an overwhelming majority of the people affected by the Mandate and therefore was the population whose “well-being” should not be neglected. However, the Arab community was not consulted in the decision process about the future of their country. The positive injunctions by the Mandate were directed to the promotion of Jewish interests.²⁹

Palestine had been the national home of the Palestinians for centuries. The Palestinians naturally saw the establishment of a national home for an alien people in Palestine as a violation of their sovereignty and their natural rights of independence and self-determination as inhabitants. The League of Nations decision that Great Britain as the Mandatory should work in favour

²⁵ Ibid, p 20.

²⁶ Schild, Tscheulin, Schillhorn and Kenny: *Conflicts, Middle East*, in Wolfrum (ed.): *United Nations: Law, Policies and Practice*, C.H. Beck Verlag, 1995, p 289.

²⁷ Ibid, p 289.

²⁸ Preamble paragraf 2

²⁹ The Committee on the Exercise of the Inalienable Rights of the Palestinian People: *The origins and evolution of the Palestine problem 1917-1988*, United Nations, New York, 1990, p 31.

of the establishment of a Jewish national home, in a territory almost entirely inhabited by Palestinians, is not in coherence with the authority given to it by the parties to the Covenant, formulated in article 22 of the Covenant. The League of Nations did not possess the power, any more than Great Britain did, to dispose of Palestine, or to grant to the Jews any political or territorial rights in that country, in the views of Cattán.³⁰

The establishment of a national home for the Jewish people commenced with the goodwill of the League of Nations in general and particularly Great Britain as the Mandatory.³¹

2.3.1 The course of the mandate

Great Britain's mandate-policy was elaborated in a statement 1 July 1922, popularly referred to as the "Churchill Memorandum". The statement reaffirmed the Balfour Declaration, and the "historic connection" of the Jews with Palestine. It further stressed the acknowledgement that the presence of the Jewish people in Palestine was "as of right and not as sufferance". Great Britain considered that it was necessary that the Jewish community in Palestine should be able to increase its numbers by immigration. The economic absorptive capacity of Palestine would be the only acceptable factor limiting the extent of the immigration.³²

The Palestinians strongly objected to the goals set up in the Churchill Memorandum, advocating that the Jewish population that lived in Palestine before the First World War enjoyed the same rights and privileges as the rest of the citizens under the Ottoman Empire. Both Arabs and Jews had lived under the same government without any grave conflicts occurring between them. According to the Palestinians the British plan for establishing a national home for the Jews, did nothing to safeguard the Arab interests in Palestine. Instead the Arabs proposed an immediate creation of a national government, responsible to a Parliament of all and whose members would be elected by the inhabitants in the country – Moslems, Christians and Jews.³³

The Jewish community, represented by the Zionist Organization, applauded the Memorandum. They considered Churchill's policy to be an assurance of a joint effort leading towards the final goal of a Jewish State in Palestine. The Zionist Organization promoted three principal means for achieving the national home:

³⁰ Cattán, Henry: *Palestine and International Law*, p 30-33.

³¹ The Committee on the Exercise of the Inalienable Rights of the Palestinian People: *The origins and evolution of the Palestine problem 1917-1988*, United Nations, New York, 1990, p 33.

³² *Ibid*, p 35.

³³ Moore, John Norton: *The Arab-Israeli Conflict*, Princeton, University Press, 1974, pp 22.

1. Large scale immigration,
2. Large scale land purchase,
3. The denial of employment to Palestinian labour.³⁴

As a consequence of the Balfour Declaration and the termination of the First World War, large scale Jewish immigration to Palestine had commenced in the early 1920's. With the endorsement of the Churchill policy, immigration accelerated and reached its peak in 1925, when 33 801 Jews were recorded as immigrants. During the whole decade about 100 000 Jewish immigrants entered Palestine, resulting in an increase of the Jewish part of the population from below 10 per cent to over 17 per cent.³⁵

The Zionist Organization maintained a strict policy of only to employ Jewish labour to service Jewish farms and settlements. The Zionist agencies that purchased land for the benefit of Jewish immigrants and assisted in the building of settlements had various policies for how the land should be used and developed. The Keren Kayemet draft lease includes such provisions:

“... The lessee undertakes to execute all works connected with the cultivation of the holding only with Jewish labour. Failure to comply with this duty by the employment of non-Jewish labour shall render the lessee liable to the payment of compensation...”

Provisions of this kind were included in legal documents binding on every settler in a Zionist colony. The Zionist Organization's public statements of their policy towards the Arab people, displayed a different attitude. They described a common desire of the Jewish people to live in co-existence with the Arab people and a joint strife for a prosperous community, which would ensure the growth of the two peoples'. The public statements obviously did not correspond with the practice of the Zionist colonies, a practice that rendered strong criticism from Great Britain.³⁶

A Palestinian resistance started in the early 1920's, leading to several violent and non-violent protests in its early years. The Churchill Memorandum had reaffirmed the “national home policy” and the extensive immigration threatened the Palestinian interests in Palestine. In August 1929 the conflict once again became violent. The clash between Palestinians and Jews led to 220 dead and 520 injured on both sides. The British were able to bring the situation under control after ample reinforcements had been made. A special commission, *The Shaw Commission*, was issued to investigate the

³⁴ The Committee on the Exercise of the Inalienable Rights of the Palestinian People: *The origins and evolution of the Palestine problem 1917-1988*, United Nations, New York, 1990, p 36.

³⁵ *Ibid*, pp 36-37.

³⁶ *Ibid*, pp 38-39.

outbreak.³⁷ The commission found that during the last 10 years three serious attacks had been made by Arabs on Jews. For the 80 years before the first of these attacks there is no record of any similar incidents. The commission thus concluded that there must have been some material change in the relation between the two people that caused the aggravation. The commission argued that there was a widespread feeling of resentment among the Palestinians caused by the failure of Great Britain to grant some measure of self-government. It was not entirely surprising that parts of this resentment would show itself against the Jews since their presence could be regarded as an obstacle to the fulfilment of Palestinian aspirations.³⁸

The growing level of insecurity, culminating in the 1929 riots, in combination with the report of the Shaw Commission increased the awareness of just how explosive the situation in Palestine was. The Zionist struggle for a Jewish state in Palestine met with even stronger opposition from the Palestinians. The situation called for action on behalf of the Mandatory power – Great Britain. Reinforcements of the military postings in Palestine were being made and a new statement of policy was presented in October 1930, called the Passfield White Paper.³⁹

The Passfield White Paper recognized the growing disproportion of influence between the two sections of the population in Palestine. It stated that the principle feature of the mandate was not only to make possible the Jewish national home, of equal importance was to safeguard the rights of the non-Jewish community. The paper acknowledged that the Palestinian grievance had justification, but urged for an effort at co-operation for the benefit of the whole country. The Jewish leaders were asked to make some concessions on their behalf in regard to certain independent and separatist ideals. The Passfield White Paper indicated a distinct change of the British policy, compared to what had been presented in the Churchill Memorandum of 1922, with its promoted restrictions on Jewish immigrations and land transfers. After heavy criticism from the Zionist Organization, the British Prime Minister again gave paramountcy to the goals of Zionism in a letter to the Zionist leader Doctor Weizmann. The significance of the paper more or less became null and void and the policy implemented turned out to be the one of 1922.⁴⁰

During the 1930s the Jewish immigration reached new heights. In 1935, 61 854 Jews immigrated to Palestine. The Nazis had started their persecution of Jews in Europe forcing Jews to flee their homelands. Most of them left for Britain or the US but large numbers sought refuge in Palestine, contributing to the total number of 232 00 immigrants in the 1930s. In the 20 years that

³⁷ Popularly referred to as the Shaw Commission, since it was headed by Sir Walter Shaw, a retired Chief Justice of the Straits Settlements.

³⁸ The Committee on the Exercise of the Inalienable Rights of the Palestinian People: *The origins and evolution of the Palestine problem 1917-1988*, United Nations, New York, 1990, p 44.

³⁹ *Ibid*, p 39.

⁴⁰ *Ibid*, p 40.

had passed since the establishment of the League of Nations, the Jewish population had grown to 445 000, representing nearly 30 per cent of the population compared with less than 10 per cent before the mass-immigration.⁴¹

The explosive increase of the Jewish population in Palestine during the 1930s further aggravated the Arab population. The Passfield White Paper had raised the Palestinian's hope for a more controlled immigration and exploitation of the country. When these expectations were proved futile and the immigration reached previously unknown heights, the Arab opposition grew stronger. The Arabs for the first time felt a relevant fear that the Jewish population eventually would be in majority, leading to a Jewish state with Palestinian Arabs being ruled by Jews. The Palestinian antagonism resulted in violent clashes both with Jews and the British authorities. Even so, an Arab Executive Committee was formed in 1933, consisting of various Palestinian political parties and groupings that made efforts to cooperate with the British.⁴²

The Palestinians did not find peace with the foreign rule nor the foreign colonization and a major rebellion broke out in 1936 and lasted virtually until the outbreak of the Second World War in 1939. The British were finally able to end the rebellion, after large-scale military operations, but several thousands of lives had been spilled on all sides. The rebellion had made a clear statement from the Palestinians that they by no means were willing to give up their country in accordance with the Balfour Declaration and that the Churchill policy had proved ineffective.⁴³

To investigate the infected situation in Palestine the British established The Peel Commission that presented a 400-page report in 1937. The report recognized the justice in the demands by the Palestinian people for independence, even though the commission defended the actions taken by the British government. The commission saw a grave problem in the dual obligations of the mandatory: the advocating of a transformation of Palestine into an independent Jewish state, while at the same time protecting the Palestinians natural right of self-determination. For the Arabs, the incorporation of the Balfour Declaration in the draft Mandate was what considered mainly preventing them from obtaining further independence. They could not accept the creation of a Jewish national home in Palestine and to a large extent refused to cooperate with Great Britain who promoted this idea. The Peel Commission stated therefore that the rebellion in the 1930's was not primarily directed towards the Jews, but were rather to be seen as an attack on the Palestine Government – the British Mandatory rule. The commission was of the impression that the Arabs might profit from the capital and enterprise that the Jews could provide and that they would be ready to permit a Jewish immigration under their own conditions and

⁴¹ Ibid, p 42.

⁴² Ibid, p 45.

⁴³ Ibid, pp 46-47.

control. But the creation of the Jewish national home was on the contrary established directly against the will of the Arabs. The Jewish actions in Palestine based its legitimacy on the good-will of the League of Nations, the acceptance of the Mandatory, and the encouragement of the United States of America – but without any agreement with the Arab population, creating a conflict between the two people.⁴⁴

The report described the Arab-Jewish relationship as follows:

“An irrepressible conflict has arisen between two national communities within the narrow bounds of one small country. About 1 000 000 Arabs are in strife, open or latent, with some 400 000 Jews. There is no common ground between them. The Arab community is predominantly Asian in character, the Jewish community predominantly European. They differ in religion and in language. Their cultural and social life, their ways of thought and conduct, are as incompatible as their national aspirations. These last are the greatest bars to peace.”⁴⁵

The commission found no ways of upholding the Mandate, with its inclusion of the Balfour Declaration, without a constant use of force. A government based on constant repression would be both morally and politically questionable. Neither giving the Jews nor the Arabs all that they want would create a stable ground for peace. Instead, the Royal Commission argued that partition could be the only plan with at least a chance to generate ultimate peace.⁴⁶

Partition of Palestine became the official British standpoint after the presentation of the report. The Palestinians however could by no means accept governing only a part of the country; they had been struggling for full independence in the whole of Palestine and were not inclined to give up their demands. Neither were the Jewish people entirely content with a plan for partition. They claimed that the provisions of the mandate, and its reference to the Balfour declaration, included an ultimate aim of establishing a Jewish state in all of Palestine and demanded the fulfilment of these promises. The irreconcilable demands of the parties led to further discussions with Great Britain to formulate a more acceptable strategy.⁴⁷

The result of these new efforts was the “MacDonald White Paper” of May 1939. The British government rejected both the Jewish demands for creating

⁴⁴ Ibid, pp 48-50.

⁴⁵ British Government, Palestine Royal Commission: Report – Cmd. 5479 (1937), p 370.

⁴⁶ Ibid, pp 373-76.

⁴⁷ The Committee on the Exercise of the Inalienable Rights of the Palestinian People: *The origins and evolution of the Palestine problem 1917-1988*, United Nations, New York, 1990, p 52.

a Jewish State and the Palestinians demands for Palestine to become an independent Arab state. Instead they suggested the termination of the Mandate by 1949 with independence for Palestine in which both Palestinians and Jews would share the government. The Jewish immigration would be limited to 75 000 new immigrants over the following five years and then come to an end. During these last years of the Mandate the government would strictly regulate land transfers.⁴⁸

The Jewish community objected that the implementation of the White Paper would involve a breach of the promise in the Balfour Declaration of “a national home for the Jewish people”. The British government admitted that a Jewish state had been promoted as one possible outcome, but refused to believe that the creators of the Mandate in which the Balfour Declaration was embodied, could have intended that Palestine should be converted into a Jewish state against the will of the Arab population of the country. The British declared that the creation of a Jewish State with the Palestinians subjected to its government against their will, were by no means part of their policy.⁴⁹

The White Paper aggravated the Jewish people in general and especially the Zionist groups who responded primarily by three means: illegal immigration, terrorism and attempts to obtain support from the United States. The terrorist activities were directed both towards the British Government and the Palestinians, reaching a climax with an explosion in the King David Hotel in Jerusalem on the 22nd July 1946, killing 86 public servants. Other terrorist activities included the kidnapping of a British judge and of British officers, sabotage of the railway system and of oil installations at Haifa, and the blowing up of a British Officers’ Club in Jerusalem with considerable loss of life.⁵⁰

⁴⁸ Ibid, p 53.

⁴⁹ British Government, Statement of Policy, Cmd 6019 (1939), in The Committee on the Exercise of the Inalienable Rights of the Palestinian People: *The origins and evolution of the Palestine problem 1917-1988*, United Nations, New York, 1990, p 54.

⁵⁰ The Committee on the Exercise of the Inalienable Rights of the Palestinian People: *The origins and evolution of the Palestine problem 1917-1988*, United Nations, New York, 1990, pp 63-65.

3 The Palestine Question as a problem for the UN

By the end of the Second World War the United States of America had become more involved with the issues of the Jewish people. Zionist organisations sought to strengthen their positions by drawing support from the USA and succeeded mainly in this effort. Admission to Palestine were discussed for 100 000 Jews that were victims of Nazi persecution. The British, however, stated that the issue needed to be examined further and could not accept an immediate immigration of that scale. About 600 000 Jews in Palestine were set on converting Palestine to a Jewish state. 1 200 000 Arabs planned to resist, to the last, the establishment of Jewish sovereignty, on the contrary promoting the establishment of an Arab state. The situation was growing out of control for the British Mandatory power and Great Britain decided in 1947 to hand over the Palestine problem to the newly established United Nations and possibly absolve its role as the Mandatory power.⁵¹

The General Assembly appointed a Special Committee to consider the Palestine problem. The committee offered to different plans, one majority and one minority plan. Both plans, however, included the termination of the mandate. The majority plan proposed the partition of Palestine, creating one Arab State and one Jewish State in an economic union. The city of Jerusalem would be subjected to an international regime, administrated by the UN. The minority plan suggested the establishment of a federal state that would compromise an Arab State and a Jewish State with Jerusalem as the capital.⁵²

The General Assembly adopted on 29 November 1947, by a vote of 33 to 13 with 10 abstentions, resolution 181 for the partition of Palestine, basically in accordance with the suggestions in the majority plan. All six independent Arab States, together with four Muslim States, voted against the resolution. Great Britain was among the countries that abstained.⁵³

By decision of the UN the British mandate was about to be absolved, although Britain would have to remain in Palestine until the moment of transfer. Resolution 181 concluded that the Mandate would come to an end no later than 1 August 1948.⁵⁴

⁵¹ Ibid, pp 69-71.

⁵² Gilbert, Martin: *ISRAEL – A History*, William Morrow and Company Inc., New York, 1998, p 150.

⁵³ See supplemented fulltext resolution.

⁵⁴ Ibid, p 153.

The Palestinians had opposed the plan for partition, as had the Arab member states of the General Assembly. After the passage of the resolution, as a direct result, armed conflict broke out between Palestinian Arabs and the Jews. The British were still responsible for maintaining order in Palestine, which they were not entirely successful in. During the period between 30 November 1947 and 3 April 1948, 1 977 people were killed and 4 210 were wounded.⁵⁵

Great Britain was eager to cover its losses and end its involvement in the infected conflict as quickly as possible. Thus, The British Government determined that the mandatory government would end at one minute past midnight on 15 May 1948, four and a half month prior to the date set by the General Assembly. The official termination of the mandate came to be carried out even earlier, at 9.00 A M on the 14 of May 1948 the high commissioner and the military commander left Jerusalem and Palestine was left without any formal government.⁵⁶

3.1 The genesis of the United Nations

The United Nations is an organization without any equivalent in the international community. When founding the Organization, representatives of several nations endeavoured to create something that, despite prior efforts, never had been successfully constructed: an instrument for maintaining global peace and justice. The intentions behind this endeavour as well as a theoretical basis for the classification of the Organization and its Charter in relation to other juridical instruments will be described in the following to illustrate some of the obstacles that such an Organization may encounter. To investigate what position the Organization really has, is essential for a discussion of what obligations to act in accordance with its provisions the states of the world have.

The genesis of the United Nations came to a start when Hitler's forces attacked Poland and the breakdown of the League of Nations became evident. The Second World War had commenced and as it grew to greater proportions the question of the post-war situation and how to prevent new wars in the future was raised.⁵⁷

In the late summer of 1944 a double conference was held at Dumbarton Oaks in the outskirts of Washington including the four great powers: China, Great Britain, the Soviet Union and the USA. The purpose of the conference was to agree on an understanding in principle of how to establish a system of wide and permanent general security. They were not aiming at a

⁵⁵ Geddes, Charles L: *A Documentary History of the Arab-Israeli Conflict*, Praeger Publishers, New York, 1991, p 285.

⁵⁶ Ibid, pp 279-80.

