rights, is to be exercised by the people of the relevant unit without coercion and on a basis of equality.[113]

(5) Self-determination can result either in the independence of the self-determining unit as a separate State, or in its incorporation into or association with another State on a basis of political equality for the people of the unit.

(6) By definition, matters of self-determination are not within the domestic jurisdiction of the metropolitan State.

(7) Where a self-determination unit is a State, the principle of self-determination is represented by the rule against intervention in the internal affairs of that State, and in particular in the choice of the form of government of the State.

(2) Statehood and the operation of the principle of self-determination

The relation between the legal principle of self-determination and statehood must now be considered. It has been seen already, in situations such as that found in the Congo, that the principle of self-determination will operate to reinforce the effectiveness of territorial units created with the consent of the former sovereign. However, this only holds good where the new unit is itself created consistently with the principle of self-determination. Where, as with the Bantustans in South Africa a local entity is created in an effort to prevent the operation of the principle to the larger unit, different considerations apply. The same principle holds good in cases of secession. The secession of a self-determination unit, where self-determination is forcibly prevented by the metropolitan State, will be reinforced by the principle of self-determination, so that the degree of effectiveness required as a precondition to recognition may be substantially less than in the case of secession within a metropolitan unit. The contrast between the cases of Guinea-Bissau and Biafra is marked and can be explained along these lines. As a consequence, the rules relating to intervention in the two cases are, it seems, different. These problems will be elaborated further in Chapter 9.

These are, perhaps, ancillary or peripheral applications of the principle. The question remains whether the principle of self-determination is capable of preventing an effective territorial unit, the creation of which was a violation of self-determination, from becoming a State. Practice in this area is not well developed, but in one case, that of Southern Rhodesia, the problem was squarely raised.

[113] See Johnson, *Self-determination with the Community of Nations*, and the early classic studies by Wambaugh, *A Monograph on Plebiscites; Plebiscites since the World War*.

Oxford Public International Law

Part 1 The subjects of international law, Ch.2 International persons, Recognition of States and Governments

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and administration in the Golan Heights was 'null and void and without international legal effect'.[61]

With regard to India's seizure of the former Portuguese territory of Goa in 1961, the United Nations failed to condemn an Indian act of force in seizing the territory, the incorporation of which into India has become accepted by most states including, eventually, Portugal.[62] The United Nations in 1975 condemned armed attacks by Indonesia upon the neighbouring Portuguese territory of East Timor, but failed to condemn Indonesia's seizure of that territory the following year and its incorporation into Indonesia.[63]

(p. 197) South Africa's presence in Namibia (formerly South West Africa)[64] was originally lawful, by virtue of the Mandate for South West Africa, but became unlawful after the United Nations General Assembly decided in 1966 that the Mandate was terminated, that South Africa had no other right to administer the territory and that henceforth it came under the direct responsibility of the United Nations.[65] This did not lead to South Africa vacating Namibia. The Security Council passed a number of resolutions[66] in which it declared that the continued presence of South African authorities in Namibia was illegal and that consequently all acts taken by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate were illegal and invalid. The Security Council also requested an Advisory Opinion from the International Court of Justice regarding the legal consequences for states of the continued presence of South Africa in Namibia.[67] The Court advised that the decisions of the Security Council created for member states of the United Nations an obligation to recognise the illegality and invalidity of South Africa's continued presence in Namibia, and to refrain from any acts or dealings with the Government of South Africa implying recognition of the legality of its presence and administration in Namibia.[68] The Security Council and General Assembly accepted the Court's advice.[69] States generally refrained from recognising as lawful South Africa's presence in Namibia, which attained independence in 1990.

§ 56 Consequences of non-recognition

The consequences of non-recognition[1] depend to some extent on the reason for non-recognition.[2] Certain consequences, however, apply generally. First, non-recognition alone does not (p. 198) make the state or government any the less a state or government in terms of its own national legal order, or its laws any the less laws in its territory,[3] although it does affect its international position and the exercise of rights and duties on the international plane. Secondly, non-recognition of the government of a state does not affect the continued existence of the state itself, although it will affect its ability to perform those international acts which require action by governments. Thus the state's international rights and responsibilities will continue, although action to enforce them may have be be delayed until the government is recognised. Treaties will continue in force,[4] although if they require governmental action it may not be possible to give effect to them so long as one party's government remains unrecognised by the other.[5] The non-recognised government will not be regarded by non-recognising states as competent to make its state a party to a multilateral treaty,[6] or to act on behalf of the state in legal proceedings;[7] and agents sent abroad by the non-recognised government will not have diplomatic, consular or other official status as regards a state withholding recognition.[8] Thirdly, non-recognition of a new situation often involves continuing recognition of the previous state of affairs. Thus, non-recognition of the annexation of one state by another will usually mean that a state which withholds recognition will continue to regard the annexed state as continuing its former separate existence,[9] treaties with it as still in force, and its diplomatic and consular officers as still entitled to act as such.[10]

(p. 199) Generally, a situation which is denied recognition, and the consequences directly flowing from it, will be treated by non-recognising states as without international legal effect. Thus a non-recognised state will not be treated as a state,[11] nor its government as a government of the state; and since the community or authority in question will thus not be treated as having the status or capacities of a state or government in international law, its capacity to conclude treaties,[12] or to send agents of a diplomatic character, or to make official appointments of persons whose acts are to be regarded as acts of a state[13] may all be called in question. Generally, in its relations with non-recognising states that community will not benefit from those consequences which normally flow from the grant of recognition.[14]

Apart from such general consequences of non-recognition, particular consequences may flow from the circumstances of the individual case, and the scope of any obligation to withhold recognition. The question was considered by the International Court of Justice in its Advisory Opinion of 21 June 1971 on the *Legal Consequences for States of the continued presence of South Africa in Namibia*.[15] The Court found that all member states of the United Nations were under an obligation to regard the continued presence of the South African authorities in Namibia as illegal and to treat all acts taken by the Government of South Africa on behalf of or concerning Namibia after the termination of the (p. 200) Mandate as illegal and invalid; and that all member states were obliged to refrain from any acts or dealings with the Government of South Africa implying recognition of the legality of its presence and administration in Namibia.[16] Although the Court considered that the precise determination of the acts permitted or allowed was a matter within the competence of the appropriate political organs of the United Nations it nevertheless offered advice as to those dealings with the Government of South Africa which, under the Charter of the United Nations and general international law, should be considered as inconsistent with the declaration of illegality and invalidity because they may imply a recognition that South Africa's presence in Namibia is legal.[17] Thus member states were said to be generally obliged 'to abstain from entering into treaty relations with South Africa in all cases in which the Government of South Africa purports to act on behalf of or concerning Namibia', and they must abstain from invoking or applying bilateral treaties concluded by South Africa on behalf of or concerning Namibia which involve active inter-governmental cooperation. As regards 'multilateral treaties, however, the same rule cannot be applied to certain general conventions such as those of a humanitarian character, the non-performance of which may adversely affect the people of Namibia'. The duty of non-recognition also imposes upon member states the 'obligation to abstain from sending diplomatic or special missions to South Africa including in their jurisdiction the Territory of Namibia, to abstain from sending consular agents to Namibia, and to withdraw any such agents already there. They should also make it clear to the South African authorities that the maintenance of diplomatic or consular relations with South Africa does not imply any recognition of its authority with regard to Namibia.'[18] Member states are also obliged not to enter into 'economic or other forms of relationship or dealings with South Africa on behalf of or concerning Namibia which may entrench its authority over the Territory'. However, the Court emphasised that the non-recognition of South Africa's administration of the Territory should not result in depriving the people of Namibia of any advantages derived from international cooperation; thus in particular, the invalidity of official acts performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate cannot be extended to those acts, such as, for example, the registration of births, deaths and marriages the effects of which can be ignored only to the detriment of the inhabitants of the Territory. The Court also found that the termination of the Mandate and the declaration of the illegality of South Africa's presence in Namibia were opposable to all states, including non-members of the United Nations in the sense of barring *erga omnes* the legality of the situation which is (p. 201) maintained, in the Court's view, in violation of international law, with the result in particular that no state which enters into relations with South Africa

ANNEX IV

PROTOCOL CONCERNING LEGAL

MATTERS

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ARTICLE I

Criminal Jurisdiction

1. a. The criminal jurisdiction of the Council covers all offenses committed by Palestinians and/or non-Israelis in the Territory, subject to the provisions of this Article.

   For the purposes of this Annex, "Territory" means West Bank territory except for Area C which, except for the Settlements and the military locations, will be gradually transferred to the Palestinian side in accordance with this Agreement, and Gaza Strip territory except for the Settlements and the Military Installation Area.

   b. In addition, the Council has criminal jurisdiction over Palestinians and their visitors who have committed offenses against Palestinians or their visitors in the West Bank and the Gaza Strip in areas outside the Territory, provided that the offense is not related to Israel's security interests.

   c. Notwithstanding the provisions of subparagraph a. above, the criminal jurisdiction of each side over offenses committed in Area B shall be in accordance with the provisions of paragraph 2.a of Article XIII of this Agreement.

   d. Individuals arrested by the Palestinian Police in Area B for public order and other reasons shall be tried before the Palestinian courts, provided that these courts have criminal jurisdiction.

