

Assessing the Scope of the Palestinian  
Territorial Entitlement

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## ARTICLE

### ASSESSING THE SCOPE OF THE PALESTINIAN TERRITORIAL ENTITLEMENT

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#### ABSTRACT

*What is the scope of the Palestinian entitlement to the territory of the West Bank, currently occupied by Israel? The right of the Palestinian people to self-determination and its derivative, a Palestinian right to statehood, have been widely acknowledged. But does the right to self-determination determine the borders of the Palestinian state, giving rise to a Palestinian territorial entitlement to the whole of the West Bank? The Article answers this question in the negative, demonstrating that neither state practice nor the jurisprudence of the International Court of Justice support a rule of customary international law that assigns self-determination considerations a role in the demarcation of international boundaries.*

*The Article also examines the role of international recognition of title to territory in the resolution of the territorial dispute between Israel and the Palestinians. To what extent does international law empower the international community to resolve a territorial dispute over the objection of an affected party, by pronouncing a collective position that reflects near-consensus? The Article concludes that a collective recognition by the international community of Palestinian title to territories currently occupied by Israel would have neither a probative value nor a constitutive effect under international law, unless such international position takes the form of UN Security Council action in the exercise of its binding powers under Chapter VII of the UN Charter.*

*The Article further demonstrates that international law does not support an Israeli claim to sovereignty over the occupied West Bank. This inquiry focuses on a critical examination of a theory recently advanced in legal literature, which predicates such a claim on the*

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*doctrine of uti possidetis juris. Finally, the article considers the consequences of the absence of a norm of international law governing the demarcation of the border between Israel and the Palestinians.*

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### I. INTRODUCTION

Most territorial disputes are captured by a web of well-established norms on border demarcation.<sup>1</sup> The challenge for international adjudicators of such disputes typically concerns evidentiary difficulties in the application of a clearly identified norm.<sup>2</sup> It is far less common that uncertainty extends to the question of which legal principle governs the territorial dispute, or to whether such a principle exists. The territorial dispute between Israel and the Palestinians is an instance of the latter situation. Whereas most territorial disputes are minor and

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1. See Brian Taylor Sumner, *Territorial Disputes at the International Court of Justice*, 53 DUKE L.J. 1779, 1792-808 (2004) (reviewing the adjudication by the International Court of Justice of territorial disputes).

2. See, e.g., *Frontier Dispute (Burk. Faso/Mali)*, Judgment, 1986 I.C.J. Rep. 554, 587 (Dec. 22) (addressing evidentiary difficulties in the application of the principle of *uti possidetis juris*); *Land, Island and Maritime Frontier Dispute (El Sal./Hond.: Nicar. intervening)*, 1992 I.C.J. Rep. 351, 513 (Sept. 11) (identifying the principle of *uti possidetis juris* as the applicable border demarcation rule, but noting the absence of “any evidence whatsoever as to the line of the *uti possidetis juris*” in the region in question).

peripheral,<sup>3</sup> uncertainty regarding the norm governing the Israeli-Palestinian territorial dispute affects the scope of the dispute, which extends to a significant portion of the West Bank,<sup>4</sup> an area currently occupied by Israel and claimed by the Palestinians as the territory of a Palestinian state.

Any inquiry into the scope of Palestinian territorial entitlement would be pursued in the shadow of the controversy on whether or not a Palestinian state exists. It has been noted that “the question of boundaries arises only once independence has been acquired.”<sup>5</sup> The question of whether or not the Palestinian political entity in the West Bank qualifies under international law as a state has been the subject of an extensive debate,<sup>6</sup> which is beyond the scope of this Article. Rather, the Article follows the literature that examined the territorial scope of a Palestinian state on the assumption that such a state exists.<sup>7</sup> Moreover, regardless of whether or not a Palestinian state currently exists, there is little doubt that the Palestinian people have a *right* to

3. Eugene Kontorovich, *Israel/Palestine – The ICC’s Uncharted Territory*, 11 J. INT’L CRIM. JUST. 979, 997 (2013) (noting that “while many nations are involved in territorial disputes, most are minor, peripheral and non-militarized”).

4. The scope of Israeli territorial claims in relation to the West Bank is demonstrated by a statement issued in 2004 by the Prime Minister of Israel at the time, Ariel Sharon, which presented the Israeli plan for disengagement from the Gaza Strip. The statement stipulated that “it is clear that in the West Bank, there are areas which will be part of the State of Israel, including major Israeli population centers, cities, towns and villages, security areas and other places of special interest to Israel.” See Prime Minister Ariel Sharon, Prime Minister of Israel, Disengagement Plan of Prime Minister Ariel Sharon – Revised, sec. 1(3), (May 28, 2004).