⁵⁷ Grewe, Wilhelm G: *The History of the United Nations*, in Simma (ed.): *The Charter of the United Nations – A commentary*, C H Beck Verlag, München, 1995, p 2.

completely worded draft charter but rather a guideline paper. Such a paper was published on October 9, 1944 under the heading "Proposals for the Establishment of a General International Organization".⁵⁸

All questions had not been solved at the Dumbarton Oaks conference. A summit meeting between Roosevelt, Churchill and Stalin was held in Yalta to work out the remaining differences in February 1945. The Dumbarton Oaks proposal supplemented by the settlements originated at the Yalta summit were to constitute the basis for the general conference at San Francisco in 1945.⁵⁹

3.1.1 The League of Nations

In 1914 peace had prevailed in Europe for almost half a century. During this time several efforts had been made to create institutions promoting cooperation between states to achieve a peaceful settlement when conflicts would arise. A feeling that large-scale war could be prevented was widespread. But in the middle of the summer of 1914 a sudden change took place. The shot in Sarajevo at the 28th of June was the spark that ignited the First World War and within a month all hopes for an everlasting peace in Europe was transformed into despair.⁶⁰

The idea that this war maybe could have been avoided as future wars could, if only a better apparatus existed for eliminating threats to peace, was widely accepted. The Allied Powers promoted the concept of an organization including all peace loving states striving to avoid a repetition of the devastation that was the result of war. The 28 of June 1919 the Treaty of Versailles were signed. The first 26 Articles formed the League of Nations, which came into force the 10th of January 1920. The basic goals of the League were to promote international cooperation and create international peace and security. However, the League never gained the importance that was once hoped for.⁶¹

Forming an organization meaning to prevent the outbreak of war is a tricky business in a world where the use of force is not monopolized, but instead shared among all the sovereign states. The League of Nations had to face this basic obstacle, as any international organization would. In addition, certain circumstances, special for this moment of history further complicated the problematic situation. In the period between the two great wars seven great powers existed in the world. Out of these powers Great Britain and France were practically the only ones that wholeheartedly supported the League and showed dedication to accomplish the goal of

⁵⁸ Ibid, p 8.

⁵⁹ Ross, Alf: *Constitution of the United Nations*, Ejnar Munksgaard, Coopenhagen, 1950, p 19.

⁶⁰ Ross, Alf: *De Forenede Nationer*, Nyt nordisk Forlag, Copenhagen, 1963, p 22.

⁶¹ Ibid, pp 22-23.

creating a potent international organization. The other great powers were either not parties of the Covenant - for example the USA - or had a reserved attitude towards it, considering it to be mainly an instrument for British and French politics. By the end of the 1930's the League of Nations therefore had basically lost all its influence.⁶²

3.1.2 The San Francisco conference

In San Francisco during the summer of 1945, delegations representing 50 states were gathered to form what was to become the Charter of the United Nations. The Second World War had proved that the League of Nations was not sufficiently effective in maintaining or providing a stable and peaceful world order. Both the United Nations and the League of Nations were born in the aftermath of large-scale, devastating wars. The horrors of these wars had to be prevented from repeating themselves. This was a common desire among the people of the world and their leaders were searching for a more effective alternative to the League of Nations.⁶³

The representatives at the conference were organized in four commissions each with certain areas of responsibility. The commissions were subsequently divided in committees. Committee I/1 was responsible for the preamble of the Charter and the purposes and principles of the Organization. Decisions were made by a 2/3-majority vote, at the Conference, which aimed to ensure that even the smaller states were given influence in the making of the Charter, according to Bring.⁶⁴

Of course the greater states had a dominant standing in the discussions. The five principal powers⁶⁵ had strong influence in all parts of the conference. Whenever a difference of opinion reached a critical point, all the delegates were aware of that a veto of one of the five powers would endanger the whole project. This awareness and the strong will of fulfilling the objectives of the Conference contributed to the adopting of the draft previously negotiated by the Great Powers at the Dumbarton Oaks conference and the Yalta-meeting without any major changes.⁶⁶

The delegates at the San Francisco-conference were set on creating a basis for international cooperation among states. The Charter was to describe principles of public international law that could govern the relations

⁶² Ibid, p 28.

⁶³ Ross, Alf: *Constitution of the United Nations*, Ejnar Munksgaard, Coopenhagen, 1950, p 11.

⁶⁴ Bring, Ove: *FN-stadgans folkrätt*, Norstedts Juridik, Stockholm, 1992, pp 22-23.

⁶⁵ USA, Soviet Union, Great Britain, France and China. France was not a party to the Dumbarton Oaks conference but was considered as one of the great powers at the San Francisco conference.

⁶⁶ Grewe, Wilhelm G: *The History of the United Nations*, in Simma (ed.): *The Charter of the United Nations – A commentary*, C H Beck Verlag, München, 1995, p 11.

between states in general. It was necessary that these basic principles were applied even upon the actions by states that were not members of the Organization. The creation of somewhat binding statutes even for states that had not already ratified the Charter was not as difficult to promote as it might appear. The states that were not represented at the Conference were either the enemy powers in the Second World War, which after their defeat had no choice but to accept the will of the victors, or states that had been neutral in the past and were expected to become members of the new Organization in time. It was even expected that the membership eventually would reach somewhat universal proportions and thereby make the Charter binding to all states of the world.⁶⁷

⁶⁷ Bring, Ove: *FN-stadgans folkrätt*, Norstedts Juridik, Stockholm, 1992, pp 23-24.

4 The United Nations, what is it?

The United Nations is at times regarded as a form of world government. The government of a single state may strive for the well-being and prosperity of its inhabitants without further concern for how the inhabitants of other states may be affected. By advocating principles from which the whole world could benefit the UN is put on a higher moral plane than the states of which it is composed. Undoubtedly, the wordings of the preamble of the Charter highlight such idealistic expectations. In practice the UN cannot function completely as national governments, according to Roberts and Kingsbury. A general inter-governmental organization's decision-making and implementation-powers are limited. It lacks the boundaries that define and distinguish a territorial entity, and is always operating concurrently with governments and other entities, which it does not control. It is difficult to separate the performances of the UN from the will of the member states. The Organization was created by governments and can do little without the assent of at least the majority of them.⁶⁸

The United Nations organization is definitely one of a kind. An innumerable amount of bilateral and multilateral treaties flourish in the relations among states – and almost every state has its own written constitution. Thus, both treaties and constitutions are familiar documents in international law. The Charter of the UN is not easily defined as one or the other; it has similarities with both. However, the differences between how a treaty and a constitution evolve and bind its parties are manifest in international law. Therefore the classification of the Charter is of interest.

Ross asserts that in scholarly usage it is possible to distinguish between two different determining factors defining the concepts of treaty and constitution. The first method for defining a certain institution emphasizes the *historical origin as a determining factor*. Applying the second method, the focus is directed on the *internal systematic basis of validity of the institution*.⁶⁹

4.1.1 Historical origin

A certain institution can be established in two different ways, depending on what it bases its competence on to produce binding rules for its subjects. The institution and its system of rules may be based on the principle of the

⁶⁸ Kingsbury and Roberts, *United Nations, Divided World*, Oxford University Press, 1993, pp 15-16.

⁶⁹ Ross, Alf: *Constitution of the United Nations*, Ejnar Munksgaard, Coopenhagen, 1950, pp 30-35.

binding force of agreements. That would bind only the subjects who have given their consent to the introduction of the system. Or it may be based on the *principle of legislation*; some implied competence to form rules of law binding on others than those who have consented to their forming. Relying on the binding force of agreements, a number of states can create a treaty among them; binding them to the conduct that they all have given their consent to when signing the treaty. The principle of legislation would, if it refers to the creation of an organization with appertaining legal competence, rather lead to the establishment of a constitution.⁷⁰

International law can in principle not be based on legislation as in constitutions. However, it cannot only be originated by agreements. According to Ross this is evident since the basic norm itself, that agreements must be kept, hardly can be based on an agreement. International customary law has variable binding effects even on states that were not part of the creation of the custom and therefore is not based on consent but rather executes as legislation. If this can be agreed upon, in Ross's view, it is not farfetched to apply the same reasoning to the creation of law that is brought about in the form of treaties. Even treaties could, according to this argument, constitute general legislation, constitution.⁷¹

The UN Charter is primarily a treaty. Historically it originates from an agreement of states and will normally only be binding on the contracting parties. But as described above it is not unthinkable that a treaty might have legislative effects even for others than the contracting parties. Some parts of the Charter could be accused of going beyond the principle of the binding force of agreements, intending to create legislation. Article 2 (6) declares that the organization is to ensure "that states which are not members of the United Nations act in accordance with these principles so far as may be necessary for the maintenance of international peace and security".⁷²

The Charter has been subscribed to by all the great powers and a vast majority of the states of any importance in the world. If the states that remain outside the organization were able to, unopposed, commit acts of aggression or in other ways obstruct the organizations efforts to maintain peace, it could seriously hamper the work of the UN. Therefore the delegations at the San Francisco conference openly recognized that legislative intention was present.⁷³

The purpose of the UN is not only to maintain peace within the Organization, the whole international community is intended to enjoy peace, and world peace is the final aim. Kelsen claims that in order to fulfil this purpose the Charter imposes direct obligations on the members, but indirectly also upon the states that are not members. The organization would

⁷⁰ Ibid, p 31.

⁷¹ Ibid, p 31.

⁷² Ibid, p 32.

⁷³ Ibid, pp 32-33.

accordingly be authorized to react against a non-member state that does not act in conformity with the principles of the Charter.⁷⁴

Article 2 (6) does certainly display an intention to make the Charter not only the law of the United Nations but of the whole international community, that is to say, to be general, not only particular international law. However, Kelsen states that one of the fundamental principles of international law is that a treaty can only impose duties and confer rights upon the contracting parties.⁷⁵

4.1.2 Internal systematic basis of validity

As soon as a certain institution has come validly into existence, it regulates the conditions governing valid resolutions for the amendment of the system itself, and thus for the validity of the system as a whole. The validity is defined by the rules of the system concerning its own amendments. Ross states that if the unanimous consent of all the members is required for an amendment, the basis of validity in an internal systematic sense is the principle of the binding force of agreements. If it is possible to make amendments in other ways, the principle of legislation is at hand. If this line of argument were applied on the question of defining an institution as based on a treaty or a constitution, a treaty would be present if the unanimous assent were required for amendments. One could speak of the legislative effect of a constitution if amendments instead can be made by resolutions passed by a certain majority.⁷⁶

Amendments to the Charter of the United Nations are regulated by its Articles 108 and 109. Article 108 states that an amendment shall come into force for all members when it has been adopted by a vote of two thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two thirds of the members, including all the permanent members of the Security Council. Articles 108 and 109 deals with different types of amendments, but the material prerequisites and legal effects are basically the same.⁷⁷

As stated in Article 108 an amendment that has come into force is legally binding on each member of the UN, even if the member in question voted against the amendment in the GA. This obligation means that a member state undertakes to apply any future amendments to the Charter.⁷⁸ Ross

⁷⁴ Kelsen, Hans: *The Law of the United Nations*, Praeger, New York, 1964, p 106.

⁷⁵ Ibid, pp 109-110.

⁷⁶ Ross, Alf: *Constitution of the United Nations*, Ejnar Munksgaard, Coopenhagen, 1950, p 35.

⁷⁷ Karl and Mützelburg: *Amendments*, in Simma (ed.): *The Charter of the United Nations – A commentary*, C H Beck Verlag, München, 1995, p 1165.

⁷⁸ Ibid, p 1174.

describes this system for amendments as a technically unlimited power of legislation regarding the members.⁷⁹

According to Ross's theory of classification, in a systematic respect the Charter is a constitution. Its basis of validity is a competence to legislate, exercised with respect to the members by the procedure indicated in Article 108. Ross concludes that a certain order must be called a constitution, according to its content, if it aims at creating organs for a collective and at establishing corresponding powers. In this sense there can be no doubt that the Charter is a constitution – besides containing norms directly regulating the rights and duties of the members.⁸⁰

4.1.3 The Competence of the UN

The major difference between a treaty and a constitution, as above, is the demand for a unanimous consent of the parties to every detail of a treaty, while the legislative effects of a constitution bind even those who disagree with the position of the majority. The UN Charter undoubtedly bears several features of a constitution. Brownlie advocates that: “*As a matter of description it is much less accurate to say that the United Nations is not a form of government than to say that it is.*”⁸¹

Most treaties are not as far-reaching in the obligations conferred upon their parties, as the United Nations Charter. The scope of the matters that is included in the cooperation among states bound together by certain treaties vary. However, not many of those, if any, have such a developed organizational structure as the UN. It can be argued that the legal status of the UN resembles the ones of national governments and that the constituting treaty, the Charter, is similar to their constitutions.

The UN possesses juridical personality in the field of international law, as well as in the national law of the members. Hence, the UN has the capacity to be a subject of legal duties and legal rights. An international community possesses juridical personality in the field of international law if its organs have the competence to exercise certain functions in relation to the members, especially the power to enter into international agreements establishing duties, rights and competences of the community. These duties, rights and competences differ from the individual ones of the states. Certainly they are conveyed on the members, but have still a collective status, since the organs of the community in accordance with the constituent treaty adopt them. Centralized organs carry out the duties and exercise the

⁷⁹ Ross, Alf: *Constitution of the United Nations*, Ejnar Munksgaard, Copenhagen, 1950, p 37.

⁸⁰ Ibid, pp 37-40.

⁸¹ Brownlie, Ian: *The United Nations As a Form of Government*, HILJ, 1972, p 421.

rights and competences on behalf of the organization primarily, only secondarily on behalf of the members, claims Kelsen.⁸²

The competence of the UN to enter into international agreements is not unrestricted. The Charter does not contain any general provision authorizing the organization to make such agreements. Legally, the UN only has power to enter into those international agreements that it is authorized by special provisions of the Charter to conclude.⁸³

As we have seen above, decisions taken by the Organs of the UN in due order can be binding to all its members. Whether a certain member opposes to the decision have no consequence as to its legality nor binding force. The constitutional character of the Organization obligates the member states to act in accordance with the decisions taken by the collective. Israel, a member of the UN, would therefore be compelled to implement the provisions of the Charter and certain decisions by the UN-organs even if they do not approve of their implications. The UN's legislative character, the Charter as an element of international law, may imply that even peoples and states that are not members of the Organization are obligated to take its provisions and decisions into account. Accordingly this discussion is of relevance even to the Palestinians, as non-members of the UN.

⁸² Kelsen, Hans: *The Law of the United Nations*, Praeger, New York, 1964, p 329.

⁸³ *Ibid*, p 330.

5 The legal position of the United Nations Charter

The UN Charter holds a special position among the international organizations. Even in normal circumstances, the interpretation of the law of international organizations depends on various factors. The founding Charter is not of a structural homogenous nature. It contains contractual as well as normative elements. The contractual elements, such as questions concerning the conclusion of the Charter, termination and to some extent amendment or modification, are interpreted by the ordinary rules of international organizations, due to the equal standing of the partners. However, the Charter's normative side can only find its equivalent among domestic public law; the constitutional and administrative law of the member states.⁸⁴

According to Higgins international law basically derives from two sources: *contractual law* and *general international law*. Contractual law, by her account, comprises both bilateral treaties, constituting a special regime, and multilateral treaties constituting a general regime; as for example the UN. General international law includes *customary rules* created by general practice of states and *general principles of law* that are widely accepted. These sources of law are recognized in Article 38 of the Statute of the International Court of Justice as grounds for their evaluation of international disputes. As a subsidiary mean for the determination of the rules of law, also judicial decisions and the writings of distinguished jurists, is mentioned.⁸⁵

Bring states that general principles of law, represents a very small element of general international law in relation to customary law.⁸⁶ International customary law is constituted by two elements: *usus* and *opinio iuris*.⁸⁷ *Usus* represents the objective criteria of the two, state practice, while *opinio iuris* has a more subjective character, a conviction of lawfulness. Thus, it is not sufficient to identify solely a practice of states to establish a rule of customary international law; it must be proved that the states in question act accordingly due to a conviction that it is the only right thing to do, that they are forced to do so by law.⁸⁸

⁸⁴ Ress, Georg: *The Interpretation of the Charter*, in Simma (ed.): *The Charter of the United Nations – A commentary*, C H Beck Verlag, München, 1995, p 27.

⁸⁵ Higgins, Rosalyn: *Law, Politics, and the United Nations*, in Falk and Mendlovitz (ed): *The United Nations*, New York, 1966, p 39.

⁸⁶ Bring, Ove: *FN-stadgan och världspolitik*, Norstedts Juridik, 1997, p 21.

⁸⁷ Nicaragua v. USA (Merits), ICJ Report, 1986, 14, at 97.

⁸⁸ Malanczuk, Peter: *Akehurst's Modern Introduction to International Law*, Routledge, 1997, p 39.

“It matters not that the action performed accords with the convenience of the state – it would be a curious form of Puritanism which insisted that convenience and legality could never run side by side; what is relevant is the belief in the nature of the obligation as binding.”⁸⁹

Multilateral treaties, such as the UN Charter, may very well constitute a document of legally binding customary law. If the Charter aims at codifying customary law and fulfils the above-mentioned criteria, it can be presented as evidence of international customary law even in relation to a state that is not a contracting party.⁹⁰ If a multilateral treaty simultaneously forms a part of general international law, amendments or modifications thereof are far more complicated to achieve, than if it were solely a matter of a regular treaty where ordinary rules of international organizations would be sufficiently applicable. When dealing with changes of general international law, a more complex body of rules is implicated and the changing process is more protracted.⁹¹

In regard to the UN Charter, Bring argues that the *usus*-element with a detectable state practice is fulfilled since most of the members, as a rule, refrain from acting in conflict with the Charter and in addition accepts the Charter as a whole every time a new member is admitted. To become a member of the UN a voting in the General Assembly will be held in accordance with Article 4 of the Charter, whereas both the new members, as well as the voting ones, show their acceptance of the Charter.⁹²

However, an integrated evaluation that includes the *opinio iuris*-element is required to determine whether the Charter can be regarded as a constituent of customary law and therefore a part of general international law. The parties are, as we have seen, inclined to act in accordance with the provisions of the Charter, but the question is why they do so. The subjective element of customary law implicates a conviction of the fundamental value of the action, which the provision in question points out. In the General Assembly the members have an opportunity to collectively manifest an *opinio iuris*. According to Bring, by doing so, the members have on several occasions accepted the principles of the UN Charter as the fundamental principles of the international community, thus adding the last component for the establishment of general international law.⁹³

Treaty-making and judicial decisions are, in the views of Higgins, far more rigid methods of legal regulation than international custom. International

⁸⁹ Higgins, Rosalyn: *Law, Politics, and the United Nations*, in Falk and Mendlovitz (ed): *The United Nations*, New York, 1966, p 40.