2. Israel has sole criminal jurisdiction over the following offenses:

   a. offenses committed outside the Territory, except for the offenses detailed in subparagraph 1. b above; and

   b. offenses committed in the Territory by Israelis.

3. a. In exercising the criminal jurisdiction of their courts, each side shall have the power, *inter alia*, to investigate, arrest, bring to trial and punish offenders.

   b. Activities of the Palestinian Police and the Israeli military forces for the implementation of subparagraph a. above shall be as set out in the Agreement and Annex I thereto.

4. In addition, and without derogating from the territorial jurisdiction of the Council, Israel has the power to arrest and to keep in custody individuals suspected of having committed offenses which fall within Israeli criminal jurisdiction as noted in paragraphs 1.c, 2 and 7 of this Article, who are present in the areas under the security responsibility of the Council, where:

   a. The individual is an Israeli , in accordance with Article II of this Annex; or

   b. (1) The individual is a non-Israeli suspected of having just committed an offense in a place where Israeli authorities exercise their security functions in accordance with Annex I, and is arrested in the vicinity in which the offense was committed. The arrest shall be with a view to transferring the suspect, together with all evidence, to the Palestinian Police at the earliest opportunity.

      (2) In the event that such an individual is suspected of having committed an offense against Israel or Israelis, and there is a need for further legal proceedings with respect to that individual, Israel may retain him or her in custody, and the question of the appropriate forum for prosecuting such a suspect shall be dealt with by the Legal Committee on a case by case basis.

5. In the case of an offense committed in the areas under the security responsibility of the Council by a non-Israeli against Israel or an Israeli, the Council shall take measures to investigate and prosecute the case, and shall notify Israel of the result of the investigation and any legal proceedings.

6. When a suspicion arises against a tourist in transit to or from Israel through the Territory in the West Bank and the Gaza Strip, that the tourist has committed an offense in the Territory and that tourist is present on roads or in Jewish holy sites specified in Article V, paragraph 7, Article VII, paragraph 9 and Appendix 4 of Annex I, the Palestinian Police may detain him in place and immediately notify the Israeli military forces which shall be authorized to arrest and question him. Where an offense has been committed by a tourist in violation of the prevailing law and further legal proceeding in respect of the tourists are required, such proceedings shall be taken by the Council.

   Where such a tourist present outside these areas is detained or arrested by the Council, it shall notify the Israeli authorities within a reasonable time, not exceeding 24 hours, and shall enable them at the earliest opportunity to meet the detainee and to provide any necessary assistance, including consular notification, requested by the detainee.

7. a. Without prejudice to the criminal jurisdiction of the Council, and with due regard to the principle that no person can be tried twice for the same

offense, Israel has, in addition to the above provisions of this Article, criminal jurisdiction in accordance with its domestic laws over offenses committed in the Territory against Israel or an Israeli.

b. In exercising its criminal jurisdiction in accordance with subparagraph a. above, activities of the Israeli military forces related to subparagraph a. above shall be as set out in the Agreement and Annex I thereto.

ARTICLE II

Legal Assistance in Criminal Matters

1. General

a. Israel and the Council shall cooperate and provide each other with legal assistance in criminal matters. Such cooperation shall include the arrangements detailed in this Article.

b. Documents served by one side in the territory under the responsibility of the other, shall be accompanied by a translation into the official language of the other side.

2. Cooperation in Criminal Matters

a. The Israeli Police and the Palestinian Police shall cooperate in the conduct of investigations. Subject to detailed arrangements to be agreed upon, such cooperation shall include the exchange of information, records and fingerprints of criminal suspects, vehicle ownership registration records, etc.

b. Where an offense is committed in the Territory by an Israeli acting jointly with an individual under Palestinian personal jurisdiction, the Israeli military forces and the Palestinian Police will cooperate in conducting an investigation.

c. The Palestinian authorities shall not arrest Israelis or place them in custody. Israelis can identify themselves by presenting Israeli documentation.

However, when an Israeli commits a crime against a person or property in the Territory, the Palestinian Police, upon arrival at the scene of the offense shall, if necessary, until the arrival of the Israeli military forces, detain the suspect in place while ensuring his protection and the protection of those involved, prevent interference with the scene of the offense, collect the necessary evidence and conduct preliminary questioning, and in any case shall immediately notify the Israeli authorities through the relevant DCO.

d. Without derogating from the jurisdiction of the Council over property located or transported within the Territory, where the property is being transported or carried by an Israeli , the following procedure shall apply: The Palestinian authorities have the power to take any measures necessary in relation to Israeli vehicles or property where such vehicle or property has been used in the commission of a crime and present an immediate danger to public safety or health. When such measures are taken, the Palestinian authorities shall immediately notify the Israeli authorities through the relevant DCO, and shall continue to take the necessary measures until their arrival.

3. When an Israeli is suspected of committing an offense and is present in the Territory, the Israeli military forces shall be able to arrest, search and detain the suspect as required; in areas where the Palestinian Police exercise powers and responsibilities for internal security and public order, such activities shall take place in coordination with the Palestinian Police, in its presence and with its assistance.

4. Israel shall hand over to the Palestinian Police the Palestinian offenders to whom Article I, paragraph 1.b applies, together with any collected evidence.

5. Restraining Orders

Each side shall execute orders issued by the competent organs of the other side restraining a person under the jurisdiction of that side from traveling abroad.

6. Summons and Questioning of Witnesses

a. Where the statement of a witness who is an Israeli or other person present in Israel is required for a Palestinian investigation, the statement shall be taken by the Israeli Police in the presence of a Palestinian Police officer in an Israeli facility at an agreed location.

b. Where the statement of a non-Israeli witness present in the Territory is required for an Israeli investigation, the statement shall be taken by the Palestinian Police in the presence of an Israeli Police officer in a Palestinian facility at an agreed location.

c. In exceptional cases, each side may take a statement requested by the other side itself, without the presence of the requesting side.

7. Transfer of Suspects and Defendants

a. Where a non-Israeli suspected of, charged with, or convicted of, an offense that falls within Palestinian criminal jurisdiction is present in Israel , the Council may request Israel to arrest and transfer the individual to the Council.

b. Where an individual suspected of, charged with, or convicted of, an offense that falls within Israeli criminal jurisdiction, is present in the Territory, Israel may request the Council to arrest and transfer the individual to Israel.

c. Requests under subparagraph a. and b. above shall specify the grounds for the request and shall be supported by an arrest warrant issued by a competent court.

Oxford Public International Law

Part 2 The objects of international law, Ch.5 State territory, Historic Titles, Critical Date, Self-Determination

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Historic Titles, Critical Date, Self-Determination

de Visscher, *Theory and Reality in Public International Law* (1953), English trans by Corbett (2nd ed, 1960), especially pp 255ff Schwarzenberger, AJ, 51 (1957), pp 308–24 Jennings, *Acquisition of Territorial Sovereignty* (1963) Hag R, 121 (1967), ii, pp 387–410 Munkman, BY, 46 (1972–73), pp 1–116 Rigo, *The Evolution of the Right of Self-Determination* (1973) Alexander and Friedlander, *Self-Determination: National, Regional and Global Dimensions* (1980) Gottlieb, *Self-Determination in the Middle East* (1982) Powerance, *Self-Determination in Law and Practice* (1982) Fitzmaurice, *The Law and Procedure of the International Court of Justice*, vol I (1986), 284–315.

§ 271 Continuous display of territorial sovereignty

The modes of acquisition of territory described above were, except for subjugation, based upon analogies from classical Roman private law. These modes gave both a starting point and a structure for an international law of territorial acquisition and loss which, as has already been seen, was gradually developed through state practice. That development has, in the last few decades, reached the stage where the scheme of separate modes may be beginning to be outgrown; except, of course, where situations belonging to former times sometimes still come into question.

It should be emphasised, however, that, although the law is changing, there is also continuity; and the new developments can hardly be understood without their origins in the classical scheme of the modes of acquisition. The changes may indeed be said to have begun with the celebrated Award of Judge Huber in the *Island of Palmas* case,[1] in holding that 'it cannot be sufficient to establish the title by which territorial sovereignty was validly acquired at a certain moment; it must also be shown that territorial sovereignty has continued to exist and did exist at the moment which for the decision of the dispute must be considered as critical'.[2] Judge Huber recognised that there is a core requirement of peaceable (p. 709) possession common to the modes of occupation and prescription; and that in respect of a given claim this could well be decisive, so dispensing with any need to establish whether the origin of the possession were an occupation of *terra nullius* or the beginning of a period of acquisitive prescription. Hence, as the Award expresses it:

> 'It seems therefore natural that an element which is essential for the constitution of sovereignty should not be lacking in its continuation. So true is this, that practice, as well as doctrine, recognizes — though under different legal formulae and with certain differences as to the conditions required — that the continuous and peaceful display of territorial sovereignty (peaceful in relation to other States) is as good as a title.'

