

RESOLUTION 242 – WHY THE ISRAELI VIEW OF THE “WITHDRAWAL PHRASE” IS UNSUSTAINABLE IN INTERNATIONAL LAW

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INTRODUCTION

Any interpretation of the Resolution which allows Israel to acquire territory occupied in 1967 is untenable in international law

Since the breakdown of the Camp David negotiations in the summer and the testing new phase which the conflict between Israelis and Palestinians has entered, much attention has been brought to bear on Security Council Resolution 242, the Resolution passed by the Security Council in the aftermath of the Six Day War in 1967. The Israeli Government appears to maintain that the Resolution does not require Israel to withdraw from “all” the territories it seized in that war as part of an overall peace settlement, and this is a viewpoint, which is frequently reiterated in the media. In fact, the Israeli Government appears to be carrying out a propaganda offensive on this point,¹ perhaps designed to underpin a view that the occupied territories are the subject of a genuine legal dispute. This paper attempts to analyse the Resolution with this view in mind. If the analysis set out here is correct, any interpretation of the Resolution which allows Israel to acquire territory occupied in 1967 is untenable in international law, and ought not to be a legitimate matter for debate.

We will first set out the relevant aspects of the acquisition of sovereignty over territory in international law which must be understood first, since they provide essential background to the Resolution. We will follow this by a consideration of the Israeli argument by reference to the text and structure of the Resolution, then turn to the interpretation of the Resolution. In an endnote, we shall also consider very briefly the debate in the Security Council at which the Resolution was adopted.

THE LAW ON TITLE TO TERRITORY

Since the 1920s, international law no longer recognises that a state can acquire title to territory by conquest, in other words by acquiring it through war.² This has probably been the case ever since the League of Nations Covenant. The only state practice which has gone against this view has been that of a handful of states which are rightfully regarded as pariahs: examples which spring to mind are the Axis Powers before and during World War II and, more recently, Saddam Hussein’s Iraq.

Israel’s victory in the Six Day War in 1967 could not, therefore, grant Israel either sovereignty or a right to acquire sovereignty over territories which it occupied. Nor did any of these territories constitute *terra nullius*, the only form of territory which would have been open to unilateral acquisition by a power which came into possession of it since, quite apart from anything else, each of the territories had inhabitants with settled forms of social and political organisation. All other ways in which sovereignty could have been acquired would have involved, at the very least, some form of consent to that sovereignty by the inhabitants of the territories or the states which had previously had sovereignty over them.³ Such consent has been spectacularly unforthcoming.

International law thus gave Israel no right to acquire sovereignty over any of the territories. This applied whatever the status of the territories at that time, and questions such as what was the legal status of East Jerusalem, the West Bank and the Gaza Strip immediately prior to their seizure by Israel are therefore irrelevant to the question under consideration here.

THE TEXT OF THE RESOLUTION

Let us now turn to Resolution 242 itself. It is quite short. The official English text is as follows:

*“The Security Council,
Expressing its continuing concern with the grave situation in the Middle East,
Emphasising 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,
Emphasising 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 of 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 acknowledgement of the sovereignty, territorial integrity and political independence of every state in the area and the right to live in peace within secure and recognised boundaries free from threats of acts of force;*
2. *Affirms further the necessity*
 - (a) *For guaranteeing the 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 demilitarised 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.”*

THE STRUCTURE OF THE RESOLUTION

Let us also pause to look at the structure of the Resolution before turning to the Israeli argument, since the structure is important in order to establish the context of the various provisions in the Resolution and the relationship between them. The Resolution must be considered as a whole.

The Resolution divides into three parts. The first three paragraphs (those beginning with the words “*Expressing*” and “*Emphasising*”) form the first part. They are general in nature and unnumbered. They are “preambles”, provisions which are accepted as part of the context for determining the meaning of the operative provisions which follow, including the determination of their object and purpose.

The second part consists of operative provisions, numbered paragraphs 1 and 2 which each begin with the word “*Affirms*”. We will call paragraph 2(i) “*the*

withdrawal phrase”, borrowing the term from the Israeli Government’s website.⁴ Notice how it is closely connected with the other principle in paragraph 2, “*termination of all claims or states of belligerency and respect for and acknowledgement of the sovereignty, territorial integrity and political independence of every state in the area and their right to live in peace within secure and recognised boundaries free from threats of acts of force.*” For brevity, we will call this provision “*the secure and recognised boundaries phrase*” and will need to consider it later. However, it is the withdrawal phrase at which we must look first.

The third part also consists of operative provisions, namely two *Requests* to the Secretary-General in paragraphs 2 and 4. These are also relevant to our enquiry and we will turn to them when setting out our own interpretation.

THE ISRAELI ARGUMENT

The Israeli contention that it need not withdraw from all the territories would seem to be based on its interpretation of the wording of the withdrawal phrase:

“Withdrawal of Israel armed forces from territories occupied in the recent conflict.”