⁹⁰ Malanczuk, Peter: *Akehurst's Modern Introduction to International Law*, Routledge, 1997, p 40.

⁹¹ Bring, Ove: *FN-stadgan och världspolitiken*, Norstedts Juridik, 1997, p 22.

⁹² *Ibid*, p 24.

⁹³ *Ibid*, pp 25.

custom is modified and developed by the practice of states. Higgins concludes that customary international law constitutes the most political form of international law, as opposed to the basically juridical form represented by treaties. However, the conduct of the UN-organs, bound by the rules of the Charter, as well as general international law, may play an important part in creating customary law. A vast amount of the states in the world are members to the UN and represented in its organs, why the actions of the organs can be seen as a sign of state practice, indicating a basis for a development in international law.⁹⁴

Provisions within the Charter itself regulate changes and amendments to the Charter. Adaptations of the Charter, in the sense of a multilateral treaty, are therefore comparatively uncomplicated, as long as the majority of the parties to the treaty support the adaptation. But in the regard of a codification of custom as a part of general international law, changes are not as easily performed. Customary law is depending on both a recurring state practice and a conviction of the fundamental value of that practice. This is not something that can be proven overnight. A multilateral treaty that changes through a relatively swift voting procedure does therefore not necessarily comprise international customary law, even if a majority of the states of the world are parties to it.

5.1 The jus cogens status of the UN Charter

Jus cogens, or peremptory norm of international law, protects the basic values on which the international community as a whole is built.⁹⁵ The Vienna Convention on the Law of Treaties of 1969 classifies it in Article 53 as follows:

“a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”⁹⁶

The incorporation of the jus cogens concept in the Vienna Convention started a vivid discussion concerning the limits of sovereign consent and the concrete substance of the term. Some states, for example France, initially contested the drafting of Article 53. However, the concept of jus cogens has

⁹⁴ Higgins, Rosalyn: *Law, Politics, and the United Nations*, in Falk and Mendlovitz (ed): *The United Nations*, New York, 1966, pp 39-40.

⁹⁵ Zemanek, Karl: *New Trends in the Enforcement of erga omnes Obligations*, Max Planck Yearbook of United Nations Law, Volume 4, 2000, p 6.

⁹⁶ Bring and Lysén: *Materialsamling i folkrätt*, Iustus Förlag AB, 1996, p 110.

been anchored in the Vienna Convention by an overwhelming consensus of states.⁹⁷

The ICJ has indirectly confirmed the existence of jus cogens in reference to obligations *erga omnes* in the Barcelona Traction Case of February 5, 1970. The Court spoke of the “*obligations of a State towards the international community as a whole*” which were “*the concerns of all States*” and for whose protection all States could be held to have a “*legal interest*”.⁹⁸

Violations of jus cogens will in many cases also constitute violations of obligations *erga omnes*. Jus cogens represents rules from which no derogation is permitted due to their supreme position in the hierarchy of norms in public international law. *Erga omnes* obligations are those in whose performance all states must be seen to have a legal interest as a result of their fundamental importance for the well-being of all mankind. Accordingly, obligations *erga omnes* are not necessarily identical with jus cogens. A legal act that conflicts with jus cogens represents a nullity. A breach of an *erga omnes* obligation is regarded as an offence not only against a state directly affected by the breach, but also against all members of the international community. Consequently, even states that have not been injured directly may be deemed to have the right to impose countermeasures against the perpetrator of the breach.⁹⁹

Article 39 of the UN Charter authorizes the Security Council to “*determine the existence of any threat to the peace, breach of the peace or act of aggression*” and to take all necessary measures to maintain or restore peace. These enforcement measures are also possible to apply against non-members. According to Verdross this rule has not been fundamentally opposed, whereas one can conclude that general recognition of the principles of the Charter governing the use of force exists, even among states that are not members of the UN. As a consequence of the general recognition and effects on non-members the Charter would have attained the status of jus cogens.¹⁰⁰

Zemanek states that the exact substance of the jus cogens concept seems to be uncertain, but it is generally recognized that the fundamental principles of the UN Charter, especially Article 2 (4) prohibiting the use of force, have this character. Unilateral acts that violate such principles are accordingly never possible.¹⁰¹

⁹⁷ Simma, Bruno: *From Bilateralism to Community Interest in International Law*, RdC 250, 1994, p 287.

⁹⁸ Barcelona Traction Case, ICJ Reports, 1970, 33, at 32.

⁹⁹ Bring, Ove: *FN-stadgan och världspolitiken*, Norstedts Juridik, 1997, pp 227-230.

¹⁰⁰ Verdross, Alfred: *Jus Dispositivum and Jus Cogens in International Law*, AJIL, 1966, p 62.

¹⁰¹ Zemanek, Karl: *New Trends in the Enforcement of erga omnes Obligations*, Max Planck Yearbook of United Nations Law, Volume 4, 2000, p 7.

The International Law Commission of the United Nations gave notion in 1963 that they considered Article 2 (4) of the Charter to be of jus cogens character.¹⁰² The ICJ in the Nicaragua Case later supported this view. The Court noted that the prohibition of the use of force frequently was referred to, in statements by State representatives, as being not only a principle of customary law but also a fundamental principle of such law. The Court quoted the Commission's notion, thereby expressing a certain level of agreement.¹⁰³

5.2 The basic goals, purposes and principles of the United Nations

The UN Charter contains provisions governing the organs of the Organization; who they are, what matters they are competent to manage and what valid actions they are entitled to perform. Apart from these specific rules of conduct, the Charter also offers provisions that describe the general purposes of the Organization and basic principles that should govern the actions taken by the various organs. Such provisions are rarely part of the constitution of states since, according to Ross, a state is not created at a certain moment designed to fulfil a specific purpose, but rather to provide an all-inclusive framework for the conduct within the community in question. Associations of non-governmental character, on the other hand, are only in charge of certain aspects of the parties' mode of existence; therefore a declaration of the purposes is paramount. The UN was not established to govern every part of the members' lives, only actions relating to certain questions, which is why the purposes and principles are declared.¹⁰⁴

The Organizations' purposes as expressed in the preamble of the Charter can be described as maintaining international peace and security, at the same time as social-economic progress shall be promoted.¹⁰⁵ Concerning the legal status of the preamble, Kelsen advocates that since it is a part of the Charter, the consequence must be that it has virtually the same binding force as other parts. But the contents of the Charter, similar to those of any statute or treaty, have; according to Kelsen, only binding force if it has a normative character. The meaning of the preamble is not to establish, by itself, obligations. The obligations of the members are to be found in other parts of the Charter.¹⁰⁶ The preamble does not set forth any basic obligations of the member states, but it highlights some of the motives of the founders of the

¹⁰² Yearbook of the International Law Commission, 1963, p 213.

¹⁰³ Nicaragua v. USA, ICJ Reports 1986, pp 100-101.

¹⁰⁴ Ross, Alf: *De Forenede Nationer*, Nyt nordisk Forlag, Copenhagen, 1963, pp 59-60.

¹⁰⁵ Ibid, pp 62-63.

¹⁰⁶ Kelsen, Hans: *The Law of the United Nations*, Praeger, New York, 1964, p 9.

Organization. Therefore, it can work as an interpretative guideline for the provisions of the Charter.¹⁰⁷

How the organs of the Organization shall act to achieve the goals set forth in the preamble is difficult to ultimately state. The “purposes and principles” of the United Nations as described in Chapter 1, Articles 1 and 2 of the Charter functions as a framework for the conduct of the UN organs. Decisions taken by the organs may be regarded as bearing upon these purposes and principles, in the views of Wolfrum.¹⁰⁸

In the following, only the basic purposes and principles that are of primary concern for the discussion relating to the question of Palestine will be more thoroughly described.

5.2.1 The principle of non-intervention

Article 2 (7) of the Charter imposes a restriction on the competence of the Organization. It states, “nothing shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state”. The competence of the UN would therefore obviously not comprise such matters as dictating the financial politics or the forming of the infrastructure of any state. Such involvement would violate the sovereignty of states and has never been considered as a part of the purposes of the Organization. However, the question remains what exact significance “domestic jurisdiction” is to be given.¹⁰⁹

The principle of non-intervention was also a part of the League of Nations, incorporated in Article 15 (8) of the Covenant. However, it was adopted to fit the needs of the UN before it was transferred into its charter. The Covenant stated that matters that lay “solely within the domestic jurisdiction” were not covered by the scope of the League of Nations. The new provision more strongly secures state jurisdiction by excluding matters that not “solely” but “essentially” belong to domestic jurisdiction, from the competence of the UN.¹¹⁰

Ross claims that the evolution of the principle of non-intervention, since the days of the League of Nations, was directed to strengthen the safeguard for domestic jurisdiction of states. At the San Francisco conference both the great powers and the majority of the smaller states shared a will to protect the sovereignty of states from interventions of the Organization. The

¹⁰⁷ Wolfrum, Rüdiger: *Preamble*, in Simma (ed.): *The Charter of the United Nations – A commentary*, C H Beck Verlag, München, 1995, p 48.

¹⁰⁸ Wolfrum, Rüdiger: *Purposes and Principles*, in Simma (ed.): *The Charter of the United Nations – A commentary*, C H Beck Verlag, München, 1995, p 50.

¹⁰⁹ Ross, Alf: *De Forenede Nationer*, Nyt nordisk Forlag, Copenhagen, 1963, p 67.

¹¹⁰ Ermacora, Felix: *Article 2 (7)*, in Simma (ed.): *The Charter of the United Nations – A commentary*, C H Beck Verlag, München, 1995, p 142.

restriction was considered to be so far-reaching that some feared that it would seriously hamper the work of the UN.¹¹¹

The practice by the organs has, according to Ross, proved these fears to be unfounded. On the contrary, the article has been interpreted very liberally, in favour of the competence of the Organization. The UN has on several occasions found itself competent to deal with matters concerning a states domestic government and administration.¹¹² But even if the practice has been relatively consistent, the position of separate states has varied noticeably from time to time in relation to the issue at hand. Ross argues that this inconsistency follows, since the interpretation is not based on juridical arguments, but on political. The states positions will therefore vary according to their political interest in the certain issue. When an accusation is raised towards a state it is very likely that it will claim that the issue is within the domestic jurisdiction and accordingly is none of the UN's business. Other states, that have mutual interests with the accused state, are also inclined to be in opposition of intervention. However, this group tends to be in minority opposing the common desire among the other member states to uphold the competence of the Organization, as soon as they feel that the issue can be of relevance for other states, and therefore should be dealt with inside the scope of the UN.¹¹³

5.2.1.1 The meaning of “essentially ... domestic jurisdiction”

A final definition of the term is yet to be found, but certain aspects could be regarded as vital for the interpretation. Ross discusses two¹¹⁴ different aspects of why somebody – a state or an individual – could claim that something is their private business and has nothing to do with others:

First the issue at hand could be of nobodies concern because it does not infringe the rights of another. Between states this would mean that something that is not subject to regulation in international law would be within the domestic jurisdiction of a state, leaving any discussion concerning the conduct of a state in such issues unjustifiable. This argument is fairly easy to comprehend since the UN is an organ relying on lawfulness as a basic characteristic in defining its competence.

Secondly, a state may argue that a certain circumstance does not conflict with interests of any other state, which would make it a matter within their domestic jurisdiction. In principle everything could be of interest to another, why Ross argues that a reasonable demarcation must be that matters without any essential interest to other states fall beyond the limit of the term.

¹¹¹ Ross, Alf: *De Forenede Nationer*, Nyt nordisk Forlag, Copenhagen, 1963, pp 71-72.

¹¹² For exempel the Franco regime in Spain (1946) and the communist reform in Czechoslovakia (1948).

¹¹³ Ross, Alf: *De Forenede Nationer*, Nyt nordisk Forlag, Copenhagen, 1963, pp 70-71.

¹¹⁴ *Ibid*, pp 74-75.

Ross advocates that the second interpretation, what is to be considered as within domestic jurisdiction, is probably the one intended in Article 2 (7). A certain matter would accordingly be within the domestic jurisdiction of a state if it does not essentially concern the interests of other states. Whether it is a matter dealt with in international law or not would not be a decisive attribute. Otherwise the Organisation would be restricted from taking action in conflicts without a clear reference to public international law. That would, in Ross's view, contradict the purposes of the UN. The Organisation is established to deal with both political and socio-economic issues, promoting its values in general, not only to uphold the rules of public international law.¹¹⁵

Ermacora claims that basically all authors incorrectly consider Article 2 (7) to be a prohibition of intervention in a substantive sense. This generalization does not suffice; the article is to be understood as a delimitation of competence between the states and the organs of the UN. According to Ermacora 2 (7) merely provides an organizational rule of conduct for the organs of the UN. Such a rule can only embrace activities that are possible, as well as permissible under the charter, of course with the exception of matters that fall under Chapter VII as declared in the Article.¹¹⁶

In Ermacor's interpretation Article 2 (7) does not describe what falls outside the jurisdiction of the UN. It only tells us that what is not mentioned in the Charter is to be considered as under the domestic jurisdiction of states. The only certain characteristic to matters that, according to their essence, fall within the domestic jurisdiction of a state, Ermacora claims, seems to concern a state's governmental system. The rest can in theory be incorporated in the Charter, thus including it in the competence of the UN.¹¹⁷

Article 15 (8) of the Covenant of the League of Nations spoke of matters "solely" within the domestic jurisdiction instead of "essentially", as in the UN Charter. Kelsen finds this change unfortunate. He argues that there are no matters that can be defined as "essentially" within the domestic jurisdiction of a state. Even matters such as form of government and acquisition or loss of citizenship may be the objects of an international agreement. The fact that these matters are, normally, not regulated by a rule of international law is no reason to assume that they are "essentially" within the domestic jurisdiction of the states. The determining factor is whether or not the matter, out of which a dispute arises between two states, is regulated either by customary international law or a treaty to which the involved states are parties. If international law does not impose any obligations in this respect, then the matter is solely, never essentially, within the domestic

¹¹⁵ Ibid, p76.

¹¹⁶ Ermacora, Felix: *Article 2 (7)*, in Simma (ed.): *The Charter of the United Nations – A commentary*, C H Beck Verlag, München, 1995, p 150.

¹¹⁷ Ibid, pp 150-152.

jurisdiction of a state. What is a part of international law can only be decided by examining international law in relation to the matter in question.¹¹⁸

Article 2 (7) states that in matters, which are within the domestic jurisdiction of state, members are not obliged “to settlement under the present Charter”. This could, in Kelsen’s views, be interpreted to mean that the members are not forced to deal with such matters in accordance with the principles of the Charter. Instead of acknowledging for example the principle in Article 2 (3) to settle disputes by peaceful means, a state dealing with a matter essentially within its domestic jurisdiction, could find itself to be entitled to use force. Kelsen further advocates that this interpretation of Article 2 (7) could be in conformity with the wording of Article 2 (3), which obligates the members to settle by peaceful means only their “international” disputes. Thus leaving the disputes that are not of international character, but rather risen out of a matter of domestic jurisdiction, outside the scope of the provision.¹¹⁹

Article 2 (4) of the Charter provides a general prohibition on the threat or use of force. The use of force can therefore be allowed only if an express exception to this rule is stipulated. Article 2 (7) could according to Kelsen be interpreted as such an exception with its reference to matters that are essentially within the domestic jurisdiction of a state. However, in keeping with Article 2 (7) *in fine*, the principle of non-intervention “shall not prejudice the application of enforcement measures under Chapter VII”. Chapter VII deals with actions by the UN with respect to threats to the peace, breaches of the peace and acts of aggression. So if the Security Council finds that such a threat to peace is at hand, it is authorized to intervene.¹²⁰

In Article 1 (1), “to maintain international peace and security” is described as the ultimate purpose towards which all the activities of the organization are to be directed. Article 1 (1) only includes *international* peace and security in the purposes mentioned, just as the wording in Article 2 (3). Such situations that are mentioned in Chapter VII, but take place within the boundaries of an individual state, could therefore be outside the competence of the UN. However, civil wars and revolutions might very well involve a danger to the international peace, even if the major conflict occurs solely within the boundaries of one state.¹²¹

¹¹⁸ Kelsen, Hans: *The Law of the United Nations*, Praeger, New York, 1964, pp 776-777.

¹¹⁹ *Ibid*, pp 781-782.

¹²⁰ *Ibid*, 783.

¹²¹ Ross, Alf: *Constitution of the United Nations*, Ejnar Munksgaard, Coopenhagen, 1950, pp 110-111.

5.2.2 The principle of self-determination

The principle of self-determination has been of some importance ever since the French Revolution.¹²² The First World War emphasized the importance of the principle. Both the Eastern and the Western Powers made proposals to consider it as a standard for the behaviour of states. For instance President Woodrow Wilson of the United States stated on the 11th of February 1918:

“The rights of nations to self-determination is no mere phrase, it is an imperative principle of action, which will be disregarded by statesmen in future only at their own risk.”