The Award also states that the establishment of territorial sovereignty 'cannot limit itself to its negative side, ie, to excluding the activities of other States'.[3] Thus, the Award in the *Island of Palmas* arbitration showed the importance of 'continuous and peaceful display of the functions of State within a given region' as itself 'a constituent element of territorial sovereignty'.[4]

Further, in a contention between two states it may not be a question of finding an absolute title, but rather the decision might turn upon 'the relative strength of the titles invoked by each Party'.[5]

§ 272 Consolidation of historic titles

Yet continuous and peaceful display is a complex notion when applied to the flexible and many-sided relationship of a state to its territory and in relation to other states. The many and varied factors which it may comprise were felicitously subsumed by Charles de Visscher under the convenient rubric of 'consolidation by historic titles'; of which he says:

> 'Proven long use, which is its foundation, merely represents a complex of interests and relations which in themselves have the effect of attaching a territory or an expanse of sea to a given State. It is these interests and relations, varying from one case to another, and not the passage of a fixed term, unknown in any event to international law, that are taken into direct account by the judge to decide *in concreto* on the existence or non-existence of a consolidation by historic titles.'[1]

(p. 710) In an important examination of the criteria applied by tribunals to resolve territorial disputes,[2] Munkman[3] identified *inter alia* the following: recognition, acquiescence[4] and preclusion; possession and administration; affiliations of inhabitants of disputed territory; geographical considerations; economic considerations; historical considerations.[5] Of these several factors it has been said that: 'Recognition is the primary way in which the international community has sought to reconcile illegality or doubt with political reality and the need for certainty'.[6]

§ 273 The critical date

In an investigation of criteria which form a continuum of different phenomena, the question can arise whether the situation at any particular time, or period of time, is more important than at another time; or, indeed, whether for some questions the situation at a particular time may even be decisive. The tendency thus to ask whether there is such a so-called 'critical date' must be the greater where the moment of the actual origin of a possession may be no longer itself critical: thus, as mentioned already, it may for example, be no longer necessary to decide whether the territory was originally a *terra nullius*, or whether the taking of possession was at that moment lawful or wrongful.[1] As Judge Huber in the *Island of Palmas* case put it:[2]

> (p. 711) 'If a dispute arises as to the sovereignty over a portion of territory, it is customary to examine which of the States claiming sovereignty possesses a title— cession, conquest, occupation etc — superior to that which the other State might possibly bring forward against it. However, if the contestation is based on the fact that the other Party has actually displayed sovereignty, it cannot be sufficient to establish the title by which territorial sovereignty was validly acquired at a certain moment; it must also be shown that the territorial sovereignty has continued to exist and did exist at the moment which for the decision of the dispute must be considered as critical.'[3]

Clearly, however, there can be an important difference of opinion about what is to be regarded as the critical moment or critical period in relation to a particular dispute; thus, in the *Minquiers and Ecrehos* case[4] the French argument asked the Court to regard one period in the history of these rocky islets as critical, whilst the British argued that it was a different and later period that was critical. It was in the course of this argument that the idea of the critical date was erected into a doctrine of some complexity, especially in the speeches of Sir Gerald Fitzmaurice who described it in these terms:

> 'the theory of the critical date involves … that, whatever was the position at the date determined to be the critical date, such is still the position now. Whatever were the rights of the Parties then, those are still the rights of the Parties now. If one of them still had sovereignty, it has it now, or is deemed to have it. If neither had it, then neither has it now … The whole point, the whole *raison d'être*, of the critical date rule is, in effect, that time is deemed to stop at that date. Nothing that happens afterwards can operate to change the situation as it then existed. Whatever the situation was, it is deemed in law still to exist; and the rights of the Parties are governed by it.'[5]

Such a date, said Fitzmaurice, 'must exist in all litigated disputes, if only for the reason that it can never be later than the date on which legal proceedings are commenced'.[6] Furthermore, the choice of critical date is a matter not of procedure but of substance; from which it follows that it must also be a matter ultimately for the court itself to determine in the course of its decision, as indeed the term 'critical' would imply.

Courts have, nevertheless, been reluctant to accept critical date arguments aimed at hampering their discretion to look at the whole of the evidence before coming to a decision. Thus, in the *Minquiers and Ecrehos* case, the Court decided that the critical date should not exclude consideration of subsequent acts of the (p. 712) parties 'unless … taken with a view to improving the legal position of the Party concerned'.[7]

§ 274 Self-determination

Just as in a developed domestic system of law the ownership and user of a parcel of land may depend not only on the conveyancing law but also upon general legislation, so also international law has come to embody general considerations different from modalities of acquisition or loss. A principle of this sort, which has been of great importance in the United Nations period, is that of self-determination.[1] The concept is of course much older than that, and goes back at least to President Wilson, the post-First World War settlement, and the League of Nations. But it was bound to take on significance during the 'decolonization' period after the end of the Second World War; and indeed the principle has often appeared in practice to be an adjunct of the decolonialisation process rather than an autonomous principle, and this perhaps saved it at least during the decolonisation period from being a solvent of the unity of existing independent states.[2]

The principle of 'equal rights and self-determination of peoples' is stated in Articles 1 and 55 of the United Nations Charter; in Resolution 637 A (VII) of 16 December 1952, the General Assembly of the United Nations recommended *inter alia* that 'the States members of the United Nations shall uphold the principle of self-determination of all peoples and nations'; and the principle was again endorsed in the General Assembly's Declaration on the Granting of Independence to Colonial Countries and Peoples of 1960,[3] for the implementation (p. 713) of which the General Assembly established a Special Committee. The principle is also embodied in the Declaration of Principles of International Law concerning Friendly Relations, adopted by the General Assembly in 1970,[4] which also adopted the principle that territories must exercise their right of self-determination within established colonial boundaries.[5] It has also had very many endorsements in the statements of governments.[6]

Whatever the difficulties of determining what is a 'people' for this purpose, there can be no doubt that so lively a legal principle has a part to play in the determination of territorial sovereignty. It could also lend a new dimension to the old device of the plebiscite, under the aegis of the United Nations. Thus, in 1954, the United Nations General Assembly expressed the opinion, regarding non-self-governing territories, that 'a mission, if the General Assembly deems it desirable, should, in agreement with the Administering Member, visit the Non-Self-Governing Territory before or during the time when the population is called upon

to decide on its future status'.[7] In accordance with this the United Nations supervised plebiscites or elections in the British Togoland Trust Territory in 1956, in French Togoland in 1958, in the Northern Cameroons in 1959 and 1961, in the Southern Cameroons in 1961, in Ruanda-Urundi in 1961, in Western Samoa in 1962, and in Papua-New Guinea in 1972.[8] Such action has not been confined to trust territories, however, and the UN Special Committee on the implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples has, in the name of self-determination, demanded the same procedures for colonies.[9]

(p. 714) The International Court of Justice had occasion to consider these developments of the law in its *Namibia* Advisory Opinion of 1971,[10] when it referred to the development 'of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations', which 'made the principle of self-determination applicable to all of them'.[11] In the *Western Sahara* case, the Court again endorsed this aspect of the law. Although the questions put to the Court, for its Advisory Opinion, by the General Assembly, did not directly refer at all to the issue of self-determination, the Court, nevertheless, stated that whatever questions had been asked, its answers would have to take into account 'the applicable principles of decolonization', as being 'an essential part of the framework of the questions contained in the request'.[12] The Opinion of the Court, accordingly, referred to Article 1 of the United Nations Charter, and to the Declaration on the Granting of Independence to Colonial Countries and Peoples,[13] which it said 'confirm and emphasize that the application of the right of self-determination requires a free and genuine expression of the will of the peoples concerned'.[14] Moreover, it insisted that, 'The validity of the principle of self-determination, defined as the need to pay regard to the freely expressed will of peoples, is not affected by the fact that in certain cases the General Assembly has dispensed with the requirement of consulting the inhabitants of a given territory'.[15]

Accordingly, the General Assembly Resolution urging a postponement of a proposed referendum, and making the request for the Court's Opinion,[16] did not affect the right of the population of Western Sahara to self-determination, which 'constitutes therefore a basic assumption of the question put to the Court'.[17]

(p. 715) Thus the principle of self-determination, both as an autonomous legal principle, and as a vehicle of United Nations policies, insofar as the United Nations properly has functions and discretions in the matter, must clearly affect and modify the law governing territorial sovereignty.