Israel would appear to hold that “the withdrawal phrase in the Resolution was not meant to refer to a total withdrawal.” Is this view sustainable?

There is no word “*all*” or “*the*” before “*territories*” in the withdrawal phrase. Israel would appear to rely on this in order to hold that “*the withdrawal phrase in the Resolution was not meant to refer to a total withdrawal.*”⁵ Is this view sustainable? Certainly, there have been academic publicists whose statements may be used to support this position. To take Gerson, one frequently cited example:

[Resolution 242] *unanimously called for withdrawal from ‘territories’ rather than ‘withdrawal from all the territories’. Its choice of words was deliberate and the product of much debate. They signify that withdrawal is required from some but not all the territories.*⁶

Gerson adds a footnote to this assertion:

*This becomes clear upon an examination of Security Council deliberations prior to reaching consensus on the text of Resolution 242. Several states made repeated attempts to require ‘withdrawal from all the territories’, which they interpreted to mean that only withdrawal from all the territories would do. The defeat of these efforts makes it, therefore, incorrect to assert that withdrawal from all territories is required.*⁷

One very recent commentator, Geoffrey Watson, has suggested that Resolution 242

*... points in different directions at once. On the one hand, its preamble speaks of ‘the inadmissibility of the acquisition of territory by war’, implying that Israel should return all the territories obtained in the 1967 War. On the other hand, the English text of the resolution provides that peace ‘should’ (not ‘must’) include withdrawal of Israeli forces ‘from territories occupied in the recent conflict’, not ‘from the territories occupied’ in that conflict.*⁸

He then cites Gerson in support of the proposition that “*The deliberations of the Council suggest that this wording was no accident, and that many of the drafters intended that ‘withdrawal is required from some but not all of the territories.’*”⁹

What Watson has written brings us to another question which we must consider in due course. Is the text of the Resolution clear?

RESPONSES TO THE ISRAELI ARGUMENT

The Israeli position encounters a number of difficulties, only one of which needs to be fatal in order to invalidate the Israeli interpretation

The Israeli position does not reflect the ordinary meaning of the wording

Even is the wording of the withdrawal phrase is ambiguous, it must be placed in the context of the rest of the Resolution

The Israeli position encounters a number of difficulties, only one of which needs to be fatal in order to invalidate the Israeli interpretation.

Despite the absence of “*all*” or the definite article “*the*” before “*territories*”, it cannot be said that “*territories*” is undefined. “*Territories*” is defined as a specific category of territories, namely “*territories occupied in the recent conflict*.” So long as there are still territories which Israel occupied in that conflict, and from which no withdrawal has taken place, can it be said that Israel has complied with the principle? This writer believes that the answer to this is in the negative, and that it follows from this that the Israeli position does not reflect the ordinary meaning of the wording. The translators into French who produced the official text (French being the other working language of the UN and of equal status with English) believed that the French text reflected the ordinary meaning of the English text. And the French text is quite clear in referring to *the territories*: *Retrait des forces armées israéliennes des territoires occupés lors du récent conflit*. This contains the French definite article *des* in its genitive form, which clearly means “*from the*” in this context.

Even if the wording of the withdrawal phrase is ambiguous, and both the Israeli view and that of this writer are sustainable readings of it, it must be placed in the context of the rest of the Resolution. And we find other expressions in the Resolution which are not preceded by words such as “*all*” or “*the*”, but where in context it is inconceivable (and, incidentally, grossly inimical to Israel’s interests) that the reason for the absence of such words was that only “*some*” and not “*all*” were intended. Consider the following:

“*secure and recognised boundaries*”¹⁰ (para. 1(II));
“*international waterways*”¹¹ (para 2(a)).

Could it be seriously suggested that the intention is that only “*some*”, and not “*all*”, of the boundaries should be secure and recognised?

Could it be seriously suggested that the intention is that only “*some*”, and not “*all*” of the international waterways in the area need a guarantee of freedom of navigation?

Yet such assertions would not be different from Israel’s position with regard to withdrawal from “*some*” of the territories occupied in the recent conflict. The only difference is that the latter is self-serving from an Israeli perspective, whilst the two other examples given above are unfavourable from an Israeli perspective.

THE INADMISSIBILITY OF THE ACQUISITION OF TERRITORY BY WAR

SECURE AND RECOGNISED BOUNDARIES

The second preamble, “*Emphasising 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*” must be used to interpret the meaning of the withdrawal phrase. The words “*the inadmissibility of the acquisition of territory by war*” are self-explanatory. As we have seen, they do no more than reiterate the current state of international law on the acquisition of territory by war. Their presence renders impossible a good faith interpretation which would allow Israel to acquire sovereignty unilaterally over any of the territories it had occupied. This, on its own, renders the Israeli position untenable.