In the Atlantic Charter of 1941 self-determination was described as a principle of policy entailing respect for “the right of all peoples to choose the form of government under which they will live”. By the establishment of the United Nations the right to self-determination has reached an even higher status as becoming an important universal principle.¹²³

Article 1 (2) of the Charter includes the “respect for the principle of equal rights and self-determination of peoples” in the purposes of the United Nations. The use of the word purpose may indicate that Article 1 solely describes a form of political program for the UN, which in that case could give no reason for any individual claim of rights or duties based on it. Nevertheless, the legal nature of these principles has never been seriously questioned. Article 2 (4) of the Charter states that members of the Organization must refrain from all activities, which could impair the “purposes” of the Charter. The legally binding nature of the purposes described in Article 1 would be apparent, since they are expressly described as the object of legal protection, according to Doehring.¹²⁴

The principle of self-determination is also referred to in Article 55 of the Charter. This provision speaks of certain measures that the UN shall promote in the strife for a general stability and well being among nations “based on respect for the principle of equal rights and self-determination of peoples”. This provision presupposes that the right of self-determination must be promoted, further indicating the legally binding nature of the principle.¹²⁵

The distinction between the terms “peoples”, “nations” and “states” in use within the Charter has been a question of some uncertainty. Article 1 (2)

¹²² Bring, Ove: *FN-stadgans folkrätt*, Norstedts Juridik, Stockholm, 1992, p 226.

¹²³ Gayim, Eyassu: *The United Nations Law on Self-Determination and Indigenous Peoples*, in *Nordisk Tidskrift for International Ret*, 1982, pp 53-54.

¹²⁴ Doehring, Karl: *Self-Determination*, in Simma (ed.): *The Charter of the United Nations – A commentary*, C H Beck Verlag, München, 1995, p 57.

¹²⁵ Magiera, Siegfried: *Composition*, in Simma (ed.): *The Charter of the United Nations – A commentary*, C H Beck Verlag, München, 1995, p 219.

speaks of **one** principle that includes **two** elements: the principle of equal rights and the principle of self-determination of *peoples*. It is arguable that the term peoples in this Article may not mean the state, but one element of a state: the population. However, the paragraph concerns the relations among states. Kelsen therefore comes to the conclusion that the term peoples in connection with equal rights must mean states, since only states have equal rights according to general international law. The purpose of the Organization to develop friendly relations among states can, according to Kelsen, not be dependable on democratic forms of government. The purpose of the Organization is not to favour such form of government. That would be incompatible with the principle of sovereign equality, expressed in Article 2 (1), and the principle of non-intervention in domestic affairs in Article 2 (7). Kelsen advocates that the discussed “self-determination of peoples” merely is another way of expressing “sovereign equality” among states.¹²⁶

The Kelsian interpretation would grant Article 1 (2) applicability on peoples of states, as long as only external self-determination matters. On the basis of his argumentation any form of foreign intervention can be rejected in such matters. It does not cover the case of internal self-determination; a right for people to choose under which form of government they will live, nor does it include the case of peoples deprived of their own sovereignty as in the populations of colonies.¹²⁷

If one applies Kelsen’s interpretation of the right to self-determination of peoples on the situation of the Palestinians it seems complicated to categorically determine their status. Since only external self-determination is safeguarded according to Kelsen, the Palestinians does not appear to be guaranteed a right to self-govern nor decide over what form of government they will be subjects to. A people of a state are entitled to the preservation of their borders and foreign intervention would be unlawful, but peoples without a state can find themselves under the will of foreign domination. However, after the First World War the Palestinians were liberated from the Turkish “colonial power”, instead they found themselves under the tutelage of Great Britain as the mandatory power. The mandate system were to function as a transitional phase for previously colonized territories, they were expected to become self-governing after a period of tutelage by more politically mature nations. Arguably the Palestinians were in the process of reaching full independence and the mandate system could be seen as representing the first step. Since the Palestinians definitively no longer were a colonized people and the Jewish mass immigration leading to the declaration of the State of Israel in 1945 undoubtedly was originated from foreign soil, an application of Kelsen’s reasoning might lead to the

¹²⁶ Kelsen, Hans: *The Law of the United Nations*, Praeger, New York, 1964, pp 51-53.

¹²⁷ Partsch, Karl Josef: *Self-Determination*, in Wolfrum (ed.): *United Nations: Law, Policies and Practice*, C.H. Beck Verlag, 1995, p 1173.

conclusion that the Palestinians were bearers of a right to external self-determination, in opposition to the creation of Israel.¹²⁸

Nevertheless, UN practice indicates that the Kelsian approach is somewhat limited. The General Assembly Resolution 1514 of 1960 presents a wider interpretation, including what Kelsen possibly would describe as internal self-determination:

“All peoples have the right to self-determination: by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”

Whether such a declaration constitutes a legally binding document is most doubtful¹²⁹, but it certainly gives a picture of the general views of the members of the United Nations, especially since it was adopted unanimously. In addition, this interpretation of the right to self-determination has been confirmed in several following resolutions.¹³⁰

Still, the concept of self-determination remains an area of discussion among scholars. Various positions on the exact content of this right have been, and are, expressed. An accepted definition, with clear limits as to how and when the right to self-determination is to be deployed, cannot easily be outlined. However, the general recognition of the right's existence has been overwhelming.¹³¹

¹²⁸ Concerning the status of the Palestinians, see chapter 2.

¹²⁹ Concerning the competence of the GA, see chapter 6.

¹³⁰ Bring, Ove: *FN-STADGANS FOLKRÄTT*, Norstedts Juridik, Stockholm, 1992, p 231-232.

¹³¹ Doehring, Karl: *Self-Determination*, in Simma (ed.): *The Charter of the United Nations – A commentary*, C H Beck Verlag, München, 1995, p 60.

6 The Implications of GA Resolution 181

6.1 The competence of the General Assembly

According to article 9 (1) of the United Nations Charter the General Assembly shall consist of all members of the UN. This makes the GA the only principle organ of the UN in which all member states are represented.¹³² The GA has various tasks to fulfil; in this study the power to make recommendations is of primary concern.

The GA's power to make recommendations is stipulated in general terms in Article 10 of the charter. It grants the GA the competence to discuss any matter within the competence of the United Nations and in addition to make recommendations on any such matter.¹³³ As long as the Security Council is performing the duties assigned to it, the GA's power to make recommendations is restricted by Article 12, in case of a dispute or situation that endangers world peace.¹³⁴

When examining the competence of the General Assembly, according to Kelsen, it is vital to separate the legal and the political competence of the organ. By exercising certain functions that are conferred upon it, the GA can create acts that have valid legal effect; constitute obligations, rights or competences. The GA has been entrusted with such legal competence in, for example, Article 4 concerning the admission of new members. On the other hand, political functions - however strong their actual influence may be - have no equivalent binding effect. The main competence of the Assembly, as described in Article 10, has a political and not legal character. The intention behind the establishment of the GA was to create a "town meeting of the world"¹³⁵. Legal functions of the GA therefore constitute an exception and would require special provisions in the Charter.¹³⁶

Recommendations, by their very nature, do not constitute a legal obligation to behave in conformity with them. Making recommendations are therefore among the political functions of the GA. This implies that recommendations

¹³² Magiera, Siegfried: *Composition*, in Simma (ed.): *The Charter of the United Nations – A commentary*, C H Beck Verlag, München, 1995, p 218.

¹³³ Kelsen, Hans: *The Law of the United Nations*, Praeger, New York, 1964, p 198.

¹³⁴ Hailbronner and Klein: *Functions and Powers*, in Simma (ed.): *The Charter of the United Nations – A commentary*, C H Beck Verlag, München, 1995, p 231.

¹³⁵ Yearbook of the United Nations, 1946-47, p 51.

¹³⁶ Kelsen, Hans: *The Law of the United Nations*, Praeger, New York, 1964, pp 193-200.

made by the GA to the SC, and for that matter states, may or may not be accepted and carried out.¹³⁷

Acts of the GA are issued in the form of *resolutions*, *declarations* or *decisions*. Resolutions are to be regarded as the collective term for the expressing-mode of the GA. In a resolution the GA can communicate a specific recommendation, decision, observation or issue a reminder. The term *declaration* is used by the GA for resolutions that claim to express political or legal principles of particular importance, reaching the status of a quasi-legislative function.¹³⁸ *Decisions* can be declared in certain matters in the form of legally binding rulings. The authority to make legally binding decisions only covers the area relating to internal organization.¹³⁹ For all other matters the charter speaks of recommendations.¹⁴⁰

A recommendation signifies, in general international usage, a legal act that expresses a desire, which is not binding to the addressees. At the San Francisco Conference the suggestion that the GA should be given legislative competence to enact rules of international law, was rejected. In the *South-West Africa Case* the ICJ confirmed this view, stating that: “Resolutions of the United Nations General Assembly ... are not binding, but only recommendatory in character”.¹⁴¹

One could argue that the GA’s resolutions should exert great influence since they represent the will of the majority of nations and thereby would function as an expression of world opinion. Indeed, Johnsson underlines, the GA always has a vast political influence; acting against the views expressed in one of its resolutions includes a risk of losing the political friendship of other states supporting the resolution. The political price of acting against the resolution might prove too costly, leading to a frequent acceptance of the resolutions.¹⁴²

Some scholars advocate that the GA also has the power to enact legally binding resolutions. As we have seen, this argument finds no support in the wordings of the relevant articles 10-14 of the Charter; neither do the intentions expressed at the foundation of the organization give basis for this view. Still, Johnsson advocates, even though the element of true legal obligation may be lacking, GA resolutions at least in practice have been granted a legal relevance to some extent. Resolutions of the GA concerning a state’s actions could be seen as elements indicative of the law, which an

¹³⁷ Ibid, pp 195-97.

¹³⁸ For example the Universal Declaration of Human Rights.

¹³⁹ Such as: the admission, suspension and expulsion of members (Articles 4, 5, 6), amendments to the Charter (108, 109), the election of members to organs or committees (23, 61, 97), budget questions (17).

¹⁴⁰ Hailbronner and Klein: Functions and Powers, in Simma (ed.): *The Charter of the United Nations – A commentary*, C H Beck Verlag, München, 1995, pp 236-37.

¹⁴¹ Ibid, p 237.

¹⁴² Johnsson, D H N: *The effect of resolutions of the General Assembly of the United Nations*, BYIL, 1955-56, p 121.

international court in case of a conflict, could take into account in determining whether there have been a breach of international law by the state concerned.¹⁴³

6.2 The legal effect of General Assembly Resolution 181

As described above, the legally binding effect of resolutions of the General Assembly must be considered as very limited. Still, it is of interest to further examine the validity of the specific resolution in question, General Assembly resolution 181, in relation to the great impact it have had on the Palestine conflict.

First of all, the Assembly's power is relying on the competence given to it by the United Nations as an organization. The GA's power over the future government of Palestine can by no means be stretched further than the basic authority of the UN. The sovereignty over Palestine belonged to the inhabitants of the country, not the UN. The UN is, as Cattán points out, an organization of states, not a sovereign over countries. Palestine did not and could not belong to the UN, which accordingly was not entrusted to decide over the territory.¹⁴⁴

Professor Ian Brownlie comments the situation as follows:

“It is doubtful if the United Nations has a “capacity to convey title”, in part because the Organization cannot assume the role of territorial sovereign ... Thus the resolution of 1947 containing a partition plan for Palestine was probably ultra vires, and, if it was not, was not binding on member states in any case.”¹⁴⁵

The question remains whether the UN had any other power to administer the country. It could be held that the mandate still was in force and that supervision thereof had passed to the United Nations. This argument would be somewhat hazardous juridically, Pitman argues. The Arabs denied the binding force of the mandate in 1947 as much as they had always been doing, as they denied the validity of the Balfour Declaration on which it partly was based.¹⁴⁶

¹⁴³ Ibid, p 118.

¹⁴⁴ Cattán, Henry: *Palestine and International Law*, Longman Group ltd, London, 1973, p 42-44.

¹⁴⁵ Brownlie, Ian: *Principles of International Law*, Oxford University Press, Oxford, 1998, p 169.

¹⁴⁶ Pitman, Potter B: *The Palestine Problem Before the United Nations*, in AJIL 1948, p 860.

Article 2 (7) of the Charter declares that nothing contained within the charter shall authorize the UN to intervene in matters that are essentially within the domestic jurisdiction of any state. However, the Article does not prejudice the application of enforcement measures under Chapter VII with respect to threats to the peace, breaches of the peace, and acts of aggression. Since the detachment from Turkey and the recognition of its independence by Article 22 of the Covenant of the League of Nations, Palestine had become a separate state. This state had been the subject to a mandate for over 20 years and still was in 1947, even if the mandate system legally had been terminated when the League of Nations was dissolved. The statehood of Palestine remained unaffected by these changes and the question of its future government must be seen as something that falls under the domestic jurisdiction of a state, according to Cattán. Issues concerning the violent situation in Palestine would have been possible to raise under Chapter VII, but such enforcement measures are directed to the maintenance of peace, and do not include decisions over the government in the state in question. The resolution for the partition of Palestine does in this respect constitute a violation of Article 2 (7) of the Charter.¹⁴⁷

Article 1 of the Charter states the basic purposes and principles of the United Nations. Accordingly the Organization is bound to act “in conformity with the principles of justice and international law” and to respect “the principle of equal rights and self-determination of peoples”. Under Article 73, concerning non-self-governing territories and mandated areas, the UN undertakes “to promote to the utmost ... the well-being of the inhabitants of these territories” and to “take due account of the political aspirations of the peoples”. In view of the clearly expressed opposition of the majority of the population in Palestine against the partition, it can hardly be argued that Resolution 181 respected these principles of the Charter.¹⁴⁸

A right to self-determination for the Palestinian people has not been taken into account in the making of resolution 181. But the question is whether such a right constitutes a binding rule of positive international law, or merely is a political principle or moral postulate. Feinberg finds this question hard to answer directly, but in his interpretation at least it was not a binding rule of law at any of the many stages on the road towards the emergence of the state of Israel, including when the GA passed its resolution on the partition of Palestine.¹⁴⁹

If it can be concluded that the right to self-determination, as expressed in Article 1 (2) of the Charter, forms part of positive international law, this status naturally was achieved as soon as the United Nations Charter came into force. If self-determination would be a right emanating from a basis in

¹⁴⁷ Cattán, Henry: *Palestine and International Law*, Longman Group Ltd, London, 1973, p 45.

¹⁴⁸ Official Records of the 2nd Session of the General Assembly, Document A/AC 14/32, p 279, 11 November 1947.

¹⁴⁹ Feinberg, Nathan: *The Question of Sovereignty over Palestine*, in Moore (ed): *The Arab-Israeli Conflict*, Princeton, University Press, 1974, pp 231-232.

customary law, the situation of course could be different, but of relevance for this discussion is whether it is a part of the law of the United Nations. As discussed above, the arguments for such a status are not neglectable. But can the people of Palestine be bearers of this right?

Doehring argues that there are mainly three different categories of people that can come in question as bearers of a right to self-determination. The classic holders of this right would be minorities, as a part of the population of a state, but which distinguishes itself from the majority in certain ways. A second group of persons is the population of a colonized state, people living beyond the territory of the governing colonial power. The third bearer of a right to self-determination is the population of a sovereign state that could invoke this right in the case of a foreign domination over the entire state.¹⁵⁰

The people of Palestine did not constitute a minority at the time for the GA resolution, rather a vast majority. Palestine in the mid 1940's can be regarded in two different respects. Either, one can argue that Palestine was a sovereign state that had been imposed upon various foreign rulers but never lost its rightful sovereignty. Another way of seeing it, and probably less controversial, would be to regard Palestine as a territory going through the process of decolonisation in respect to the termination of the British mandate. Thus, the people of Palestine would be bearers of a right to self-determination, free to decide on the form of government preferred. Any outside pressure designed to enforce the installation of a particular government must be defined as an internationally prohibited intervention, in the views of Doehring.¹⁵¹

It must be considered as somewhat customary that the voting both in the Security Council and the General Assembly are preceded by political argumentation between the member states. Behind the resolution for the partition of Palestine, the Zionist influence and American political pressure for a favourable vote was massive. Some Zionist leaders suggested to the White House that pressure should be put on sovereign nations into voting in favour of the resolution in the GA. Many countries, that openly had declared their opposition towards partition of Palestine, were persuaded of the necessity of a more positive attitude, and accordingly changed their attitude in time for the voting in the General Assembly. Without this undue influence, as Cattán notes, it is likely that the partition resolution never would have been adopted.¹⁵²

As identified above, the principle of justice is among the basic provisions governing the actions of the United Nations. In 1946 the total population of Palestine had reached approximately 1 900 000 inhabitants. It consisted of

¹⁵⁰ Doehring, Karl: *Self-Determination*, in Simma (ed.): *The Charter of the United Nations – A commentary*, C H Beck Verlag, München, 1995, p 64.

¹⁵¹ Ibid, p 65.

¹⁵² Cattán, Henry: *Palestine and International Law*, Longman Group Ltd, London, 1973, p 49-54.

1 203 000 Moslems, 145 000 Christians and 608 000 Jews. Only one-tenth of the Jewish population was part of the original inhabitants and belonged to the country in this respect. The rest were foreign immigrants, of whom only one-third had acquired Palestinian citizenship. The Jewish land ownership amounted to 5,66 per cent of the total area of the country, compared with the 47,77 per cent that was owned by the Palestinian Arabs. The rest was constituted by public domain.¹⁵³

Contradictory to these figures the partition plan dedicated an area representing 57 per cent of the area of Palestine to the Jews. The Jews were hereby given a territory that was ten times the area they currently possessed, a territory mainly inhabited by Palestinians. As Cattan highlights, such actions challenge the concept of the UN safeguarding the principle of justice.¹⁵⁴

6.3 Proclamation of the State of Israel

During the period following the approval of Resolution 181, the British were not willing to participate in the partitioning, nor did they permit the UN commission to enter Palestine earlier than two weeks before the termination was scheduled. Thereby the preparations for the implementation of the plan for partition had been seriously delayed. The commission realized that the partition could only come into effect, after the withdrawal of the British troops, if they could engage military force from other sources. Appeals to the Security Council to provide this assistance proved fruitless.¹⁵⁵

Facing the situation where the United Nations might prove unable to enforce its own resolution, the Jews were worried that their efforts to achieve an independent state would be wasted. The Jewish Agency Executive determined that they would have to seize the initiative themselves.¹⁵⁶ At 5.00 P M on 14 May 1948, the chairman of the executive, David Ben-Gurion put his signature to Israel's Declaration of Independence. Ben-Gurion himself would act as Prime Minister and Minister of Defence in the new government of Israel.¹⁵⁷

¹⁵³ Ibid, p 54-55.

¹⁵⁴ Ibid, p 55.