It is clear that the injection of a legal principle of self-determination into the law about acquisition and loss of territorial sovereignty is both important and innovative. State and territory are, in the traditional law, complementary terms. Normally only a state can possess a territory, yet that possession of a territory is the essence of the definition of state. The infusion of the concept of the rights of a 'people' into this legal scheme is therefore a change which is more fundamental than at first appears.[18]

It is important, however, to note one significant qualification of the principle. In the *Burkina Faso/Mali Frontier* case, a Chamber of the International Court of Justice has in effect subordinated self-determination to the principle of *uti possidetis* in the case of boundaries of former colonial territories.[19]

§ 275 Attitude of the international community

There is another factor to be taken into consideration in the modern law about the acquisition of territorial title. It has been seen above how the classical scheme of modes and roots of title has evolved into a more elaborate system of consolidation of title over a period of time, and involving the interplay of a variety of different factors and considerations, as well as actual possession. One of the most important of the new factors is the attitude

towards a given situation of the international community, partly by the process of recognition but also as expressed through the United Nations. Territorial title *erga omnes* no longer has its origin wholly in a kind of international system of conveyancing, but involves or may involve, an element of international decision. This is not to suggest that any organ of the United Nations has a legal discretion to determine the destiny of territory.[1] It is nevertheless clear that the opinion and will of the international community cannot but be other than a factor of considerable importance in the process of (p. 716) historical consolidation of title and also in establishing the position of the United Nations towards a use of force in furtherance of a territorial claim.[2]

Given these several different factors and criteria that may influence a decision on territorial entitlement, it is clear that international law has outgrown the stage when territorial title depended upon fulfilling the particular requirements of one of a stereotyped scheme of modes of acquisition and loss of territorial sovereignty. In the words of Brownlie:[3] 'A tribunal will concern itself with proof of the exercise of sovereignty at the critical date or dates, and in doing so will not apply the orthodox analysis to describe its process of decisions. The issue of territorial sovereignty, or title, is often complex, and involves the application of various principles of the law to the material facts'. The issue depends, therefore, upon the weight to be attached at a critical date or period, itself a matter to be decided in relation to each particular case, to a variety of possible factors and considerations. These include continued and effective occupation and administration, acquiescence and/or protest, the relative strength or weakness of any rival claim, the effects of the inter-temporal law, the principle of stability in territorial title and boundaries, regional principles such as *uti possidetis*, geographical and historical factors, the attitudes of the international community, and the possible requirements of self-determination, and also indeed the possibly unlawful origin of the original taking of possession, and that subjugation is no longer *per se* a recognisable title. The weight to be given to these factors and considerations, in the assessment of the total result in terms of a consolidated title, will vary with particular cases.

Footnotes:

1 See *Island of Palmas Case* (1928), RIAA, 2, p 829, at p 845. On this whole matter see especially the short article by Schwarzenberger, AJ, 51 (1957), pp 308–24.

2 *Ibid*, at p 839. For the concept of the critical date, see § 237. See Jessup, AJ, 22 (1938), p 735 for a celebrated critique of Huber's ideas in the *Island of Palmas* case, where Jessup argues that a requirement of continuity of entitlement would in effect make new law have retroactive effect so as to jeopardise old titles. It seems doubtful, however, whether Huber was propounding so extreme a doctrine which would be difficult to reconcile with what he has to say about the critical date.

3 *Ibid*, at p 839.

4 *Ibid*, at p 840.

See also Oda and Owada, *The Practice of Japan in International Law* (1961–70), at p 69, where the Japanese Government, in a protest to the Korean Government about Takeshima, says: 'Under international law, the most decisive factor in determining whether or not a certain area is an inherent territory of a certain State from olden times is how effectively the State concerned has controlled and managed the area in question'. See also *Hiizu Hiraide v Yosuhide Niizato* (1966), Japan Supreme Court, a decision that narcotics brought to Japan from the Okina islands (formerly Japanese but administered by the US under the

Treaty of Peace 1952) constituted an 'import' into Japan; ILR 53, p 281, and Jap Annual of IL (1987), ii, p 143.

5 *Ibid*, at p 869. See also the *Legal Status of Eastern Greenland Case* (1933), PCIJ Series A/B No 53, at p 22, to the same effect.

1 *Theory and Reality in Public International Law*, English trans of revised ed by Corbett (1968), p 209. (Shaw suggests that the appropriate term may be effectiveness rather than consolidation, *Title to Territory in Africa: International Legal Issues* (1986), p 19.) See also Johnson, CLJ, 13 (1955), pp 215–25.

See also the *Rann of Kutch Case*, ILM (May 1968), pp 633ff, between India and Pakistan (Award of 1968), where the tribunal evaluated *all* evidence relating to the exercise of the exclusive rights and duties of sovereignty, in order to establish in whom the conglomerate of sovereignty functions had exclusively or predominantly vested.

2 See especially, *Clipperton Island Case* (1932), RIAA, 2, p 1105; *Eastern Greenland Case*, PCIJ Series A/B, No 55, p 22; *Temple Case*, ICJ Rep (1962), p 6; *Arbitral Award of the King of Spain Case*, ICJ Rep (1960), p 214; *Frontier Land Case*, ICJ Rep (1959), p 209; *Argentine-Chile Frontier Case* (1967), ILR, 38, p 10; *Rann of Kutch Case*, ILM, 7 (1968), p 633ff.

3 See BY, 46 (1972–73), pp 1–116, and particularly pp 95–116.

4 See MacGibbon, BY, 30 (1953), p 293; see also, however, Johnson, vol 11, *loc cit* for a warning against the dangers to international relations of placing a premium on constant protest.

5 Another criterion mentioned from time to time is *contiguity*, which however rightly does not find a place in Miss Munkman's list. Contiguity is a consideration clearly relevant to the geographical assessment of a territorial question, and may be important in testing, for example, the ability of a claimant to maintain a sufficient presence and administration. But it is not *per se* a root of entitlement. 'If it were otherwise, there would be a whole series of situations around the globe where the title to territories would immediately come into open dispute' (Sinclair cited in BY 54 (1983), at p 468). The *locus classicus* of the pertinence of contiguity is Huber's Award in the *Island of Palmas Case* (1928), RIAA, 2, at pp 829–71 ; and see also the *Western Sahara Case*, ICJ Rep (1975), p 3, at p 43. On contiguity in general, see also H Lauterpacht, BY, 27 (1950), pp 423–31.

6 Shaw, *Title to Territory in Africa: International Legal Issues* (1986), pp 23–4; see also Jennings, *Acquisition of Territorial Sovereignty* (1963), ch III.

1 See also the *Minquiers and Ecrehos Case*, ICJ Rep (1953), p 47, at p 57: 'What is of decisive importance, in the opinion of the Court, is not indirect presumptions deduced from events in the Middle Ages, but the evidence which relates directly to the possession of the Ecrehos and Minquiers groups'.

2 (1928), RIAA, 2, at p 839.

3 *Ibid*, at p 845. See also the *Eastern Greenland Case*, PCIJ, Series A/B, No 53, p 45, where the Court refers to 'The date at which … Danish sovereignty must have existed in order to render the Norwegian occupation invalid … viz: July 10th, 1931', as being the 'critical date'.

4 ICJ Rep (1953), p 47.

5 *ICJ Pleadings* in the case, vol ii, p 64; also cited in BY, 32 (1955–56), pp 20ff.

6 But see BY, 32 (1955–56), pp 20–44 for an elaborate analysis of the different possible critical dates and their functions in litigated territorial disputes; also Goldie, ICLQ, 12 (1963), pp 1251–84. The critical date can obviously be material in boundary questions as well as in purely territorial questions; see eg the *Taba Award* (1988), ILR, 80, p 226, where the tribunal looked for a 'critical period' rather than a critical date; and also stated that, 'Events subsequent to the critical period can in principle also be relevant, not in terms of a

change of the situation, but only to the extent that they may reveal or illustrate the understanding of the situation as it was during the critical period' (*ibid*, para 175 of the Award).

7 ICJ Rep (1953), at pp 59–60. See also the *Award in the Argentine—Chile Frontier Case* (1967), ILR, 38, pp 79–80, where the Court 'considered the notion of the critical date to be of little value in the present litigation and has examined all the evidence submitted to it, irrespective of the date of the acts to which such evidence relates'. In this decision it seems clear that the Court supposed that the critical date rule was simply one about the admission or non-admission of evidence, and not a consideration going to the substance of the decision.

1 See Umozurike, *Self-Determination in International Law* (1972); Sureda, *The Evolution of the Right of Self-Determination* (1973); Shukri, *The Concept of Self-Determination in the United Nations* (1965); Calogeropoulos-Stratis, *Le Droit des à disposer d'eux-mêmes* (1973) ; Cobban, *The Nation-State and National Self-Determination* (1969); Johnson, *Self-Determination within the Community of Nations* (1967); Emerson, AJ, 65 (1971), pp 459–75; Alexander and Friedlander, *Self-Determination: National, Regional and Global Dimensions* (1980); and for illuminating studies of self-determination in relation to developing countries, see Bowett, *AS Proceedings* (1966), pp 128–41, and Shaw, *Title to Territory in Africa: International Legal Issues* (1986), pp 59ff and 149ff. See also Hannum, *Autonomy, Sovereignty and Self-Determination: The Accommodation of Conflicting Rights* (1990).

For a fuller treatment of 'self-determination' in relation to dependent states, and 'self-government', see § 85.

The idea of self-determination was important in the dispute concerning East Timor, and much relied upon by Indonesia in support of its claim: see Elliott, ICLQ, 27 (1978), pp 238–49.