The second limb of the same preamble, “*the need to work for a just and lasting peace in which every State in the area can live in security*” must also be used in the process of interpretation. These words are particularly relevant to the “*secure and recognised boundaries phrase*.” It will be remembered that this is the other principle which the Resolution states should be applied in order to establish a just and lasting peace.

We must therefore ask whether these references to “*security*” and “*secure and recognised boundaries*” have an effect on the question of an Israeli withdrawal and its extent.

There is a subtle but important difference in the language of the two limbs of the second preamble:

...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 [emphasis added].

There is a distinction between something which is “*inadmissible*” and something for which there is “*a need to work*.” In plain English, when something is inadmissible, it is ruled out. There is thus a primacy given to the inadmissibility of the acquisition of territory through war in the preamble, and that primacy pervades the entire Resolution. One might say that the inadmissibility of the acquisition of territory through war is the foundation on which the parties need to work in order to establish a just and lasting peace.

To point this out is not to deny that the principles contained in the withdrawal phrase and the secure and recognised boundaries phrase are *both* to be applied in order to establish a just and lasting peace, and they are placed on a footing of equality in the first operative paragraph. But if the second limb is to be interpreted in a way that allows Israel to acquire territory it will lead to an illegality and at the same time defeat the possibility of applying the principle contained in the withdrawal phrase. This would also render the Resolution internally inconsistent. The principle contained in the secure and recognised boundaries phrase must therefore be applied in a way that is legal and, at the same time, consistent with the principle contained in the withdrawal phrase.

CONCLUSION: THE CORRECT INTERPRETATION

The purpose of the Resolution is to encourage the parties to negotiate a settlement on the basis of the principles it contains

No territory may change hands other than through a negotiated agreement

If we now turn to the final part of the Resolution, we find the two *Requests* to the Secretary-General to appoint a Special Representative who will visit the region and report back (paragraphs 3 and 4). The Special Representative is “*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*” [Emphasis added].

This shows that the purpose of the Resolution is to encourage the parties to negotiate a settlement on the basis of the principles it contains: in particular, the principles contained in the withdrawal phrase and the secure and recognised boundaries phrase which have been analysed above.

The negotiations which the Resolution envisages are to be conducted on a footing of equality and on the basis of the rights of the Parties under international law. They have as one of their principal objects the establishment of secure and recognised boundaries for Israel and its neighbours, but this is subject to an overriding principle that the acquisition of territory by war is inadmissible. Therefore, no territory may change hands other than through a negotiated agreement. Surely, what the Security Council was saying was that there should be in effect a principle of no victor and no vanquished in those negotiations. The 1947 armistice lines were far from ideal for the security of Israel and its neighbours. But an adjustment to these lines can only happen by an agreement of the parties in order to achieve secure and recognised frontiers.¹² This writer believes that an interpretation of the Resolution in this way removes any doubt or ambiguity from the withdrawal phrase, and enables the Resolution to appear as a clear, internally consistent whole which is free from any illegalities. By contrast, the Israeli interpretation depends upon a flagrant illegality

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(the suggestion that Israel has a legal right to retain some territory occupied in war and, by implication, to acquire sovereignty). It also makes the Resolution contradictory and internally inconsistent.

**END NOTE:
THE DEBATE IN
THE SECURITY
COUNCIL**

If the analysis presented above is correct, there is no need to refer to the debates in the Security Council which led to the unanimous adoption of the Resolution as an aid to interpretation. An attempt to use the debates and earlier drafts to interpret the Resolution should only take place if the Resolution is unclear. The text of the Resolution was presented as a composite whole, and it is the meaning of the text taken as a whole that counts. As Mr Goldberg, the representative of the USA., pointed out at the meeting, "*the voting of course takes place not on the individual or discrete views and policies of various members but on the draft resolution.*"¹³. Nevertheless, the following might be observed for the record.

Lord Caradon, the British representative who introduced the draft Resolution, stated that he believed the wording of the Resolution to be clear. He did not state in so many words what he believed the withdrawal phrase to mean, but he did say that he stood by what the British Foreign Secretary had said in the General Assembly:

*... Britain does not accept war as a means of settling disputes, nor that a state should be allowed to extend its frontiers as a result of war. This means that Israel must withdraw. But equally, Israel's neighbours must recognise its right to exist, and it must enjoy security within its frontiers...*¹⁴

There is no sign of any suggestion that Israel might acquire territory here. Nor is there in what Lord Caradon said later in the same speech, which emphasises that the withdrawal phrase should be interpreted in the light of the preamble:

In our resolution we stated the principle of the 'withdrawal of Israel armed forces from land occupied in the recent conflict' and in the preamble we emphasised 'the inadmissibility of the acquisition of territory by war'. In our view, the wording of these provisions is clear."¹⁵