¹⁵⁵ Geddes, Charles L: *A Documentary History of the Arab-Israeli Conflict*, Praeger Publishers, New York, 1991, pp 286-87.

¹⁵⁶ Ibid, p 287.

¹⁵⁷ Gilbert, Martin: *ISRAEL – A History*, William Morrow and Company Inc., New York, 1998, p 186.

President Harry Truman of the USA was immediately informed about the proclamation of Israel and recognized within minutes the provisional government as the de facto authority of the new state.¹⁵⁸

The declaration of independence invoked two grounds for the proclamation of the State of Israel: a so-called “historic right” and the UN partition resolution. The “historic right” was without doubt questionable since the Palestinian Arabs had inhabited the country for ages. Their historical right was not taken into account. The General Assembly Resolution 181 provided fixed boundaries for the two parted states, but these territorial provisions were not respected by the newly proclaimed state. Thus, Israel did not conform to the UN partition plan and its existence can hardly be said to be based on the UN resolution.¹⁵⁹

6.4 The War of 1948

The war of 1948 is described by the Jews as “*The War of Independence*” while the Arabs call it “*al-Nakba*” or “*the disaster*”. In the 1980’s a series of books were written, mostly by Israeli scholars that questioned the common Israeli interpretation of the war. These scholars have been known as revisionists or new-historians and their evaluation of the past triggered an intensive public debate in Israel. This debate is mostly concerned with topics like why the war was fought, how it was performed and how it later on was depicted. Many various interpretations have come across. But the factual outcome of the war must be seen as undisputed.¹⁶⁰

The Arab-community did not look favourably upon the proclamation of Israel. The Palestinians lacked a centralized leadership and were inadequately equipped for war. The Jews, on the other hand, were well organized and armed, which enabled them to extend their territory beyond what had been appointed to them in the partition resolution, 181.¹⁶¹ The 15th of May 1948, the day after the proclamation of the state of Israel, the Arab states intervened in hostilities that had occurred between the Jewish forces and the Palestinians. The objectives of this intervention have been debated; some claim that the Arab states sought to wipe out the Jews in Palestine in an all-out-offensive. Others, like Cattan, argue that the engagement in the conflict essentially aimed at protecting the Palestinians from overwhelming attacks of the Jews and to possibly prevent the partition of the country.¹⁶²

¹⁵⁸ Geddes, Charles L: *A Documentary History of the Arab-Israeli Conflict*, Praeger Publishers, New York, 1991, p 288.

¹⁵⁹ Cattan, Henry: *The Palestine Question*, Croom Helm, London, 1988, pp 49-50.

¹⁶⁰ Shlaim, Avi: *The Debate About 1948*, in Pappé, Ilan (ed): *The Israeli/Palestine Question*, Routledge, London, 1999, p 171.

¹⁶¹ Geddes, Charles L: *A Documentary History of the Arab-Israeli Conflict*, Praeger Publishers, New York, 1991, p 293.

¹⁶² Cattan, Henry: *The Palestine Question*, Croom Helm, London, 1988, p 54.

The surrounding Arab states engaged approximately 25 000 troops in the war, but the Arab forces remained ineffective and inferior to the Israeli army.¹⁶³ Therefore Israel managed to seize roughly half the territory reserved for the Arab State by the partition resolution. The total area amounted to 20 850 square kilometres compared to the 14 500 square kilometres designated to the Jews by the UN out of 26 323 square kilometres representing the total area of Palestine. Thus leaving the Arabs with 20 per cent of the country.¹⁶⁴

A vast amount of the Arabs were expelled or otherwise forced to flee their former homes in the areas conquered by the Israelis. The majority left for Jordan and the Gaza Strip, others for Syria and Lebanon.¹⁶⁵ In 1949 the Palestinian refugees had reached a number of 960 000 people according to the UN.¹⁶⁶

The United Nations took certain measures for redress of the situation. By resolution 186, the General Assembly appointed Count Folke Bernadotte as the UN mediator in Palestine, on 14 May 1948. His work never bore fruit since he was assassinated on 17 September 1948 by Jewish terrorists. GA Resolution 194, dated 11 December 1948, established the Conciliation Commission for Palestine. But not even the Commission managed to achieve any settlement of the issue.¹⁶⁷

The Commission did however manage to arrange a conference in Lausanne in April 1949 where both leaders for the Arab States and Israel were present. Two major issues were discussed: the possibility for the refugees to return and the withdrawal of Israeli troops to the partition lines determined in resolution 181. Israel was not inclined to give up any of the territorial gains it had won, nor enabling the return of the refugees. On 12th May 1949 the Arab States and Israel agreed to use the partition resolution's boundaries as a "basis for discussions with the Commission".¹⁶⁸

6.5 Israel's admission to the UN

On 15 May 1948 the Israeli political leaders applied for membership to the UN. So far, the USA was the only state that officially had recognized the Provisional Government and the Israelis were eager to attain further recognition. But the UN did nothing to fulfil these wishes. On 29th

¹⁶³ Geddes, Charles L: *A Documentary History of the Arab-Israeli Conflict*, Praeger Publishers, New York, 1991, p 293.

¹⁶⁴ Cattan, Henry: *The Palestine Question*, Croom Helm, London, 1988, p 69.

¹⁶⁵ Ibid, p 60.

¹⁶⁶ Annual Report of the Secretary-General on the work of the UN, 1 July 1948-30 June 1949, p 102.

¹⁶⁷ Cattan, Henry: *The Palestine Question*, Croom Helm, London, 1988, pp 80-84.

¹⁶⁸ The Committee on the Exercise of the Inalienable Rights of the Palestinian People: *The origins and evolution of the Palestine problem 1917-1988*, United Nations, New York, 1990, p 142.

November Israel reapplied and this time the Security Council voted on the subject, only the USA and the Soviet Union voted in favour. A minimum of seven affirmative votes were needed in the Security Council to submit the application to the General Assembly's deciding vote. Israel applied for membership once again on 24 February 1949, supported by the USA. This time the application was passed with nine affirmatives and only one abstention - Great Britain. The day before the Lausanne-agreement, the 11th May 1949, Israel was admitted to United Nations membership.¹⁶⁹

According to Cattán, Israel's admission to the UN differed from the admission of other states. The Israeli application of the 29th November had been rejected by a majority of the members of the SC arguing that questions of boundaries, refugees and the status of Jerusalem had not been settled. Israel was therefore invited by the GA to clarify its intentions concerning these issues in reference to its new application in February 1949.¹⁷⁰

Israel took the opportunity to make formal declarations and gave explanations to the basic issues. Israel asserted that they were ready to implement GA resolutions, specifically undertaking to implement General Assembly resolutions 181 and 194. It assured the General Assembly that full cooperation of Israel, in a serious attempt to find a solution to all the problems that had arisen, could be expected. These declarations and explanations were referred to in the General Assembly resolution 273 that admitted Israel to membership.¹⁷¹

¹⁶⁹ Geddes, Charles L: *A Documentary History of the Arab-Israeli Conflict*, Praeger Publishers, New York, 1991, p 299.

¹⁷⁰ Cattán, Henry: *The Palestine Question*, Croom Helm, London, 1988, p 86.

¹⁷¹ The Committee on the Exercise of the Inalienable Rights of the Palestinian People: *The origins and evolution of the Palestine problem 1917-1988*, United Nations, New York, 1990, pp 144-145.

7 The War of 1967

The almost two decades that passed after the War of 1948 were characterized by high tensions between the Arab States and Israel. In 1956 a short war took place, called the Sinai-Suez war. This resulted in the engagement of the first UN peacekeeping force, the United Nations Emergency Force, which was deployed between the belligerent armies. Even so, several incidents between the Arab States and Israel continued to occur. According to General Odd Bull, head of the UN truce organization, the question of access to water was an important factor in the increasing conflict. The Jordan River was central for the water supply of the Arabs. When the Israelis in 1964 began to draw water from the river, the Arabs replied by constructing a dam and diverted tributary rivers of the Jordan, in order to remain control over the water. These facilities were attacked by Israel on several occasions and the tension rapidly grew stronger. General Bull expressed his thoughts on the matter: *“the result was the 1967 war, a war for the control of water resources... The war did not come as a surprise.”*¹⁷²

Israel had been subject to guerrilla attacks with roots in Syria and threatened to take military action against Syria if the attacks were to continue. Simultaneously, reports from the Soviet Union announced that Israel was massing troops on the Syrian frontier. The threats and the Soviet reports were taken seriously in the Arab world and Egypt decided to act to ease the pressure on Syria.¹⁷³ The 16th of May 1967 Egypt informed the UN that Egyptian forces were being deployed in Sinai on Egypt’s eastern borders in order to resist Israeli aggression, and asked for the withdrawal of the UN Force from observation posts along Egypt’s borders.¹⁷⁴ After a period of intense diplomatic efforts the UN found themselves forced to decide, on the 19th of May, that their peacekeeping forces should be withdrawn.¹⁷⁵

The Gulf of Aqaba is located between Sinai and Saudi Arabia, but Jordan and Israel has access to it; Jordan by the port of Aqaba and Israel by the port of Elat. Aqaba is Jordan’s only port, and Elat is Israel’s only port east of Suez. The 22nd of May president Nasser of Egypt declared that Egypt closed the Gulf of Aqaba for Israeli ships and ships carrying military cargoes for Israel. He also stated that if Israel attacked Egypt or Syria, total war with the objective of destroying Israel could be expected.¹⁷⁶

The Arab States felt threatened by Israel and the measures taken by the Arab States were considered as provocations by the Israelis. War was

¹⁷² Bailey, Sydney D: *The Making of Resolution 242*, Martinus Nijhoff Publishers, 1985, pp 7-13.

¹⁷³ Ibid, p 12.

¹⁷⁴ Ibid, p 16.

¹⁷⁵ Ibid, p 25.

¹⁷⁶ Ibid, pp 28-29.

inevitable. In the early morning of June 5th 1967 Israeli aircraft attacked Egyptian bases and succeeded in destroying some 300 out of Egypt's 340 combat aircrafts. Shortly after the attack, Israel turned to the UN asking them to convey a message to Jordan, urging them not to engage in the war. If Jordan decided to fight, the message continued, Israel would use all means at its disposal. The UN transmitted the message, but at that time Jordanian forces were already engaged. Israel responded with air strikes. Syrian and Iraqi planes had launched attacks on Israel, to which they responded with attacks on the opponents' airfields. Israel managed to virtually eliminate the air forces of both Jordan and Syria during this first day of the war, while Israel only lost 26 planes.¹⁷⁷

The Israeli victory was mammoth and the Arab armies were soon defeated. Israel seized control over the Gaza strip and all of the Sinai Peninsula to the Suez Canal. Israeli forces occupied East Jerusalem as well as the entire West Bank of the Jordan River and the Syrian Golan Heights. After only six days the war had come to an end, resulting in greatly enlarged territories for the State of Israel. However, the situation was still gravely infected and some action on the part of the UN was called for, to possibly prevent further conflicts.¹⁷⁸

7.1 Security Council Resolution 242

Efforts were made by several state representatives to meddle between the parties of the War of 1967. Both the General Assembly and the Security Council sought in a number of meetings to find an acceptable solution. The Arabs insisted on a resolution that would demand a complete Israeli withdrawal from the occupied territories. Israel wanted a resolution where any such withdrawal would be linked to an Arab commitment to real peace. Five draft resolutions were submitted to the Security Council. Finally the British proposal was approved and became Resolution 242.¹⁷⁹

A resolution from the Security Council usually consists of both preambular and operative paragraphs. The preambular paragraphs form an introduction to the decision and the operative paragraphs form the actual decision.¹⁸⁰ The preamble of resolution 242 states three fundamental principles, according to Wright.¹⁸¹

The first principle expressed in the preamble is “*the inadmissibility of the acquisition of territory by war*”. The application of the principle does not

¹⁷⁷ Ibid, pp 68-69.

¹⁷⁸ Geddes, Charles L: *A Documentary History of the Arab-Israeli Conflict*, Praeger Publishers, New York, 1991, p 315.

¹⁷⁹ Bailey, Sydney D: *The Making of Resolution 242*, Martinus Nijhoff Publishers, 1985, pp 143-147.

¹⁸⁰ Ibid, p 147.

¹⁸¹ Wright, Quincy: *The Middle East Problem*, AJIL, 1970, p 270.

depend on which party in a conflict that would be considered the aggressor. The determining factor is whether a considerable use of armed force leads to acquisition of territory. Such fruits from war are regarded as unlawful. According to Wright this principle is well established. In the War of 1967, Israel – whether the aggressor or not – indisputably managed to occupy territory by using armed force.¹⁸²

The second principle stated in the preamble is the “*need to work for a just and lasting peace in which every State in the area can live in security*”. This principle is in coherence with the purpose of the UN, proclaimed in Article 1 of the Charter and supported by principles stated in Article 2. These provisions requires the members to settle all international disputes by peaceful means, to refrain from the use or threat of force in international relations, to assist the UN in maintaining these principles, and not to intervene in matters essentially within the domestic jurisdiction of any state.¹⁸³

The third principle of the preamble is that “*all Member States, in their acceptance of the Charter of the United Nations have undertaken a commitment to act in accordance with Article 2 of the Charter*”. Article 2 deals with what are entitled principles of the UN but according to Wright, paragraph 2 makes it clear that they constitute positive “obligations” of international law, which the members must “fulfil in good faith”.¹⁸⁴

Security Council resolution 242 emphasizes that to fulfil the principles of the Charter, described in the preamble of the resolution, thus enabling peace in the Middle East, the “withdrawal of Israel armed forces from territories occupied in the recent conflict” is required. It also states that all claims of belligerency must terminate and the sovereignty of every state in the area must be acknowledged. Thus, requiring the Arab states to recognize the State of Israel and the right of the Israelis to live in peace within secure boundaries.¹⁸⁵

The meaning of the obligations conferred upon Israel and the Arab states in the resolution has been debated. Paragraph 1(i) of the resolution has been object to most arguments. Some claim that the absence of the definite article “the” as a prefix to “Israel armed forces” and “territories” was intended to be of significance. The wording that was chosen would therefore not require the withdrawal of all Israeli armed forces from all the territories. In line with this argument merely withdrawal from some territories, by some forces, would be sufficient to comply with the resolution.¹⁸⁶

¹⁸² Ibid, p 270.

¹⁸³ Ibid, p 273.

¹⁸⁴ Ibid, p 273.

¹⁸⁵ Ibid, pp 274-275.

¹⁸⁶ Mazzawi, Musa E.: *Palestine and the Law*, Ithaca Press, 1997, pp 200-201.

If there is uncertainty about the meaning of a UN text, clarification might be found in the translation by the UN Secretariat into other languages. At the time for resolution 242, the Security Council had five official languages. Neither Russian nor Chinese have a definite article such as “the” of the English language and cannot provide us with an answer to the question. The French and Spanish versions of the text both use a definitive article, indicating that a total withdrawal was intended. However, the English version is most important since the negotiations were based on the English text.¹⁸⁷

The Arabs and the countries supporting them, struggled to have the word “the” incorporated in the English text. They were concerned that without this definite article, Israel would interpret the resolution as not including all territories occupied in this conflict. If “the” were included, such interpretation would be avoided. Even the British themselves tried to add “the” to the text before the vote of the Security Council, but encountered rejections from Israel and the USA.¹⁸⁸

Resolution 242 has played an important role in the ongoing struggle for a peaceful solution to the Palestine question. It has been repeatedly recalled and reaffirmed by the Security Council and the General Assembly as a basis for resolving the conflict. According to Massawi, such subsequent resolutions by the UN-organs have declared that “the withdrawal of Israel from the Palestinian territory occupied since 1967, including Jerusalem, and other occupied Arab territories” would be required to obtain peace. In addition, these resolutions have always reaffirmed that “the acquisition of territory by force is inadmissible”. Such confirmations of resolution 242 have helped to clarify any ambiguity in its interpretation. By repeating the determined form “the”, when recalling the requirements in resolution 242, indications are made that withdrawal from all the territories is what was intended.¹⁸⁹

The subsequent resolutions repeatedly reaffirm the principle that acquisition of territory by use of force is inadmissible. This principle is embodied in the prohibition of the use of force stipulated in Article 2 (4) of the Charter.¹⁹⁰ A resolution cannot legitimately be interpreted in a way that conflicts with the Charter of the United Nations.¹⁹¹

Foreign Secretary George Brown, speaking to the General Assembly on 21 June 1967, referring to the implications of Article 2 of the Charter, stated:

“the words ‘territorial integrity’ have a direct bearing on the question of withdrawal, on which much has been said

¹⁸⁷ Bailey, Sydney D: *The Making of Resolution 242*, Martinus Nijhoff Publishers, 1985, pp 152-153.

¹⁸⁸ Ibid, p 153.

¹⁸⁹ Mazzawi, Musa E.: *Palestine and the Law*, Ithaca Press, 1997, p 219.

¹⁹⁰ Also supported by Quincy Wright in: *The Middle East Problem*, AJIL, 1970, p 270.

¹⁹¹ Mazzawi, Musa E.: *Palestine and the Law*, Ithaca Press, 1997, pp 219-221.

in previous speeches. I see no two ways about this, and I state our position very clearly. In my view, from the words in the Charter, war should not lead to territorial aggrandisement.”