2 Cf Judge Dillard in ICJ Rep (1975), at p 121: 'The pronouncements of the Court thus indicate, in my view, that a norm of international law has emerged applicable to the decolonization of those non-self-governing territories which are under the aegis of the United Nations'.

3 GA Res 1514 (XV); UN Doc A/4684 of 1966; the Declaration proclaims that 'all peoples have the right to self-determination', and that 'any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations'. For the view that this is not so much a recommendation as an authoritative interpretation of the Charter, see Waldock, Hag R, 106 (1962), ii, p 33.

4 GA Res 2625 (XXV).

5 Organisation of African Unity (OAU) Assembly AHG/Res 17 (I), Cairo, 17–21 July 1964. See also the Charter of the OAU, Art 3 (3) which stipulates 'respect for the sovereignty and territorial integrity of each State and for its inalienable right of independent existence'.

6 See eg statements of the UK Government about the Falkland Islands, Afghanistan and Cambodia, BY, 56 (1985), pp 394–406. See also § 85.

7 GA Res 850, 9 GAOR, Suppl, p 21, at p 28, UN Doc A/2890 (1954).

8 Representatives of the UN Trusteeship Council also observed the plebiscite in the Northern Marianas in 1975.

9 See eg in regard to the Cook Islands, GA Res 2005, 19 GAOR, Suppl, p 15, at p 7, UN Doc A/5815 (1965); to Equatorial Guinea, GA Res 2355, 22, GAOR, Suppl, p 16, at pp 54–55, UN Doc A/6716 (1967); to Nine, GA Res 3285, 29, GAOR, Suppl, p 31, at p 98, UN Doc A/9631

(1974); to Sarawak and North Borneo, 19, GAOR, Suppl, p 1A, at pp 8–9, UN Doc A/5801/Add 1 (1964).

But for an example of the General Assembly opposing, in all the circumstances, the holding of a referendum in Gibraltar, see GA Res 2353, 22, GAOR, Suppl, p 16, at p 53; UN Doc A/6716 (1967); and 22, GAOR, Annexes, Addendum to Agenda Item No 23 (pt II), at p 238, UN Doc A/6700/Rev 1 (1967). The General Assembly took the view that the expressed wishes of the population of Gibraltar should not be paramount because it was an imported, colonial population. This, however, raises difficult questions about the dates critical for such an assessment; as a matter of history most populations have been 'imported' at some time or another.

Cf also the acceptance by the GA of an alternative, tightly governmental controlled, consultations held by Indonesia in 'West Irian', see GA Res 2504, 24, GAOR, Suppl, p 30, at p 3, UN Doc A/7630 (1969) and Report of the Secretary-General regarding the act of self-determination in West Irian, 24, GAOR, Annexes, Agenda Item No 98, at p 2, UN Doc A/7723 (1969); also 25, GAOR, Suppl, p 1, at p 64, UN Doc A/8001 (1970).

On 18 January 1978, the British Minister of State for the Foreign and Commonwealth Office reported in Parliament that: 'The Mexican Government have stated that they will not press their historic claim [to Belize] provided that Belize is allowed to exercise its right to self-determination' (*Parliamentary Debates (Commons)*, vol 942, cols 236–7). Although the former British territory of Belize was claimed by Guatemala, a UN Resolution of 1977 supported Belize's right to self-determination, independence and territorial integrity (UN Doc A/32/356, (1977), GAOR, Suppl, p 45, p 168). Belize became independent in 1981.

10 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*, ICJ Rep (1971), p 3.

11 *Ibid*, p 31.

12 ICJ Rep (1975), p 12, at p 30. The actual questions asked of the Court were:

> '**I**. Was Western Sahara (Rio de Oro and Sakiet El Hamra) at the time of colonization by Spain a territory belonging to no one (*terra nullius*)? If the answer to the first question is in the negative,
>
> **II**. What were the legal ties between this territory and the Kingdom of Morocco and the Mauritanian entity?'.

13 See § 84.

14 ICJ Rep (1975), at p 32.

15 *Ibid*, at p 33, where the Opinion goes on to explain that 'those instances were based either on the consideration that a certain population did not constitute a "people" entitled to self-determination or on the conviction that a consultation was totally unnecessary, in view of special circumstances'. The outcome of the later negotiations concerning the Western Sahara led, however, to a somewhat different result: for criticism, see Franck, AJ, 70 (1976), pp 694–721.

16 Res 5292 (XXIX).

17 ICJ Rep (1975), at p 36. See also the Separate Opinion of Judge Dillard, when he specifically rejects the claim that any part of Western Sahara had remained an integral part of either Morocco or Mauritania and was, therefore, subject to 'automatic retrocession'; nor could a principle of territorial integrity be used in the circumstances of this case as one 'overriding the right of the people to self-determination': ICJ Rep (1975), at p 120.

18 It should be borne in mind that in other legal traditions the position has been different. Thus in the Islamic conception of territory, the territory belonged to a community. See Flory, AFDI, 3 (1957), pp 73, 76.

19 ICJ Rep (1986), 554, at para 25.

1 Particular considerations arise, of course, where the UN is directly involved in law, as in relation to trust territories. See eg the Advisory Opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*, ICJ Rep (1971), p 3.

On the question of the forcible occupation of Goa by India, on 17 and 18 December 1961, see SCOR 16th Yr 987th and 988th meetings. On 18 December, Portugal asked the Security Council to put a stop to the 'act of aggression'. A draft resolution rejecting the Portuguese complaint was rejected by seven votes to four. A second resolution calling for a ceasefire and withdrawal was vetoed by the USSR.

On the Indonesian action in East Timor (West Irian) in 1975, see Elliott, ICLQ, 27 (1978), p 238; Guillhoudis, AFDI, 23 (1977), p 307; and Dayanidhi, *India Quarterly*, 33 (1977), p 419.

2 The position is clearer where there is a 'decision' of the Security Council. On 2 August 1990 Iraqi forces invaded Kuwait, and on 3 August President Hussein of Iraq declared the annexation of Kuwait and a 'comprehensive and eternal merger' of the two states. On 9 August 1990 the UN Security Council, in SC Res 662, resolved as follows:

> '**1**. *Decides* that annexation of Kuwait by Iraq under any form and whatever pretext has no legal validity, and is considered null and void;
>
> **2**. *Calls upon* all States, international organizations and specialized agencies not to recognize that annexation, and to refrain from any action or dealing that might be interpreted as an indirect recognition of the annexation;
>
> **3**. *Further demands* that Iraq rescind its actions purporting to annex Kuwait;
>
> **4**. *Decides* to keep this item on its agenda and to continue its efforts to put an early end to the occupation.'

This resolution would seem to be definitive of the legal status of Kuwait, having regard to Arts 25 and 27 of the UN Charter.

3 *Principles of International Law* (4th ed, 1990), pp 131–2.

upon which one might found the legality of a claim for Walvis Bay's incorporation into Namibia, and that is based on the doctrine of colonial enclaves.

Walvis Bay fills the requirements of the doctrine in all but one respect. It is small, surrounded by one State from which it was originally taken, and the special status of Namibia in relation to the enclave has been clearly recognized. However, the State administering the enclave, while deriving its title through an act of colonization, is not itself a colonial power in the traditional sense, although it could be argued that South Africa's administration of Namibia renders it a colonial power in the broad sense. The question is whether the crucial economic importance of the enclave to Namibia plus the virtually unanimous view of the international community with respect to Walvis Bay's status as part of Namibia can overcome this problem.

The terms of the unanimously adopted Security Council resolution to the effect that the unit of Namibia *must* be assured through the *reintegration* of Walvis Bay suggest a recognition of the enclave as part of the territory of Namibia. The ambiguous stand of the five Western Powers on the legal issue can hardly affect this. The critical importance of Walvis Bay to an independent Namibia coupled with the extreme difficulty of maintaining South African control in such circumstances once Namibia becomes a sovereign State, especially in the light of the enclave's dependence on electricity and water supplies from Namibia, would appear to point to a colonial enclave status for Walvis Bay, which would involve a right of reincorporation into Namibia proper, but the question must be regarded as still open.

V. CONCLUSIONS

The application of the principle of self-determination to non-self-governing territories is indisputable, but the basis of the principle has been transformed from the personal concept implicit in the political definition of self-determination to the strict territorial concept of international practice. It is the territorial factor which is prescriptive and the personal element is secondary, usually being of little or no significance. The 'self' of self-determination is therefore to be understood in strict spatial terms so that the right accrues to a colonial people within the framework of the existing territorial unit as established by the colonial power. Pre-colonial and/or subsisting ethnic, religious, or

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Self-determination of peoples

A legal reappraisal

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their adoption, as well as the practice of the United Nations in the area of decolonization, warrants the conclusion that in the 1960s there evolved in the world community a set of general standards specifying the principle of self-determination enshrined in the UN Charter, with special regard to colonial peoples.