Of the other states on the Security Council, Canada, China, Denmark, Japan and the USA made no statements on the record, which touch directly on the meaning of the withdrawal phrase. Bulgaria,¹⁶ Ethiopia,¹⁷ France,¹⁸ India,¹⁹ Mali,²⁰ Nigeria,²¹ and the USSR²² stated during the debate that they considered the text of the Resolution to require an Israeli withdrawal from *all* the territories. Brazil²³ and Argentina²⁴ stated that, although they voted for the Resolution, they would have preferred an earlier draft of which they had been among the sponsors, and which was explicit on the requirement for an Israeli withdrawal from all the territories. According to the Security Council Official Records, no member of the Security Council suggested in the meeting, either before or after the vote, that Israel might have a unilateral right to retain some of the territories as part of a final settlement.

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Notes

¹ See, for instance the Israeli Government's website which includes a document entitled "*Statements Clarifying the Meaning of UN Security Council Resolution 242.*" This document states that "*Israel held that the withdrawal phrase in the Resolution was not meant to refer to a total withdrawal.*" It contains a highly selective list of statements by politicians and diplomats (many of whom were involved in the preparation and discussion of Resolution 242) which purportedly support the Israeli interpretation. However, this writer believes that the vast majority of statements in this list are perfectly compatible with the analysis set out in this paper, and that the individuals quoted would have been horrified to find their words used out of context in order to

support a position which would appear to give Israel a right to acquire parts of the occupied territories. The website is at www.israel.mfa.gov.il/mfa/go.asp/MFAH0cyv0. Note also the numerous letters published in the press which assert that the Resolution was not intended to lead to a total withdrawal. For just two examples, see the letter by Oliver Kamm published in the *London Times* on 28 October and the letter by Milton Polton published in the *International Herald Tribune* on 7 December 2000.

See Oppenheim's *International Law* (9th edition, ed. Jennings and Watts, 1992), p.699 where Brownlie's *International Law and the Use of Force by States* is quoted with approval on this point. The prohibition extends to any attempt to acquire sovereignty over territory occupied in a war of self defence. On this point, see Oppenheim *ibid.* at pp.703-5 and notes 7 and 8. This paper does not therefore need to examine the question of whether the Six Day War was in whole or in part a war of "anticipatory self-defence" or an aggressive war.

This is not the place for a detailed discussion of the ways in which states may acquire sovereignty over territory (nor for a discussion of the question of Palestinian self-determination). If, however, we categorise the ways of acquiring territory in terms of the classical modes of acquisition, cession requires agreement and acquisitive prescription implies at least tacit consent on the part of the previous owner. The same applies to estoppel. Even if a more recent theory, such as consolidation of historic title, is applied it is hard indeed to see how such a title could be produced today against the wishes of the inhabitants of the territory. But perhaps the most fundamental point is that peoples with a form of political and social organisation have sovereignty over their territory, irrespective of whether they are recognised as states in international law. This was already firmly established as the law at the time of European colonial expansions in the 19th Century (and earlier).

See Note 1 above.

Israeli document entitled "Statements Clarifying the Meaning of the UN Security Council Resolution 242." See note 1 above.

Gerson, *Israel, the West Bank and International Law*, p.76. But perhaps the wording with which he immediately follows the sentence quoted above is sometimes overlooked: "Final boundaries are to be negotiated in peace treaty proceedings. This is what was required by the 1949 Armistice Agreement and this is what Resolution 242 now seeks to bring to fruition. **The extent of territorial concessions that may be negotiated or bargained for is, however, very limited. Security Council Resolution 242 restricts such claims, as do the 1949 Armistice Agreements to territorial adjustments mandated by 'security considerations'.**" (Emphasis added). If Gerson's intention is that such adjustments should be reciprocal and reflect a state of equality between the parties, then his view is very similar to that expressed in this paper.

Gerson, *ibid.*, p104, note 179.

Watson, *The Oslo Accords – International Law and the Israeli-Palestinian Peace Agreement 2000*, p.31.

Ibid.

The French text is "à l'intérieur de frontières sûres et reconnues."

The French text is "les voies d'eau internationales." Note once again the explicit use of the definite article in the French in order to convey the meaning of the English.

This would seem to have been Israel's position before the Six Day War. See the quotation from Eban, *The Voice of Israel* and the comment thereon in Gerson, *op. Cit.*, pp.104-5, note 182.

UNCOR, 1382 Meeting, para 64.

UNCOR, 1381st Meeting, para 20.

Ibid., para 31.

UNCOR, 1382nd Meeting, para 139.

Ibid., para 33 read with para 37.

Ibid., para 111.

Ibid., paras 52, 53.

Ibid., para 189.

Ibid., para 76.

Ibid., para 119.

Ibid., para 128.

Ibid., para 162.