The principle of non-acquisition of territory by force is, according to El-Farra, widely accepted not only in the Charter. Even Israel’s closest ally, the USA, has on numerous occasions expressed its support, for example by accepting Article 17 of the Charter of the Organization of American States signed at Bogotá on 30 April 1948: “*No territorial acquisitions or special advantages obtained either by force or by other means of coercion shall be recognized*”.¹⁹²

To further examine the proper meaning of Resolution 242, Mazzawi applies general principles of international law. In the old days, when imperialism was considered an accepted part of the international community, possession and effective control over a territory could lead to a valid title, if the control was not challenged and the territory in question was regarded as not belonging to anybody. A territory that was inhabited by, what was regarded as “uncivilized peoples”, was considered to be in the legal possession of nobody and could be acquired by the right of conquest of the imperialist powers. According to these standards Israel could obtain a valid title over the occupied territories, if the Palestinians were to be regarded as inferior uncivilized people. However, the days of imperialism are over, human beings are considered to be equal and land belongs, as a general rule, to the people inhabiting it. The Palestinians did by no means support the Israeli rule – they strongly contested it – thus not presenting the acceptance needed to claim that they “gave away” their right to the territory.¹⁹³

The reasons for the outbreak of the war of 1967 have been debated. None of the parties agrees to be the one who started it. Israel, just as the Arabs, argues that they engaged in a defensive war imposed upon them. While Israel defended itself, Arab territories were occupied. Therefore some claim that in the line of self-defence, Israel can keep the territories it has occupied. But what party that should be regarded as the culpable in an outbreak of war is of no concern to the law, in terms of territorial acquisition, according to Mazzawi. He states that there is no rule in international law that confers the idea that the spoils of any war can be kept by the victor.¹⁹⁴

When examining a resolution of the Security Council one can study its various components and evaluate their particular implications. However, the components supplement each other and an integrated assessment of the resolution, as a whole, seems to be in order.¹⁹⁵ When reading the principle

¹⁹² El-Farra, Muhammad H.: *The Role of the United Nations vis-à-vis the Palestine Question*, in Moore (ed): *The Arab-Israeli Conflict*, Princeton University Press, 1974, Vol II, p 513.

¹⁹³ Mazzawi, Musa E.: *Palestine and the Law*, Ithaca Press, 1997, pp 223-224.

¹⁹⁴ *Ibid*, p 224.

¹⁹⁵ *Ibid*, p 234.

stated in the first preambular paragraph: “*the inadmissibility of the acquisition of territory by war*”, together with the operative paragraph 1(i): “withdrawal of Israel armed forces from territories occupied in the recent conflict”, the Security Councils’ views appear clearly. The territory occupied by Israel in the war of 1967 must not be retained by Israel.¹⁹⁶

Resolution 242 balanced the statements concerning Israel by requiring that, in the operative paragraph 1(ii), the Arab states should terminate all claims to a right of belligerency. The necessity of acknowledging the sovereignty, territorial integrity, and political independence of every state (including Israel) in the area were also affirmed. However, the UN did not provide the parties with any practical guidance as to how these requirements were to be realized, for example stating in which order they were to occur.¹⁹⁷

The second main paragraph refers to the need for freedom of navigation, a just settlement of the refugee problem and guarantees for the integrity and independence of all states in the area through measures including the establishment of demilitarised zones.¹⁹⁸

7.2 The competence of the Security Council

Article 23 of the Charter provides rules for the composition of the Security Council. In contrast to the General Assembly, the Security Council does not include a representative of each member state. Instead it is limited to consist of fifteen members of the United Nations, out of which five members are permanently represented: China, France, Russia, the UK and the USA. The remaining ten members of the Council are elected for a period of two years. By limiting the number of members, the Security Council is supposed to be enabled to act quickly and enforce its decisions in the international community.¹⁹⁹

The Security Council is assigned, by Article 24 of the Charter, the “*primary responsibility for the maintenance of international peace and security*”, by which the Council exercises primarily the specific powers granted to it in Chapter VI and VII. While exercising its duties the Council shall act in accordance with the purposes and principles of the UN.²⁰⁰

Article 25 of the UN Charter governs the obligations of its members to carry out the decisions of the Security Council. It reads as follows: “*The Members*

¹⁹⁶ Ibid, pp 234.

¹⁹⁷ Higgins, Rosalyn: *The June War*, in Moore (ed): *The Arab-Israeli Conflict*, Princeton University Press, 1974, Vol II, p 463.

¹⁹⁸ Security Council Resolution 242

¹⁹⁹ Geiger, Rudolf: *Composition*, in Simma (ed.): *The Charter of the United Nations – A commentary*, C H Beck Verlag, München, 1995, p 393.

²⁰⁰ Delbrück, Jost: *Functions and Powers*, in Simma (ed.): *The Charter of the United Nations – A commentary*, C H Beck Verlag, München, 1995, pp 397-405.

of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.” The imperative wordings would seem to be “*decisions*” together with “*in accordance with the present Charter*” and an assessment of its meaning is of interest. The question is what acts of the Security Council that should be regarded as “*decisions*”.²⁰¹

The use of the term *decision* within the UN Charter is rather ambiguous. As we have seen, decisions by the General Assembly sometimes are binding and sometimes only recommendatory in character. Since *decision* is used to describe intentions of the organs in a diversity of matters, the term cannot be given a specific meaning that could be applied to the Charter in general.²⁰²

Shapira argues that resolutions of a binding nature, imposing legal obligations, undoubtedly would constitute decisions within the meaning of Article 25. However, Shapira claims that not all resolutions of the Security Council are intended to impose legal obligations on the members, some merely act as recommendations. These resolutions, primarily resolutions by the Security Council under chapter VI of the Charter, cannot be seen as “*decisions*” within the meaning of Article 25.²⁰³

Delbrück argues that an interpretation that finds only those decisions to be binding, which are taken by the Security Council under Chapter VII, decisions on enforcement measures, would be too limited. Such an interpretation would limit the Councils power to maintain peace to a degree that would counter the overall concept of the Charter.²⁰⁴

Kelsen finds that decisions of the Security Council, that are normally not binding upon the Members, as mere recommendations, may very well be given a binding effect if the Council, under Article 39, considers non-compliance as a threat to the peace and would evoke sanctions on the state violating the decision.²⁰⁵ Delbrück cannot agree with Kelsen’s interpretation. The fact that the Charter does make a distinction between recommendations and decisions indicates, in his views, that there are situations where statements of the Security Council are non-binding upon the Members. Instead Delbrück finds that:

“decisions of the SC which, according to their wording, are clearly recognizable as recommendations and which, according to the Charter provisions they are based on, cannot be expected to be regarded as binding, are exempt

²⁰¹ Delbrück, Jost: *Article 25*, in Simma (ed.): *The Charter of the United Nations – A commentary*, C H Beck Verlag, München, 1995, p 409.

²⁰² *Ibid*, p 409.

²⁰³ Shapira, Amos: *Resolution of November 22, 1967*, in Moore (ed): *The Arab-Israeli Conflict*, Princeton University Press, 1974, Vol II, p 568.

²⁰⁴ Delbrück, Jost: *Article 25*, in Simma (ed.): *The Charter of the United Nations – A commentary*, C H Beck Verlag, München, 1995, p 410.

²⁰⁵ Kelsen, Hans: *The Law of the United Nations*, Praeger, New York, 1964, p 293.

from the binding force of decisions of the SC under Article 25.”²⁰⁶

Decisions taken under Chapter VII, which are not embedded in terms of a recommendation, would accordingly be binding in the meaning of Article 25. The question remains whether the Security Council has the competence to make binding decisions, in the meaning of Article 25, under Chapter VI as well. Almost all the articles in Chapter VI expressly mention the competence of the Security Council only to address recommendations to the parties in a conflict. Article 34, concerning investigations of a dispute or a situation that might lead to international friction, constitutes an exception. If the Security Council were not able to effect an investigation of a disputed matter, by making a binding decision, the peacekeeping system would be seriously hampered. Therefore, according to Delbrück, the decisions taken under Article 34 must be considered as binding, even though the rest of Chapter VI merely has a recommendatory character.²⁰⁷

7.3 The legal effect of Security Council Resolution 242

Sometimes the Security Council specifies under what Article or Chapter of the Charter it acts when promulgating resolutions. This was not the case with Resolution 242. The legal character of the Resolution is therefore a matter of interpretation. In the Namibia-case the ICJ expresses its opinion on how to evaluate a Security Council Resolution:

“The Language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect. In view of the nature of the powers under Article 25, the question whether they have been in fact exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council.”²⁰⁸

According to Shapira, the language used in the Resolution indicates that it is adopted under Chapter VI; nowhere in the text the parties are expressly required or called upon to act in a certain manner. Chapter VI deals with pacific settlement of disputes. Articles 36(1) and 37(2), included in chapter VI, provide the Security Council with the power to make recommendations

²⁰⁶ Delbrück, Jost: *Article 25*, in Simma (ed.): *The Charter of the United Nations – A commentary*, C H Beck Verlag, München, 1995, p 411.

²⁰⁷ *Ibid*, p 412.

²⁰⁸ Namibia Case, ICJ Reports 1971, 114, at 53.

to the parties to a dispute. Such recommendations lack legally binding character in Shapira's views, but may still have a great political and moral significance.²⁰⁹

Mazzawi agrees with Shapira that Resolution 242 is adopted under Chapter VI and that it had a merely recommendatory effect. Nevertheless, Mazzawi argues that it has been referred to and reaffirmed by both the Security Council and the General Assembly on so many occasions that the merely recommendatory and optional character has transformed into something more compulsive and binding. Mazzawi further advocates that the fact that a certain Security Council resolution solely has a recommendatory character can hardly imply that the parties concerned are free to reject it at their will.²¹⁰

Some authors argue that a resolution taken under Chapter VI of the Charter may have a binding effect in certain situations. According to these scholars the intentions behind the making of the resolution are what must determine its status. If it was intended to be a decision a binding effect may be granted, even if the resolution is based on provisions in Chapter VI. To come to this conclusion, the intention of the parties, all the prior discussions and all the terms of the resolution must be taken into account. When applying these criteria to Resolution 242, the uniform intentions demanded seem to be lacking. The conclusion must, claims Gainsborough, according to this theory, be that the Resolution was intended to function as a recommendation only.²¹¹

Set aside the possible future developments, at the time of its promulgation, Resolution 242 basically contributed in presenting a set of guidelines for the establishment of a "just and lasting peace" between the Arab states and Israel. The Resolution provided something of a plan for settlement, or at the very least a basis for further discussions on how to achieve peace. The legally binding force of the Resolution therefore seems to be limited at the time of its birth.²¹²

Nonetheless, Resolution 242 states legally binding principles of international law, what gives it a recommendatory character is the Resolution as a whole, not the material substance in every part. The mere recommendatory status of a certain resolution does not eliminate the juridical value of the principles it may refer to; the question is rather what enforcement measures that can be connected with it.

In October 1973 a new war broke out between Arab states and Israel. In the six-day war of 1967 the Security Council had been accused of being

²⁰⁹ Shapira, Amos: *Resolution of November 22, 1967*, in Moore (ed): *The Arab-Israeli Conflict*, Princeton University Press, 1974, Vol II, p 572.

²¹⁰ Mazzawi, Musa E.: *Palestine and the Law*, Ithaca Press, 1997, p 236.

²¹¹ Gainsborough, J R: *The Arab-Israeli Conflict*, Gower, 1986, p 157.

²¹² Gainsborough, J R: *The Arab-Israeli Conflict*, Gower, 1986, pp 154-157.

indecisive in its actions. This time a swift response to the present conflict was conferred. The 22 October 1973, by 14 votes to none (China did not participate), Security Council Resolution 338 was adopted. Apart from measures taken to the present fighting, the Resolution “*Calls upon the parties concerned to start ... the implementation of Security Council Resolution 242 (1967) in all of its parts*”.²¹³

The wording of Resolution 338, where the Security Council *calls upon* and *decides*, indicates a difference from Resolution 242. The Security Council does not merely issue a recommendation to the parties in 338, but rather presents a binding decision in line with Article 25 of the Charter. When referring to *Resolution 242 in all of its parts* the Security Council incorporates its prior recommendations in the binding decision of Resolution 338.²¹⁴ The recommendatory character of Resolution 242 itself does not change because of this; its legal status must be seen as determined at the time of its promulgation. However, by including its provisions in a decision by the Security Council they are arguably given the legally binding character they previously lacked. In 2004, 31 years after the adoption of Resolution 338, the prerequisites referred to in Resolution 242 have not yet been implemented.

²¹³ Geddes, Charles L: *A Documentary History of the Arab-Israeli Conflict*, Praeger Publishers, New York, 1991, p 320.

²¹⁴ Mazzawi, Musa E.: *Palestine and the Law*, Ithaca Press, 1997, p 236.

8 The Status of the UN and the political balance of power in the International Arena

As noted previously, the Charter of the United Nations can be subject to amendments; Articles 108 and 109 of the Charter regulate this process. The support of a two third majority of the members is normally required for the adoption of a proposed amendment. As a result, this procedure can impose legal obligations upon a member that is in opposition of the amendment in question. Actions by the organs of the UN are taken, with a few exceptions, without the consent of all the members of the Organization. Apparently, several situations might occur where a minority of states finds itself outvoted by the majority of the member states. The minority issue is a problem within the UN, as it is in democratic countries all over the world. However, this weak position of a minority is a part of the United Nations organizational structure, which all member states accept *voluntarily* upon entry to the organization. This basis for legitimacy can obviously not be found in democratic countries; since single inhabitants do not choose what country they are born in.

When joining the UN a state accepts the organizational structure, but only as a part of the UN cooperation. The formal structure of any organization has the function of a framework for upholding the purposes and principles of that organization. Actions that fall outside this framework cannot be a part of the work of the organization. Nevertheless, just because an action has been agreed upon, in due order within the limits of the organizational structure, its validity is not unquestionable. It could be argued that a basic prerequisite for any action must be that it is also in consistency with the purposes, principles and provisions of the organization. One must evaluate not only the formal side of an action, but also its material implications. If an action violates the basic features of an organization it does not matter whether the majority concurs to it, it is still intolerable. The members have accepted to possibly, as a minority, be subjugated by the majority, but only in relation to the terms of the organisation upon entering it. They have not given their approval of an unlimited rule by the majority.

The United Nations, with its Charter, has an incomparable status in the international community. Not only is a vast majority of all the states in the world members of the UN, it also has a legislative effect on the non-members to a certain extent. Some parts of the Charter are considered to be *jus cogens* and many would argue that the rest constitutes a codification of customary law, due to the many states that are parties to it, and therefore is binding on all states of the world. However it is primarily the Charter that holds this status. The specific actions taken by the Organs of the UN can

create neither *jus cogens* nor customary law. They merely constitute an indicative feature when determining the substance of customary law.

Resolutions adopted by the organs of the UN, the Security Council or the General Assembly, have sometimes been questioned as to their legality. The UN as an international organization is a subject of international law. Subjects that have such a legal personality are bound by international law; they can commit actions that violate international law. Accordingly Doehring underlines this general rule: UN-resolutions could be regarded as unlawful if the competence of the organ is overstepped, or if substantive rules of the Charter or customary international law are disregarded.²¹⁵

Resolutions of the General Assembly have, as discussed above, in the views of most scholars, merely a recommendatory character, even though they may refer to rules with a binding nature. In line with Article 25 of the Charter, *decisions* taken by the Security Council, on the contrary have a binding effect on the members. But can unlawful resolutions still be regarded as binding on the members of the UN?

When supporting the view that the UN Charter functions as a world constitution, according to Doehring, it can be held that the subordinated legal subjects have to obey all orders of the supreme authority. The same principles apply to the constitution of a state; a national government may act illegally, but the binding force of its orders persists as long as no contradictory order is pronounced.²¹⁶

An international organization, as opposed to a nation, is created to fulfil certain given purposes. The constitution of a nation, functions as an all-inclusive framework for the life of the community and the government is expected to take care of the general welfare of the nation and its citizens. In a constitutional system the rights and duties of its subordinates are limited only by the desires and requirements of the common wealth. Within the UN the autonomy of the member-states, according to article 2 (7), are to be respected as far as possible. Limitations of their autonomy need grounds specifically defined in the Charter.²¹⁷

Doehring argues that if the UN Charter were seen as a world constitution, the Security Council would have to be seen as a world government. A national government is always under the duty to exercise its competence; it cannot choose to take action or not to preserve the welfare of its subordinates. The Security Council, on the other hand, can remain inactive even when a threat to peace and security occurs, leaving the states to possibly exercise their right to self-preservation under Article 51 of the Charter. The right to self-defence, under a national constitution, is an

²¹⁵ Doehring, Karl: *Unlawful Resolutions of the Security Council and their Legal Consequences*, Max Planck Yearbook of United Nations Law, 1997, p 92.

²¹⁶ Ibid, p 93.

²¹⁷ Ibid, p 97.

exception because one relies on the responsibility of the government. Doehring finds that it is only this duty of the national government to act that justifies that even unlawful decisions must be respected, a justification which lacks an equivalent within the United Nations. If the Security Council is not compelled to preserve the welfare of the member-states it seems farfetched to demand obedience by the members in situations where the Council exceeds its given competence.²¹⁸

The two resolutions primarily discussed in this thesis, resolution 181 of the General Assembly and resolution 242 of the Security Council, are both seen as recommendations directed to the parties concerned, not imposing any obligations to perform a certain conduct at the time when they were made. Even so, all actions taken by the organs of the UN should be in accordance with the provisions of the Charter and the basic principles on which it is based. Recommendations of the UN organs have a political effect, just as the decisions of the Security Council do. The decisive resolutions of the Security Council do not create law; they are merely a way of applying it. The members of the UN are bound to respect them, but they cannot be forced to execute actively these resolutions. The members are never obligated to assist the Organization by military means.²¹⁹

The mere recommendatory character of a resolution does not mean that it is without any value. The political price of non-compliance with the will of the majority of the members, expressed in a resolution, may prove to be costly. Throughout the nearly six decades that the UN has been in function, most states have been inclined to take the resolutions under serious consideration and as a rule act accordingly. This approach may be based on a fear of reprisals from other states. Alternatively the compliance may be obtained since a state could fear that, if they disregard the assessments of the Organization, other states would follow their example, thus undermining the position of the UN as a whole.

The UN Charter as well as a national constitution cannot solely be described with what the written text states. In reality, a constitution is dependent on how the text actually is understood and observed. It comprises the actions and interpretations of the organs acting under the mandate of the constitution, but also the abidance of its subjects. Social relations, which a constitution has the purpose of regulating, change through time. Naturally the importance of certain provisions therefore varies in accordance with the changes of their context. Several scholars, including Ross, argue that the UN must not be seen as an organization once and for all constructed to present the laws and functions needed for the international community. Rather, one should regard the UN as a biological organism, bound by certain limits in its heritage, but still with the capacity to alter, by a constant adaptation, to changes in its environment.²²⁰

²¹⁸ Ibid, pp 97-98.

²¹⁹ Ibid, p 97.