The legal position was best summarized in 1971 by the International Court of Justice in its Advisory Opinion on *Namibia*, when the Court, after considering the Mandates system, held that

> The subsequent development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them.[12]

The essential content of the standards concerning colonial peoples can be outlined as follows:

(1) all peoples subjected to colonial rule have a right to self-determination, that is, to 'freely determine their political status and freely pursue their economic, social and cultural development' (operative paragraph 2 of Resolution 1514(XV);
(2) this right only concerns external self-determination, that is, the choice of the international status of the people and the territory where it lives;
(3) the right belongs to the people as a whole: if the population of a colonial territory is divided up into various ethnic groups or nations, they are not at liberty to choose by themselves their external status. This is because the principle of territorial integrity should here play an overriding role. Indeed, under operative paragraph 6 of Resolution 1514(XV), 'Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations'. It is apparent, both from the text of this provision and from the preparatory work,[13] that developing countries, with the full support of socialist States and without any opposition from Western countries, firmly believed that colonial boundaries should not be modified, lest

[12] ICJ, Reports 1971, 31 (para. 52).

[13] Before the adoption of Resolution 1514(XV), Guatemala had proposed an addendum to the draft submitted by forty-three African and Asian States; according to this proposal, 'the principle of the self-determination of peoples may in no case impair the right of territorial integrity of any State or its right to the recovery of territory'. However, this proposal was later withdrawn at the request of Indonesia, which pointed out that the question was already covered by operative para. 6 of the 43-Power draft (the present operative para 6). See UN Ybk, 1960, 48.

this would trigger the disruption of many colonial countries, as well as serious disorder as a result of the carving up of old States into new. In short, the principle *uti possidetis* was regarded as paramount (see below, Chapter 8). These geopolitical considerations led States actually to deny the right of self-determination to individual ethnic groups within colonial territories;
(4) as for the procedures for realizing the right to self-determination, States ultimately made a distinction based on the final result of self-determination, that is, according to whether a colonial country would (i) end up as a sovereign independent State, or (ii) associate with an independent State or instead (iii) integrate into an independent State. For the first of these three cases, it was not formally required that the wishes of the population concerned should be ascertained by means of a plebiscite or referendum. On the contrary, for the other two cases Resolution 1541(XV) required that association or integration with an independent State 'should be the result of a free and voluntary choice by the peoples of the territory concerned expressed through informed and democratic processes' (in the case of integration even more stringent requirements were set out);[14]
(5) once a people has exercised its right to external self-determination, the right expires. This may be inferred from paragraph VI of the Principle on self-determination laid down in the Declaration on Friendly Relations, which states:

> [T]he territory of a colony or other Non Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or Non-Self-Governing Territory have exercised their right of self-determination in accordance with the Charter, and particularly its purposes and principles.

Under the Declaration, if a people chooses to associate or integrate with a sovereign country, it can subsequently only exercise the right to internal self-determination (as will be seen shortly, this is the case if the government denies the people access to government by way of racial discrimination). Once again, the peoples' right to external self-determination is seen to

[14] Principle IX(b) of Resolution 1541(XV), provides that: 'The integration should be the result of the freely expressed wishes of the territory's peoples acting with full knowledge of the change in their status, their wishes having been expressed through informed and democratic processes, impartially conducted and based on universal adult suffrage. The United Nations could, when it deems it necessary, supervise these processes.'

complete the passage within the designated time stamped on their safe passage cards and permits, unless a delay is caused by a medical emergency or a technical breakdown. .

b. Persons using the safe passage through Israel shall be subject to Israeli law.

c. Persons and vehicles using the safe passage shall not carry explosives, firearms or other weapons or ammunition, except for special cases that may be agreed in the JSC.

4. General Provisions Regarding the Safe Passage Routes

a. The above arrangements shall in no way affect the status of the safe passage and its routes.

b. The safe passage arrangements will not be available on Yom Kippur, Israel's Memorial Day and Israel's Independence Day.

c. Israel may, for security or safety reasons, temporarily halt the operation of a safe passage route or modify the passage arrangements while ensuring that one of the routes is open for safe passage. Notice of such temporary closure or modification shall be given to the JSC.

d. Israel shall notify the Council of incidents involving persons using safe passage routes, through the JSC.

ARTICLE XI

Rules of Conduct in Mutual Security Matters

1. Human Rights and the Rule of Law

Subject to the provisions of this Agreement, the Palestinian Police and the Israeli military forces shall exercise their powers and responsibilities pursuant to this Agreement with due regard to internationally-accepted norms of human rights and the rule of law, and shall be guided by the need to protect the public, respect human dignity and avoid harassment.

2. Weapons

a. Each side shall enforce upon civilians, Palestinians or Israelis, in the West Bank and the Gaza Strip, in accordance with their security responsibility, a prohibition on possession or carrying of weapons without a license.

b. The Palestinian Police may grant licenses to possess or carry pistols for civilian use. The modalities for granting such licenses, as well as categories of persons who may be granted such licenses, will be agreed upon in the JSC.

c. Upon the assumption of security responsibility, and in accordance with the Palestinian law, the Palestinian Police shall declare a period of grace of one month, during which period holders of unlicensed weapons will be required to declare that they hold such weapons and to apply for licenses. The Palestinian Police may grant such licenses in accordance with subparagraph b. above, and will enforce the Palestinian security policy set out in Article II, paragraph 1 of this Annex, against persons who hold unlicensed weapons.

d. Israelis may carry weapons licensed in accordance with subparagraph a. above.

e. The Palestinian Police will maintain an updated register of all weapons licensed by it.

f. The Palestinian Police will prevent the manufacture of weapons as well as the transfer of weapons to persons not licensed to possess them.

g. The use of explosives in quarries and for other civilian purposes will be only in accordance with modalities and procedures agreed upon in the JSC.

3. Engagement Steps

a. For the purpose of this Article, "engagement" shall mean an immediate response to an act or an incident constituting a danger to life or property that is aimed at preventing or terminating such an act or incident, or at apprehending its perpetrators.

b. Within the territory under the security responsibility of the Council, in places where Israeli authorities exercise their security functions in accordance with this Annex and in their immediate vicinities, the Israeli authorities may carry out engagement steps in cases where an act or incident requires such action. In such cases, the Israeli authorities will take any measures necessary to bring to an end such an act or incident with a view to transferring, at the earliest opportunity, the continued handling of the incident falling within the Palestinian responsibility to the Palestinian Police. The Palestinian Police will immediately be notified, through the relevant DCO, of such engagement steps.

c. Engagement with the use of firearms in responding to such acts or incidents shall not be allowed, except as a last resort after all attempts at controlling the act or the incident, such as warning the perpetrator or shooting in the air, have failed, or are ineffective or without any promise of achieving the intended result in the circumstances. Use of firearms should be aimed at deterring or apprehending, and not at killing, the perpetrator. The use of firearms shall cease once the danger is past.

d. Any activity involving the use of firearms other than for immediate operational purposes shall be subject to prior notification to the relevant DCO.

c. Buildings or installations shall not be constructed on either side of the Lateral Roads up to a distance of 75 meters from the center of these Roads.

d. For the purpose of enforcing this Article, the United States has provided both sides with satellite photographs of the Gaza Strip depicting the buildings, installations and natural and artificial culture existing at the time of the signing of the Gaza-Jericho Agreement.

ARTICLE XIII

Security of the Airspace

1. Operation of aircraft for the use of the Council in the West Bank and the Gaza Strip shall be initially as follows:

   a. Two (2) transport helicopters for VIP transportation within and between the West Bank and the Gaza Strip.

   b. Up to 3 helicopters for the purpose of transport missions to approved landing pads.

   c. 3 fixed-wing transport aircraft with up to 35 persons capacity, for transporting persons between the West Bank and the Gaza Strip.

2. Changes in the number, type and capacity of aircraft may be discussed and agreed upon in a Joint Aviation Subcommittee of the JSC (hereinafter "the JAC").

3. The Council may immediately establish and operate in the West Bank and the Gaza Strip provisional airstrips for the helicopters and fixed wing aircraft referred to in paragraph 1 above, in accordance with arrangements and modalities to be discussed and agreed upon in the JAC.

4. All aviation activity or use of the airspace by any aerial vehicle in the West Bank and the Gaza Strip shall require prior approval of Israel. It shall be subject to Israeli air traffic control including, *inter alia*, monitoring and regulation of air routes as well as relevant regulations and requirements to be implemented in accordance with the Israel Aeronautical Information Publication, the relevant parts of which will be issued after consultation with the Council.

5. Aircraft taking off from, and landing in the West Bank and the Gaza Strip shall be registered and licensed in Israel or in other states members of International Civil Aviation Organization (ICAO). Air crews of such aircraft shall be licensed in Israel or in such other states, provided that such licenses have been approved and recommended by the Council and validated by Israel.

6. Palestinian Civil Aviation and airline staff may be recruited locally and from abroad. The number of Palestinians recruited from abroad shall not exceed 400. This number may be changed by agreement, if necessary.

7. Aircraft referred to in this Article shall not carry firearms, ammunition, explosives or weapons systems, unless otherwise approved by both sides. Special arrangements for armed guards escorting high ranking officials, will be agreed upon in the JAC.