²²⁰ Ross, Alf: *De Forenede Nationer*, Nyt nordisk Forlag, Copenhagen, 1963, p 54.

When the Charter of the United Nations was adopted in San Francisco 1945, the world order was deeply influenced by the two great wars of the 20th century. In the minds of people, war was not something unthinkable but rather something that they had been forced to grow accustomed to. Both wars had, to generalize, emerged out of fairly swift changes in world politics. The delegates of the San Francisco Conference sought to develop a system that would prevent the aggressions of a few from leading to the outbreak of new major wars. The Organization was meant to offer solutions to international conflicts that would not comprise the use of force. By the consent of states, the Charter would have a binding force, limiting the right of its members to act freely, by reason of their inter-dependability and the sanction apparatus of the Organization. Prior to the creation of the UN, the League of Nations, bi- or multilateral agreements and customary law governed the international community. The League had proved insufficient, and customs, by their very nature, were difficult to determine accurately in given situations without stirring up far-reaching political debates. The Charter, as a constant, would prevent political changes and disagreements from leading to armed conflicts.

The Charter was not meant to function as a model for how states should act internationally in all possible situations. The founding states assembled what they considered to be principles acceptable to the international community as a whole and made them the basis for the work of the Organization. The actions taken by the organs of the Organization and its members were intended to be in compliance with these basic norms. However, the precise outline of actions would have to depend on the situation at hand. Accordingly, Ross' argumentation for the UN as an organic creature capable of changing does not seem too farfetched. The political statements of the organs of the UN and the decisions taken by them in specific situations may very well constitute an element in the creation of customary law. Adaptations of the practice of the Organization, to the political and economical changes of the world, are inevitable. Nevertheless, the principles and purposes that form the foundation of the Organization must be acknowledged by the organs and the member-states in their actions. These basic norms can be seen as a framework for the changes of policy in accordance with the UN-system. Within these boundaries adaptations, without any formal changes of the Charter, may take place.

In practice the work of the Organization may not always be in strict conformity with its basic provisions. At least sometimes they are not what seem to be governing the actions taken by the organs. Often international or national politics of states are a determining factor as to how the members choose to vote in the Assembly or the Council. Ross claims, with regard to the interpretation of Article 2 (7) of the Charter, that the states positions vary according to their political interest in the certain issue. States interpret legally binding provisions of the Charter inconsistently due to the fact that the interpretations are based on political arguments instead of juridical.

It is probably fair to say that politics is the very foundation of the conflict regarding Palestine. In the early years of the 20th century a majority of Arabs, but also a rather substantial minority of Jews, inhabited the territory. The relation between the two groups was of a comparatively peaceful nature. In most parts of the world where Jewish communities existed, segregation and racial discrimination flourished. Often the Jews were not given the same rights as the other citizens of the states in question. This was not the situation in Palestine, both Arabs and Jews lived in relative harmony under the rule of the Ottoman Empire and had acquired the same rights and privileges.

Due to the pogroms directed against Jews in many parts of the world the representatives of the Jewish people started looking for a place where Jews from all over the world could create a community of their own, a safe-haven for the shattered people. Palestine with its religious significance was one of the territories discussed.

The Allied Powers of the First World War searched continuously to make additional allies. The British wanted to ensure the support of the USA and the Jewish community played a significant role in American politics. Agreements had been made among the Allied that, if the war was won, Palestine would fall under British influence. By stating in the Balfour declaration that Britain looked favourably on Jewish establishment in Palestine, the British won the support of the Jews, hoping that they would use their influence on the American government. Simultaneously the British searched for support by the Arabs in the war against the Ottoman Empire of Turkey. The Arabs of Palestine had been under foreign rule for quite some time and wished to become their own rulers. In the Husain-McMahon correspondence the British pledged themselves to recognize and uphold the independence of the Arabs if the war was won.

When the war eventually was won, the British had two conflicting promises to handle. Both Arabs and Jews were convinced of their right to form a self-governing state in Palestine. Jewish mass-immigration commenced in the 1920's and the frustration among both parties grew strong. Aggressions thrived towards each other and the Mandate Power, Britain. International politics, mainly performed by the British, had built the foundation of a major conflict between two peoples – a conflict that at the beginning of the following century has not even come close to be solved.

Political affinity and economical dependability have been determining factors in the process of searching for a solution to the Palestine conflict, rather than arguments based on the rule of law. Soon after the birth of the United Nations the problem of Palestine was handed over from the British to the newly established Organization. The horrors of the Second World War, especially impinged on the Jews, created a strong will among the members of the UN to compensate and help the persecuted Jews. In 1947 the General Assembly adopted Resolution 181 for the partition of Palestine, the legality of which has been questioned by many. Only a short period of

time after the proclamation of the State of Israel, Israel was given admission to the UN. By joining the Organization, Israel showed its approval of the principles of the Charter, which to a certain extent limits the supremacy of Israel.

The Palestinians, as well as the Arab states in general contested the partition resolution. The Jews were not entirely satisfied either, but saw it as a step in the right direction. The British seemed unable to enforce the provisions of the resolution and at the same time obstructed involvement of the UN prior to the official termination of the British mandate. This worried the Jews, fearing that the resolution never would be realized. The Jews managed to take by force an area even larger than the one appointed to them in the resolution. The Jews based their right on the recommendations of Resolution 181, but considered it to be in their right to further widen their territory.

On the other hand, the enforcement of Resolution 242, issued by the Security Council of 1967, was considered to be unacceptable by Israel. Israel has not been willing to give up the territories occupied by them in the six-day-war. They argue, seemingly correct, that the resolution only has a recommendatory character, not binding the members to act in correlation with it. Resolution 181 was also a mere recommendation, but was given more attention by Israel, most likely because its provisions were closer to the politics of Israel than what was later expressed in Resolution 242.

That a nation's evaluation of a UN-resolution, especially a recommendation, is based on political values instead of juridical is probably not uncommon. Even though the recommendation itself is not legally binding, this does not prevent it from highlighting legally binding principles of the Charter or international law in general. In resolution 242, for example, the principle of "*the inadmissibility of the acquisition of territory by war*" is referred to. According to both Wright and Mazzawi this principle is embodied in the prohibition of the use of force, expressed in Article 2 (4) of the Charter. Article 2 (4) is, in the view of most scholars, a norm of jus cogens character. Whether they are stated in a recommendation or a binding decision of the Security Council is of no concern to their validity. Such norms are never allowed to be violated by unilateral acts.

Just because violations of recommendations do not give effect to a sanction-apparatus against the perpetrator, it can hardly be regarded as acceptable to act in contradiction of their provisions at will. The unlawfulness of an action cannot be determined from whether a sanction is automatically directed upon the perpetrator for the action taken by him or not. What matters, must be if the action constitutes a violation of the law or not. The fact that effective sanctions are lacking does not make an action lawful.

The areas acquired by Israel, both in the War of 1948 and the War of 1967, have been annexed by the use of force, thus possibly violating a preemptory

norm of international law. Even so, today, most of the territories are still under Israeli occupation. Resolution 242 *emphasized* the importance of the norm but did not *demand* its obedience. Suggestions were made to adopt a stronger approach, but the necessary support by the members of the Council could not be obtained. It was not considered evident to all members that a violation of a peremptory norm, accepted and recognized by the international community of states as a whole, should be expressly described as unlawful. Supporters of this view might have regarded the occupation as something necessary for Israel's defence and the principle of non-acquisition by force as too rigid to be applied in practice.

One might argue that general principles of an organization or a body of law should be treated as common standards, not necessarily applicable in every given situation. That when the situation calls for it, one must apply a more realistic approach, adjusting the principles to what can be expected to bear fruit in practice. But these norms have attained their status because of the almost universal acceptance given to them. They aim to safeguard the rights and freedom of all nations and peoples. The Vienna Convention states that they can only be modified by another norm of the same status. Accordingly, these peremptory norms are to be given supremacy to politics and changing juridical values as long as another universally accepted rule has not been formed.

In his introduction to the annual report on the work of the Organization of 1961, Dag Hammarskjöld, The Swedish Secretary-General of the UN, underlined the necessity of upholding the purposes and principles stated in the preamble of the Charter. They form basic rules of international ethics by which all member states have committed themselves to be guided. On the national level, according to Hammarskjöld, these rules have essentially been accepted as principles binding for life within the boundaries of states. What the Charter aims to provide, is merely a reflection of those already nationally accepted principles, applicable in the international community.²²¹

Hammarskjöld realized that the differences among the member states of the UN are significant in matters of tradition, social development and the character of national institutions. Therefore the application of above mentioned basic rules in specific countries are subject to wide variations. Nevertheless, there are common elements behind those differences and these similarities are what constituted the basis for the foundation of the principles and purposes of the Charter.²²²

The Charter advocates basic democratic principles in the preamble, such as "the equal rights of men and women and of nations large and small". When upholding the principles, the strength of the individual member states may not be a determining factor for the respect of their rights. Hammarskjöld argues that another basic democratic principle, the rule of law, shall govern

²²¹ General Assembly, Official Records 1961 (16th session), Supplement 1A, p 1.

²²² Ibid, p 2.

the relations in the international community. Governments made efforts to establish an international community based on law and justice a long time prior to the United Nations. The rule of law was an essential factor in eliminating the anarchy that used to govern life within nations. As it has become in national life, the principle of justice must be applicable in international relations without distinction or discrimination. Both the strong as well as the weak must be measured according to one paradigm.²²³

A growing tendency among members can be detected to regard decisions by the organs of the UN, as something that the party concerned remains free to carry out to the extent that it finds suitable. Even decisions taken by the Security Council in accordance with Article 25 are frequently questioned. Such a failure to gain respect for decisions and actions of the Organization is often called a failure for the UN. Hammarskjöld adopted a different approach, arguing that it is rather a failure of the world community to make the Charter a living reality in practical political action, as it is already in law. Cooperation is needed by the single members, as well as all the members collectively, to make the Charter an effective instrument for safeguarding common values and the equal right of peoples.²²⁴

One very important aspect of all lawmaking, international as well as national, must be that it is made clear to its subjects how they are expected to perform to be in conformity with the law. The subjects would undoubtedly like to know what actions, on their behalf, could cause sanctions from the central power. Simultaneously, it is helpful to know what actions other subjects are prohibited to perform; in what aspects the laws safeguard the sphere of each subject from the influence of others. By regulating certain aspects of the international relations among states by (treaty-) law one hopes to establish reciprocity in state action, creating a situation where the subjects have something else to rely on than their own wits and powers for their safety. If political values and individual strength of the parties are allowed to govern the application of international law, the reciprocity of the practice among states might be endangered.

Dag Hammarskjöld foresaw in his report what the consequences of unconformity in the application of the law within the Charter would lead to:

*“Those whose reactions to the work of the Organization hamper its development or reduce its possibilities of effective action may have to shoulder the responsibility for a return to a state of affairs which governments had already found too dangerous after the First World War.”*²²⁵

²²³ Ibid, p 2.

²²⁴ Ibid, p 4.

²²⁵ Ibid, p 5.

9 Conclusions

The UN Charter represents an endeavour to bind all the states of the world to a common body of law, legitimised by mankind's fundamental wish to live in peaceful coexistence. The position of the Charter as well as its sanction apparatus is to a large extent relying on inter-dependability in the world community. If the UN is to function, not too great a part of its member states can deviate from provisions of the Charter in their state practice. The situation would be particularly threatening if one of the greater states were to choose not to act in accordance with the Charter in its international relations.

It has been claimed that the Charter has become redundant as a basis for solving international conflicts since the delegates of the San Francisco-conference could not possibly have anticipated the situations of today. Representatives for this interpretation of the state of world politics advocates that the UN Charter must evolve organically in accordance with the evolution of the international community to remain a factor of importance.

To talk about evolution of international law can be misleading in the sense that this expression has a positive ring for most people. A transformation from something that has been, into something new, does not necessarily have positive implications. When discussing evolution of international law the possible change in question must be assessed in relation to basic values concerning the organisation of international relations in general. Public international law aims primary at safeguarding international equality and worldwide peace and security. Only as long as a change of the law contributes to the fulfilment of these aims it is relevant to speak of an evolution in the positive sense.

A vast amount of the states of the world have ratified the UN Charter, thereby giving their consent to the principles and provisions of the UN as a standard for the international community. The Charter and the resolutions of the UN-organs have reached various levels of international law. The states are accordingly, in general, bound to act in harmony with the UN to avoid breaking the law.

From time to time UN demands are proved futile; the actions by states turn out to be in conflict with the Charter. The Palestine conflict has evolved parallel to the UN throughout the Organization's lifespan, but the United Nations has not been able to resolve the conflict. Yet it has been the object of a great deal of efforts on the Organization's behalf. The parties to the conflict have disobeyed the demands of the UN on numerous occasions. If the requirements of the UN fail to be enforced it is questionable if they really can be regarded as expressions of law.

What makes an action unlawful? Just because an effective sanction apparatus is lacking in international law, it does not necessarily mean that the states are free to act at their will, without exceeding the boundaries of international law. We would normally not question that if somebody were exceeding the speed limit without being caught, why no sanction would be activated, still were breaking the law. The unlawfulness of an action is not determined by what consequences it may have for the perpetrator in the future. It is determined by what consequences the action itself have to the ones that are affected and possibly victimized by it. I see no reason to question the principles and provisions dictating what international law requires from nations, just because it so happens that many nations violate these requirements and successfully avoid reprisals. It must be regarded as fairly common that individuals break the speed limit; this does not bring about a discussion about making it lawful to drive in whatever speed that would suit individual purposes. If individuals drive slower it is considered to have the positive effect of reducing casualties in traffic, which is why one is not prepared to give up the speed regulations only because they are commonly ignored. Instead one contemplates what enforcement measures could be adopted to make the regulations more efficient.

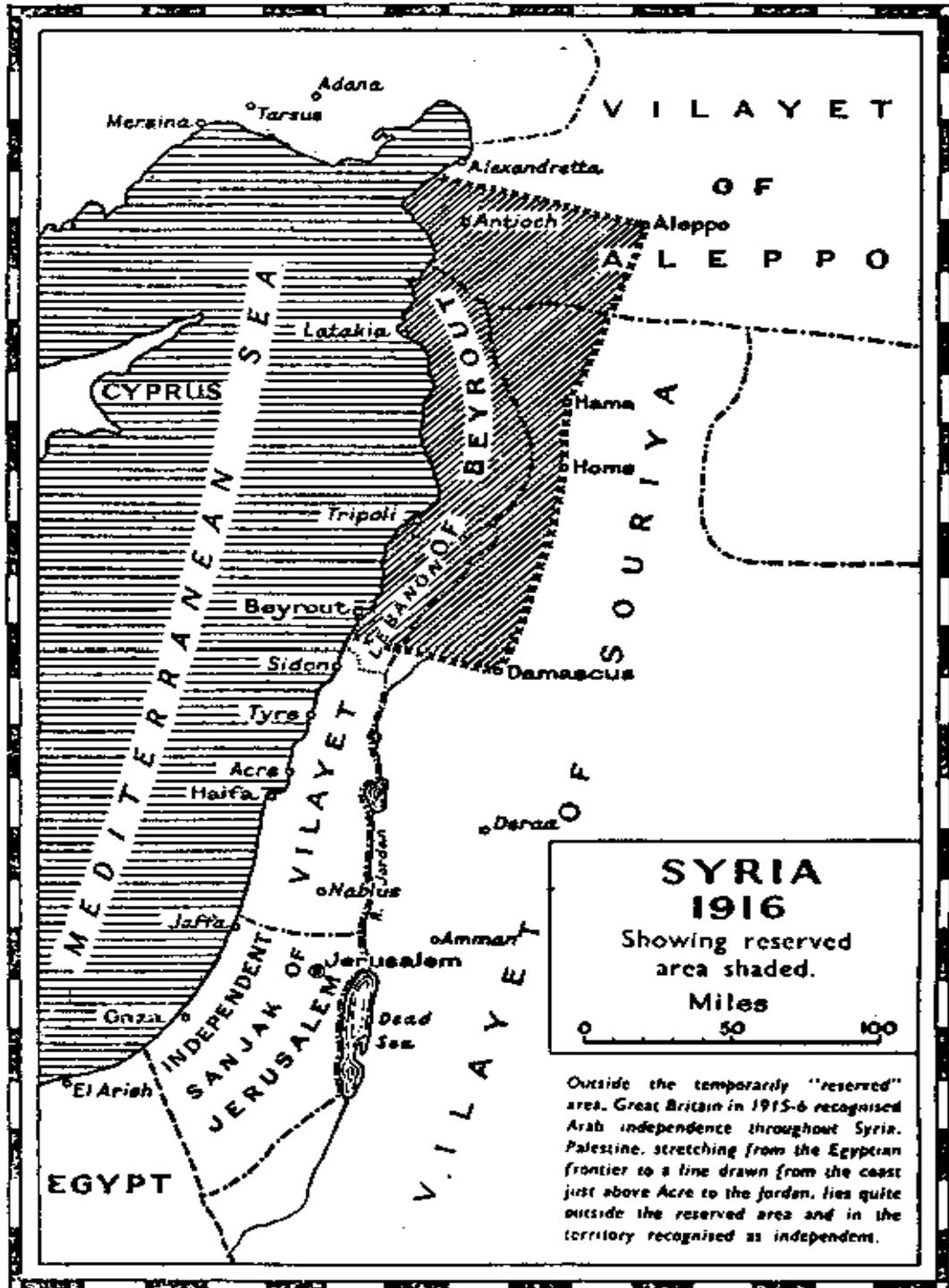
All types of law have the purpose of preserving something that has been considered to be of common significance. While circumstances in society regulated by law is subject to constant change, as a consequence the law may have to be adjusted, even public international law. When a regulation becomes out of date it does not mean that it automatically becomes obsolete. Most juridical systems have procedures for making changes within the body of law, so does the organisational structure of the United Nations. The possibilities of change that are available within a body of law are generally constructed not to work too swiftly, to minimize the risk that rash decisions overthrow a regulation that once was considered important enough to codify. This function is also imbedded in the primary codification of public international law, the UN Charter. Such procedural limitations, slowing down the development, are as a rule respected when changes are considered in national lawmaking. In my views this ought to be the rule even in public international law.

Articles 108 and 109 of the Charter primarily regulate the possibilities to change and amend the Charter. In general the support of a two third majority is needed in the General Assembly to perform a proposed amendment. Accordingly, the procedure for adapting the provisions of the Charter to possible changes of the world through time is fairly uncomplicated. However, a vast support among the member states is required. If Israel were able to gain this support, the Charter as a treaty could be modified. The UN Charter presents options for adaptation of the Charter as a treaty but another question is whether it is possible to change norms that constitute general international law, binding on all nations, as easily. As we have seen, customary international law cannot be changed without a recurring state practice aligned by a conviction of the lawfulness in the actions. A mere voting in the GA may not entirely accomplish the

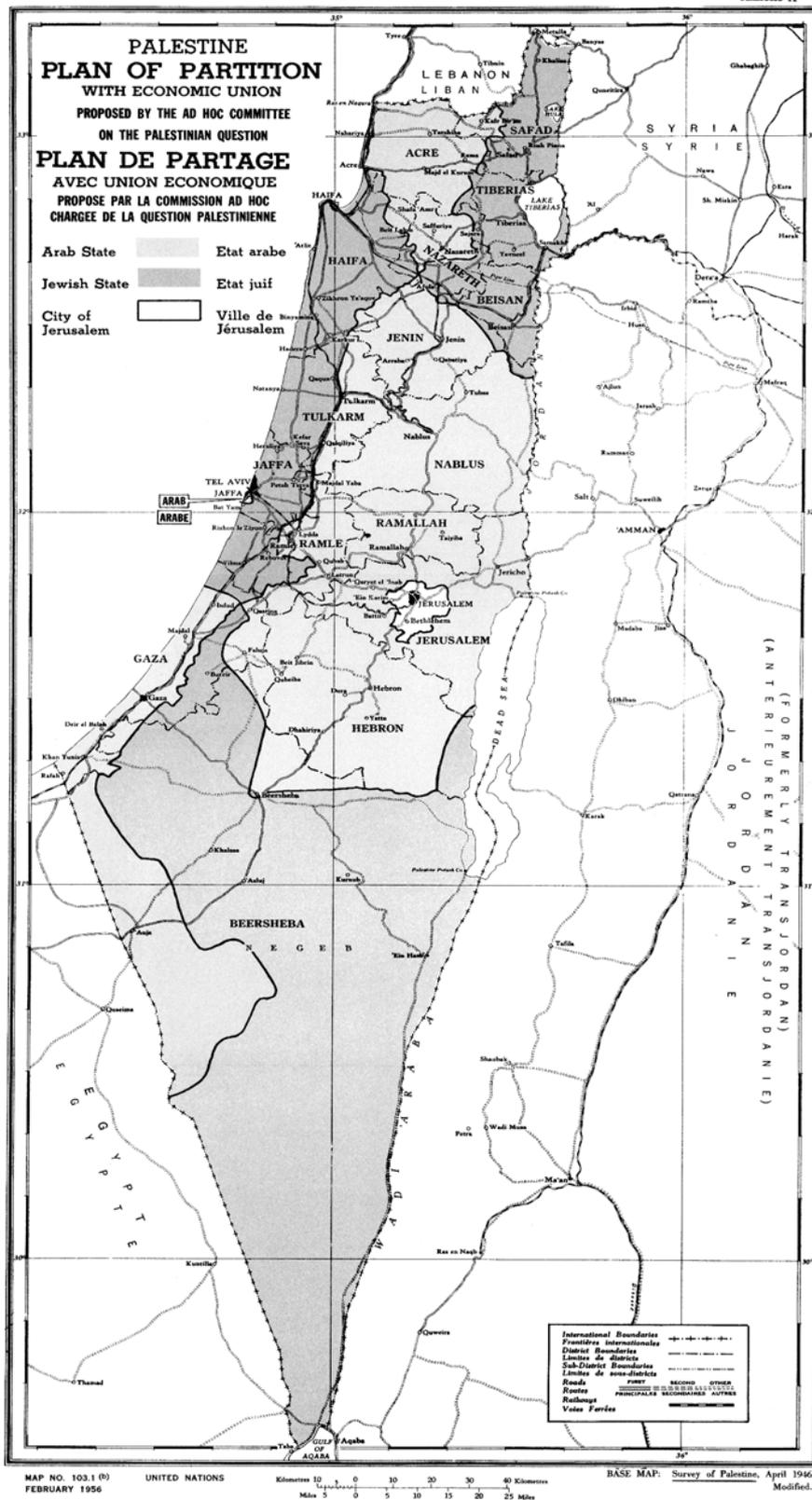
fulfilment of these requirements. Even if political changes can rapidly create new world scenarios, the customs that form part of international law cannot be adjusted to tendencies in politics, without involving the invalidation of customary law. As early as in the 17th century, the horrors of war awoke the strife among philosophers like Hugo Grotius to form a theoretical basis for a regulation on the international arena. International regulations have been formed and evolved during centuries of effort, aiming at the safeguard of peaceful co-existence among peoples and states.

Article 2 (4) of the Charter stipulates a general prohibition of *use of force* that incorporates the principle that *acquisition of territory by use of force is inadmissible*. In addition, this principle has been widely acclaimed by the states of the world. Israel claims that they must be allowed to keep territories occupied with the use of force, in the line of self-defence. It can be held that Israel considers the prohibition of the *use of force* in the Charter as non-applicable to the conflict regarding Palestine. The complex situation of a conflict between two peoples within narrow boundaries arguably forth brings issues of self-defence. The right to self-defence should not be limited by a strict implementation of the principle of the *inadmissibility of the acquisition of territory by use of force*. But if this were the general opinion among states, the sufficient support for achieving a suitable amendment of the Charter would be present. Instead of ignoring a principle of international law and express demands from the Organs of the UN, while maintaining a right to keep the territories it has occupied, Israel ought to propose an adaptation of the Charter. As long as a suggested amendment has not undergone this procedure and gained an affirmative response by the other members, the available regulations are still in force. What constitutes binding international law for a member of the UN does not depend on whether a single state, like Israel, can be forced to act in accordance with the law or persistently question its provisions – it is still the law.

10 Supplements

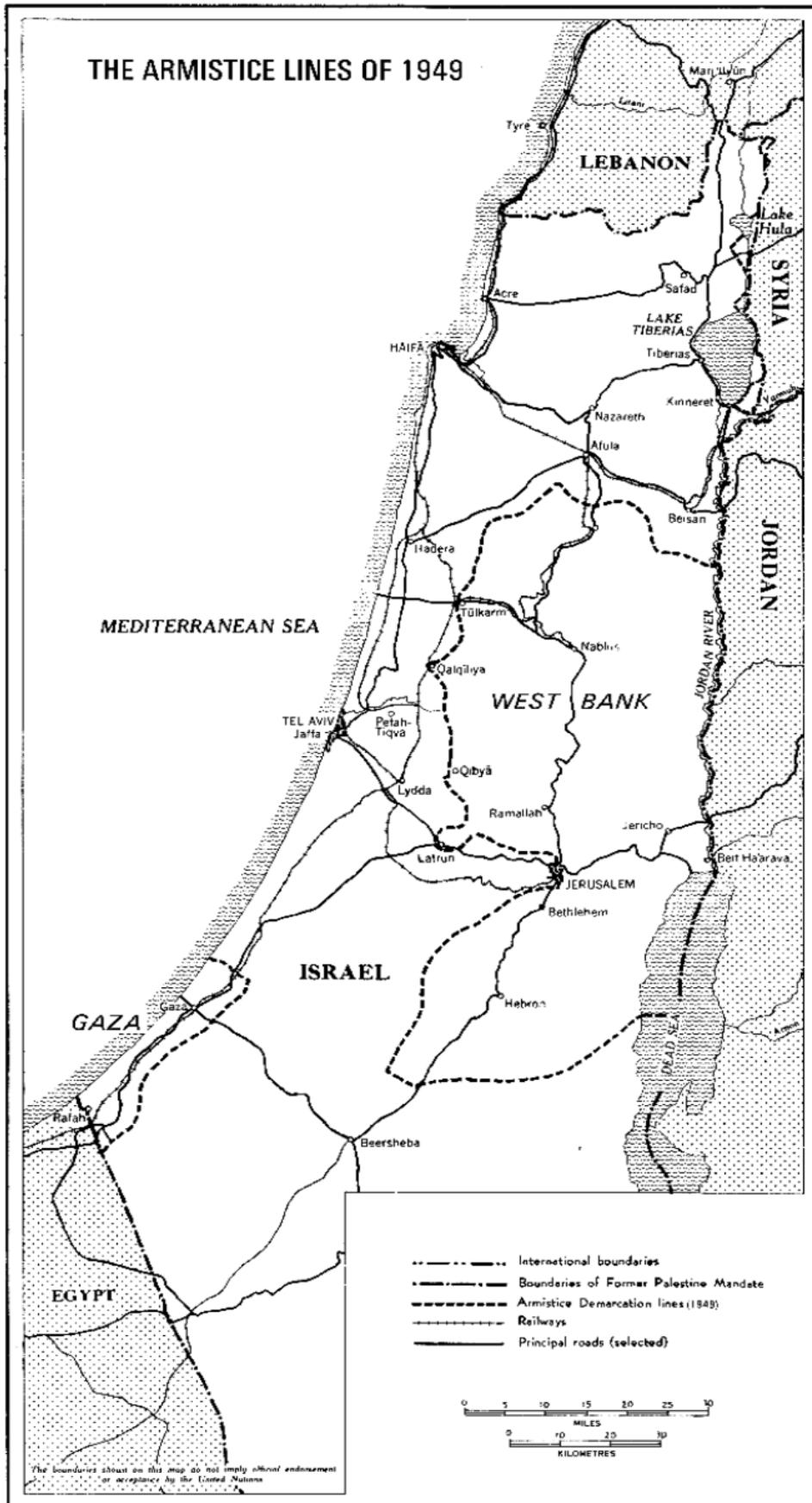


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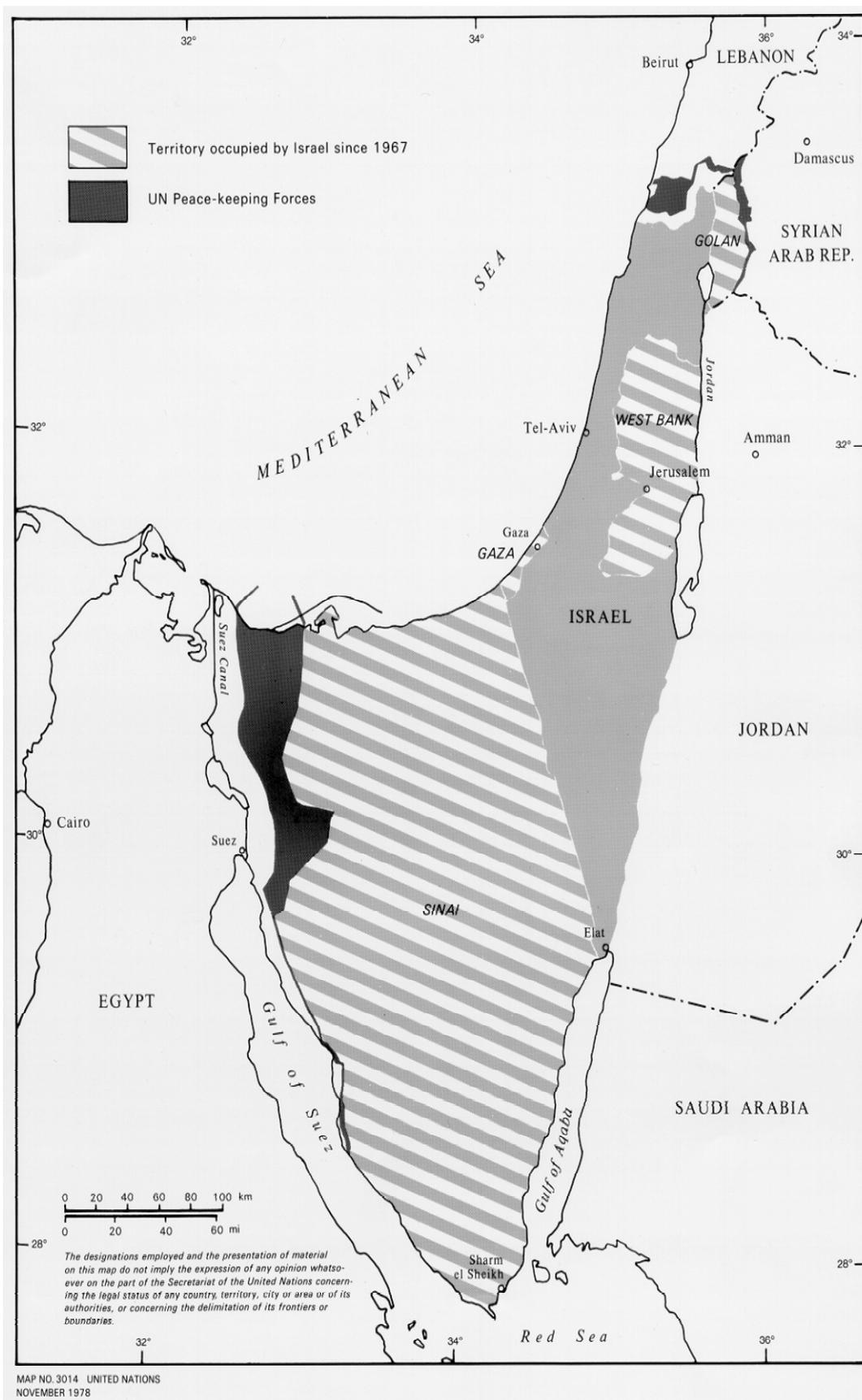
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THE ARMISTICE LINES OF 1949



MAP NO. 5471 UNITED NATIONS
OCTOBER 1953

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Resolution 181 (II). Future government of Palestine

A

The General Assembly,

Having met in special session at the request of the mandatory Power to constitute and instruct a special committee to prepare for the consideration of the question of the future government of Palestine at the second regular session;

Having constituted a Special Committee and instructed it to investigate all questions and issues relevant to the problem of Palestine, and to prepare proposals for the solution of the problem, and

Having received and examined the report of the Special Committee (document A/364) 1/ including a number of unanimous recommendations and a plan of partition with economic union approved by the majority of the Special Committee,

Considers that the present situation in Palestine is one which is likely to impair the general welfare and friendly relations among nations;

Takes note of the declaration by the mandatory Power that it plans to complete its evacuation of Palestine by 1 August 1948;

Recommends to the United Kingdom, as the mandatory Power for Palestine, and to all other Members of the United Nations the adoption and implementation, with regard to the future government of Palestine, of the Plan of Partition with Economic Union set out below;

Requests that

(a) The Security Council take the necessary measures as provided for in the plan for its implementation;

(b) The Security Council consider, if circumstances during the transitional period require such consideration, whether the situation in Palestine constitutes a threat to the peace. If it decides that such a threat exists, and in order to maintain international peace and security, the Security Council should supplement the authorization of the General Assembly by taking measures, under Articles 39 and 41 of the Charter, to empower the United Nations Commission, as provided in this resolution, to exercise in Palestine the functions which are assigned to it by this resolution;

(c) The Security Council determine as a threat to the peace, breach of the peace or act of aggression, in accordance with Article 39 of the Charter, any

attempt to alter by force the settlement envisaged by this resolution;

(d) The Trusteeship Council be informed of the responsibilities envisaged for it in this plan;

Calls upon the inhabitants of Palestine to take such steps as may be necessary on their part to put this plan into effect;

Appeals to all Governments and all peoples to refrain from taking action which might hamper or delay the carrying out of these recommendations, and

Authorizes the Secretary-General to reimburse travel and subsistence expenses of the members of the Commission referred to in Part I, Section B, paragraph 1 below, on such basis and in such form as he may determine most appropriate in the circumstances, and to provide the Commission with the necessary staff to assist in carrying out the functions assigned to the Commission by the General Assembly.

B 2/

The General Assembly

Authorizes the Secretary-General to draw from the Working Capital Fund a sum not to exceed \$2,000,000 for the purposes set forth in the last paragraph of the resolution on the future government of Palestine.

*Hundred and twenty-eighth plenary meeting
29 November 1947*

Resolution 242 (1967)

of 22 November 1967

The Security Council,

Expressing its continuing concern with the grave situation in the Middle East,

Emphasizing 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,

Emphasizing further that all Member States in their acceptance of the Charter of the United Nations have undertaken a commitment to act in accordance with Article 2 of the Charter,

1. *Affirms* that the fulfilment of Charter principles requires the establishment of a just and lasting peace in the Middle East which should include the application of both the following principles:

(i) Withdrawal of Israel armed forces from territories occupied in the recent conflict;

(ii) Termination of all claims or states of belligerency and respect for and acknowledgment of the sovereignty, territorial integrity and political independence of every State in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force;

2. *Affirms further* the necessity

(a) For guaranteeing freedom of navigation through international waterways in the area;

(b) For achieving a just settlement of the refugee problem;

(c) For guaranteeing the territorial inviolability and political independence of every State in the area, through measures including the establishment of demilitarized zones;

3. *Requests* the Secretary-General to designate a Special Representative to proceed to the Middle East to establish and maintain contacts with the States concerned in order to promote agreement and assist efforts to achieve a peaceful and accepted settlement in accordance with the provisions and principles in this resolution;

4. *Requests* the Secretary-General to report to the Security Council on the progress of the efforts of the Special Representative as soon as possible.

Adopted unanimously at the 1382nd meeting.

**Resolution 338 (1973)
of 22 October 1973**

The Security Council

1. *Calls upon* all parties to the present fighting to cease all firing and terminate all military activity immediately, no later than 12 hours after the moment of the adoption of this decision, in the positions they now occupy;

2. *Calls upon* the parties concerned to start immediately after the cease-fire the implementation of Security Council resolution 242 (1967) in all of its parts;

3. *Decides* that, immediately and concurrently with the cease-fire, negotiations shall start between the parties concerned under appropriate auspices aimed at establishing a just and durable peace in the Middle East.
*Adopted at the 1747th meeting
by 14 votes to none.*

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