8. The location of navigational aids and other aviation equipment will be approved by Israel through the JAC.

9. a. The Council shall ensure that only the aviation activity in accordance with this Agreement will take place in the West Bank and the Gaza Strip.

   b. Further powers and responsibilities may be transferred to the Council through the JAC.

   c. The Council may establish a Palestinian Civil Aviation Department to act on its behalf in accordance with the provisions in this Article and of this Agreement.

10. a. Aviation activity by Israel will continue to be operated above the West Bank and the Gaza Strip, with the same limitations applicable in Israel regarding civil and military flights over densely-populated areas.

    b. Israel will notify the Council of emergency rescue operations, searches and investigation of aerial accidents in the West Bank and the Gaza Strip. Searches and investigations of civilian aircraft accidents in which Palestinians or their property are involved, will be conducted by Israel with the participation of the Council.

11. Guided by the principle that the two sides view the West Bank and Gaza Strip as a single territorial unit, as set out in Article IV of the DOP, and in order to enable the smooth operation of flights between the West Bank and the Gaza Strip:

    a. The JAC will agree on special arrangements to facilitate flights of the Ra'ees of the Executive Authority of the Council between the West Bank and the Gaza Strip. The Ra'ees and his spouse, and family members of the Ra'ees, his body guards and VIPs when accompanying the Ra'ees will fly without prior inspection of their person, personal belongings, and luggage.

    b. The minimum time of notification of VIPs' flights will be four hours. The notification will include the list of passengers.

    c. Flights of other persons will be handled in accordance with the procedures agreed in the JAC.

12. Flights between the West Bank and the Gaza Strip may be operated through the Gaza-Tel Aviv (sea shore) corridor.

    Monitoring and regulations of this air route will be discussed in the JAC.

Elements of War Crimes under the Rome Statute of the International Criminal Court

Sources and Commentary

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Art. 8(2)(a)(vii) – Unlawful deportation or transfer or unlawful confinement

(1) UNLAWFUL DEPORTATION OR TRANSFER

Text adopted by the PrepCom

Article 8(2)(a)(vii)–1 War crime of unlawful deportation and transfer

1. The perpetrator deported or transferred one or more persons to another State or to another location.

2. Such person or persons were protected under one or more of the Geneva Conventions of 1949.

3. The perpetrator was aware of the factual circumstances that established that protected status.

4. The conduct took place in the context of and was associated with an international armed conflict.

5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Commentary

***Travaux préparatoires*/Understandings of the PrepCom**

Concerning the crime 'unlawful deportation or transfer', the PrepCom adopted the interpretation that Art. 147 GC IV, which must be read in conjunction with Art. 49 GC IV, prohibits all forcible transfers, including those within an occupied territory, as well as deportations of protected persons from occupied territory.[1] In application of paragraph 6 of the General Introduction, the requirement of 'unlawfulness' as contained in the definition of the crime in the ICC Statute has not been repeated. Arts. 45 and 49 GC IV set forth the conditions for unlawfulness.

The PrepCom took the view that the requirement suggested by some delegations that a protected person must be transferred from his/her 'lawful place of residence', as contained in the definition of the crime against humanity of deportation or forcible transfer (Art. 7(2)(d) of the ICC Statute), is not an element of unlawful deportation or transfer as defined in the GC.

Legal basis of the war crime

The term 'unlawful deportation or transfer or unlawful confinement' has been incorporated directly from Art. 147 of GC IV.

[1] The relevant element reads as follows: 'The perpetrator deported or transferred one or more persons to another State or *to another location*.' (Emphasis added.) See in this regard B. Zimmermann, 'Art. 85' in Y. Sandoz, C. Swinarski and B. Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, Martinus Nijhoff, Geneva, 1987), no. 3502, especially note 28.

Chapter 58. The Transfer and Deportation of Civilians

Select Bibliography

Chetail, V., 'Armed Conflict and Forced Migration: A Systemic Approach to International Humanitarian Law, Refugee Law and Human Rights Law', in A. Clapham and P. Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (Oxford: OUP, 2014) 700

Henckaerts, J.-M., 'Deportation and Transfer of Civilians in Time of War', 26 *Van JTL* (1993) 469

Hulme, K., 'Armed Conflict and the Displaced', 17(1) *IJRL* (2005) 91

Jacques, M., *Armed Conflict and Displacement: The Protection of Refugees and Displaced Persons under International Humanitarian Law* (Cambridge: CUP, 2012)

Meindersma, C., 'Legal Issues Surrounding Population Transfers in Conflict Situations', 41 *NILR* (1994) 31

Piotrowicz, R., 'Displacement and Displaced Persons', in E. Wilmshurst and S. Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (Cambridge: CUP, 2007) 337

A. Introduction

The forcible transfer and deportation of civilians raise complex and ambiguous issues of international humanitarian law (IHL). Indeed, forced displacement in times of armed 1

10 Among the other key characteristics of the prohibition of forcible transfer and deportation, Article 49 paragraph 1 explicitly restates that the motive is irrelevant. An illegal purpose for displacement is thus not required.[11] The general nature of the prohibition entails another substantial feature: it applies without regard to the fact that protected persons have committed crimes, sabotage, or any other activities that may represent a threat to public order or national security.[12]

11 Lastly, as underlined by the text of Article 49 paragraph 1, no distinction is made between individual or collective deportation and forcible transfer. Both are prohibited, irrespective of the number of protected persons who are forcibly transferred or deported. This specification would not have raised further comments had the Israeli Supreme Court not developed a very peculiar interpretation. According to the Court, Article 49 paragraph 1 would be limited only to mass deportations of the kind carried out by the Nazis, and would not prohibit individual deportation for reasons of public order and security.[13] Such a reading is patently biased and, as underlined by the great majority of the doctrine,[14] does not conform to the ordinary reading of Article 49 paragraph 1 in due accordance with its object and purpose.

b. The notion of forcible transfer and deportation under Article 49

12 Given the broad and inclusive scope of Article 49 paragraph 1 GC IV, the decisive factor triggering the applicability of the prohibition contained therein relies on the very notions of forcible transfer and deportation. However, their respective meanings have raised considerable and longstanding debates. There are two different interpretations: for some, forcible transfer and deportation are two distinctive notions,[15] whereas others consider that they are largely the same.[16] In fact, each interpretation may invoke some valid arguments. On the one hand, by referring explicitly and distinctively to 'forcible transfers, as well as

[11] Y. Arai-Takahashi, *The Law of Occupation. Continuity and Change of International Humanitarian Law, and its Interaction with International Human Rights Law* (Leiden/Boston, Mass: Martinus Nijhoff Publishers, 2009), at 329.

[12] It is however sometimes argued that Art 49 does not apply to the expulsion of infiltrators who are non-citizens of the occupied territory and endanger public security in the territory: Y. Dinstein, 'The Israeli Supreme Court and the Law of Belligerent Occupation: Deportation', 23 *IsrYBHR* (1993) 1, at 18; HC *454185* etc, *Gtwarawi et al v Minister of Defence et al*, 39(3) *Piskei Din* 401, at 410 and 412, 16 *IsrYBHR* (1986) 332, at 334, paras (f) and (h). This interpretation has been rightly criticized and dismissed by Arai-Takahashi, above n 11, at 331.

[13] *Abu Awad v The Military Commander* [1979] HCJ 97/79, para 11; *Afu v IDF Commander in the West Bank* [1988] HCJ 785/87, PD 42(2) 4.

[14] See, among many others, Jacques, above n 5, at 28; A. Margalit and S. Hibbin, 'Unlawful Presence of Protected Persons in Occupied Territory? An Analysis of Israel's Permit Regime and Expulsions from the West Bank under the Law of Occupation', 13 *YIHL* (2010) 245, at 256–60; Arai-Takahashi, above n 11, at 338; T. Meron, *Human Rights and Humanitarian Norms as Customary Law* (Oxford: Clarendon Press, 1989), at 49; Dinstein, above n 12, at 15; D. Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (New York: State University New York Press, 2002), at 48–51; B. Dayanim, 'The Israeli Supreme Court and the Deportations of Palestinians: The Interaction of Law and Legitimacy', 30 *Stanford Journal of International Law* (1994) 115, at 157–66: J.-M. Henckaerts, 'Deportation and Transfer of Civilians in Time of War', 26 *Van JTL* (1993) 469, at 471.

[15] See, e.g., C. Bassiouni, *Crimes against Humanity in International Law* (Cambridge: CUP, 2011), at 381; C. Hall, 'Crimes against Humanity, par. 1(d)', in O. Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (Baden-Baden: Nomos, 1999) 136, at 136; G. Werle, *Principles of International Criminal Law* (The Hague: T.M.C. Asser Press, 2005), at 240; Henckaerts, above n 14, at 472.

[16] See notably C. Meindersma, 'Legal Issues Surrounding Population Transfers in Conflict Situations', 41 *NILR* (1994) 31, at 33; de Zayas, above n 5, at 208; M. Stavropoulou, 'The Right Not to Be Displaced', 9 *American University Journal of International Law and Policy* (1994) 689, at 690.

conflict or Occupying Power of which they are not nationals.'[620] Article 4 para 4 GC IV makes it clear, that prisoners of war are not protected persons. In principle, article 85 para. 4 (a) AP I protects protected persons against deportations and forcible transfers since the conduct prohibited under it must be 'in violation' of article 49 GC IV. Yet, since article 8 para 2 (b)(viii) Rome Statute and its Elements of Crime do not explicitely refer to those articles of the GC IV, the term 'population' could include non-civilians as well, in particular since the first part of the sentence explicitly refers to transfer of parts of the Occupying Power's 'own civilian population into the territory it occupies', while the second sentence does not use the term 'civilian'.

402 While article 49 para 1 GC IV explicitly includes '**individual' transfer** and deportation, article 8 para 2 (b)(viii) Rome Statute prohibits the transfer and deportation of 'all or parts of the population'. This wording which corresponds with article 85 para 4 (a) AP I. It clearly deviates from the terms used in the Geneva Conventions, suggests that more than one person must be deported or transferred in order that the act qualifies as a crime under article 8 para 2 (b)(viii) Rome Statute, although transfers and deportations of small numbers of persons may suffice. Similarly, the Security Council has qualified the permanent expulsion by the Occupying Power Israel of nine Palestinian civilians as a deportation.[621]

403 **bbb) Exceptions.** According to the ICRC Commentary on article 49 GC IV the prohibition of transfers and deportations is absolute and allows of no exceptions, apart from those stipulated in paragraph 2.'[622] Concretely, para 2 of article 49 GC IV authorizes the Occupying Power to evacuate an occupied territory wholly or partly 'when the safety of the population or imperative military reasons so demand'. The ICRC commentary defines evacuations as 'a provisional measure entirely negative in character', which is 'often taken in the interests of the protected persons themselves.'[623] Paras two to five of article 49 GC IV define several requirements for the transfer to be lawful. If these requirements are met the act would not be punishable under article 8 para 2 (b)(viii) Rome Statute either. According to the ICRC Commentary, evacuation of the population by the Occupying Power is for instance allowed and necessary if 'an area is in danger as a result of military operations or is liable to be subjected to intense bombing' or if 'the presence of protected persons in an area hampers military operations' and only if 'overriding military considerations make it imperative; if it is not imperative, evacuation ceases to be legitimate.'[624]

404 Article 49 para 2 (first sentence) GC IV provides that only a 'given area' may be evacuated. This suggests that only a specific, geographically limited area may be evacuated.[625] Further, the evacuation must always be a provisional, temporary measure limited to the time-span during which the justifying ground, such as hostilities in the area of initial residence, persists. Article 49 para 2 (third sentence) GC IV correspondingly provides that, 'as soon as hostilities in the area [where the evacuated persons were evacuated from] have ceased', they 'shall be transferred back to their homes'. The Occupying Power consequently may be required to transfer back or repatriate evacuated persons before the end of all hostilities. Additionally, when evacuating or transferring evacuated persons back, the Occupying Power must ensure certain minimum humanitarian standards to the greatest practicable extent, including in particular proper accommodation to receive the displaced persons and satisfactory conditions

[620] According to para 2, '[n]ationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.'.

[621] SC Res 608 (14 January 1988).

[622] Pictet, *Commentary on the Geneva Convention* (1952–1960) 279.

[623] *Id.* 280.

[624] *Id.*

[625] The Commentary on article 49 para 2 GC IV surprisingly suggests that even the entire occupied territory can be evacuated, which can hardly have been the intention of the drafters of article 49 para 2 GC IV; Pictet 280.

III. H.C. 97/79, ABU AWAD v. COMMANDER OF THE JUDEA AND SAMARIA REGION

33(3) *Piskei Din* 309.

In January 1979, a Deportation Order was issued by the respondent against the petitioner, a Jordanian citizen of Bir Zeit, ordering the petitioner to be deported to Lebanon for hostile activity and propaganda. The Deportation Order was issued in pursuance of Regulation 112(1) of the Defence (Emergency) Regulations,[16] enacted in 1945 by the Mandatory Government of Palestine by virtue of Article 6 of the Palestine (Defence) Order-in-Council, 1937 (hereinafter: Defence Regulations). Counsel for the petitioner contested the validity of the Deportation Order on the grounds that the Defence Regulations in general, and Regulation 112(1) in particular, are no longer in force in the West Bank. The Supreme Court, sitting as the High Court of Justice, rejected this contention and ruled that the Defence Regulations have never been implicitly or explicitly abolished and that therefore they remain in force as enacted in 1945. On 19 May 1948, the Military Commander of the Arab Legion, acting as the Military Commander of the West Bank, issued a Proclamation providing that

> all Laws and Regulations in force in Palestine at the end of the Mandate, on 15 May 1948, shall remain in force throughout the regions occupied by the Arab Jordanian Army, or wherever the Army is entrusted with the duty of protecting security and order, save where that is inconsistent with any provision of the Defence of Trans-Jordan Law, 1935, or with any Regulations or Orders issued thereunder.[17]

Since no evidence to the contrary was submitted to the Court, it concluded that the Defence Regulations did not contravene the Defence of Trans-Jordan Law and were not affected by the Jordanian Proclamation of 1948. Nor was the validity of the Defence Regulations affected in 1967, upon the conquest of the West Bank by Israel. On 7 June 1967, the Commander of the Israel Defence Forces in the West Bank Region issued the Law and Administration Proclamation, which provided for the continued application of existent law insofar as it was not inconsistent with any provision

16. [1945] *Palestine Gazette* (No. 1442) (Supp. 2) 1055.
17. Cited in the judgment.

of that and other proclamations or orders issued by the Military Commander and subject to such modifications as the establishment of an Israeli Military Government in the Region necessitated.[18] Since the Defence Regulations did not contradict any new legislation enacted by the Military Commander of the Area and were not incompatible with changes emanating from the establishment of the Military Government, they remained in full effect after the War in 1967.

The Court also considered the petitioner's argument that the Defence Regulations were implicitly revoked by the New Constitution of Jordan of 1952, which provides in Article 9(1) that no Jordanian citizen may be deported from the Jordanian Kingdom. The Court held that no implicit abolition of the Defence Regulation could ever take place since the Interpretation Order (Additional Provisions (No. 5) (Judea and Samaria) (No. 224), 1968 [19] provides that emergency legislation which had been in force in the area in 1948 shall remain in force unless explicitly abrogated by a future legislation. Article 128 of the Jordanian Constitution of 1952 provides for the continuation of the existing law and does not, in any way, affect the validity of the Defence Regulations, particularly Regulation 112. Thus, on the issue of the validity of the Defence Regulation the Court's decision was that

> the Defence (Emergency) Regulation of 1945 remained in force in the West Bank as part of the Jordanian law.

The petitioner's counsel also specifically challenged Regulation 112(1) — upon which the Deportation Order was based — as being in violation of Article 49 of the Fourth Geneva Convention [20] which prohibits deportations. The first paragraph therein provides as follows:

> Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.

On the legislative history and purpose of this Article, Sussman P. states:

18. Published in 1 *C.P.O.A.* 3. Text reproduced in 1 *I.Y.H.R.* 419 *et seq.* (1971).
19. Cited in the judgment.
20. *Supra* note 6, at 585.

> This Article, as elucidated in Pictet's *Commentary* (p. 10) was intended to protect persons from the arbitrary actions of the occupying army and the object of Article 49 is to prevent the perpetration of acts such as the atrocities committed by Germans during the Second World War, when millions of people were deported from their homes for various purposes, usually to Germany to work as forced labour for the enemy and Jews and other nationalities were deported to concentration camps for torturing and extermination.

In the present case, the Deportation Order was issued for purposes of maintaining public order and security in the occupied territory. This is a legitimate reason for deportation since, under Article 43 of the Hague Regulations, the Occupying Power is bound to ensure public order in the occupied territory and is entitled to take the necessary steps for its own safety. Moreover, according to Regulation 108 of the Defence Regulations, an Order under the Regulation may only be issued if required so as to ensure public safety and order. Hence, the Court ruled that nothing associates the deportation of selected individuals for reasons of public order and security with the deportations envisaged under Article 49 of the Fourth Geneva Convention. The Court thus upheld the Deportation Order and rejected the petition.

Remark: For comments, analysis and criticism of the *Beth El* and *Abu Awad* cases, *see* Dinstein, "Settlements and Deportation in the Occupied Territories," 7 *Tel Aviv Univ. L. Rev.* 188 (Hebrew, 1979).

IV. H.C. 390/79, MUSTAFA DWEIKAT ET AL. v. THE GOVERNMENT OF ISRAEL ET AL. (the ELON MOREH CASE)

Not yet published.

This is a petition brought by seventeen Arab land-owners before the Supreme Court (comprising five Justices), sitting as the High Court of Justice. The Court is asked to rule on the question of the legality of the establishment of a civilian settlement at Elon Moreh (on the West Bank) on the petitioners' privately-owned lands which had been requisitioned by the Military Government, for military purposes.

At the very outset, the Court (per Landau D.P.) refers to its judgment in the *Beth El Case* (see *supra* II.), delivered several months earlier, in which it had held that the establishment of