5. Anne Peters, *The Principle of Uti Possidetis Juris: How Relevant is it for Issues of Secession?*, in SELF-DETERMINATION AND SECESSION IN INTERNATIONAL LAW 95, 101 (Christian Walter et al. eds., 2014).

6. JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 446-47 (2d ed., 2007) (rejecting the contention that a Palestinian state already exists); Paul Eden, *Palestinian Statehood: Trapped between Rhetoric and Realpolitik*, 62 INT’L & COMP. L.Q. 225, 233 (2013) (observing that “the powers currently possessed by the Palestinian Authority fall short of the independence necessary for Palestine (as currently constituted) to be regarded as a sovereign State”); John Quigley, *Palestine is a State: A Horse with Black and White Stripes is a Zebra*, 32 MICH. J. INT’L L. 749, 752 (2011) (contending that Palestine is a state); Francis A. Boyle, *The Creation of the State of Palestine*, 1 EUR. J. INT’L L. 301, 301-03 (1990) (arguing that Palestine meets the criteria for statehood, and that “the [U.N.] General Assembly’s recognition of the new state of Palestine is constitutive, definitive, and universally determinative”); William Thomas Worster, *The Exercise of Jurisdiction by the International Criminal Court over Palestine*, 26 AM. U. INT’L L. REV. 1153, 1174 (2011) (concluding that “Palestine is not a state for all purposes, though it appears to be incrementally exerting increasing independence . . . Palestine is most appropriately categorized as a quasi-state”).

7. Kontorovich, *supra* note 3, at 980-81; Yael Ronen, *Israel, Palestine and the ICC – Territory Uncharted but Not Unknown*, 12 J. INT’L CRIM. JUST. 7, 8 (2014).

statehood, emanating from the right of peoples to self-determination.<sup>8</sup> The right to statehood, which implies *some* Palestinian territorial entitlement, requires examining the scope of such entitlement.

This Article examines whether it is possible to discern a legal principle that governs the territorial dispute between Israel and the Palestinians. The inquiry begins with the norms that dominate the jurisprudence of the International Court of Justice (“ICJ”) on the resolution of territorial disputes. These norms, termed in the legal literature “the tripartite hierarchy,”<sup>9</sup> concern (a) the establishment of international borders by way of a boundary treaty; (b) the recognition of the administrative boundaries of a former colony or of a former federal province as international boundaries under the principle of *uti possidetis juris*; and (c) the acquisition of territory through the exercise of effective control over it.<sup>10</sup>

Having concluded that none of these norms pertain to the territorial dispute between Israel and the Palestinians, this Article turns to consider whether the dispute can be legally resolved under a norm that is extraneous to the tripartite hierarchy, focusing on the right of the Palestinian people to self-determination. The inquiry reveals that neither state practice nor the jurisprudence of the ICJ supports a rule of customary international law that assigns self-determination considerations a role in the demarcation of international boundaries.

Finally, the Article examines whether international law vests the international community with the power to resolve a territorial dispute over the objection of an affected party, through the pronouncement of a collective position that reflects near-consensus. Such power may be vested in the UN Security Council (“Security Council”), acting under Chapter VII of the UN Charter.<sup>11</sup> The Article demonstrates, however, that outside the legal framework of Security Council action, the international community may confer title to territory on a party to a territorial dispute, over the objection of the other party, only if the former is in possession of the territory. Acting by way of a UN General Assembly resolution or other pronouncements of a collective position

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8. See *infra* notes 168-71, and accompanying text. See also CRAWFORD, *supra* note 6, at 438-39 (noting that “[t]here is a substantial international consensus that the Palestinian people are entitled to form a State” and that Palestine is “an entity . . . whose people is entitled to self-determination, i.e., to elect to form their own State”).

9. Sumner, *supra* note 1, at 1807-08.

10. See discussion *infra* Section IV.A.

11. See *infra* notes 340-48 and accompanying text.

that do not involve Security Council action, the international community may not grant the Palestinians title to territories occupied by Israel because the Palestinians are not in possession of these territories. Although a convergence of Israeli possession of the occupied West Bank and a broad international recognition of Israeli sovereignty over this territory could, in theory, lead to Israeli title to the territory, such international recognition is not forthcoming.

The Article concludes that none of the norms of the international law on the resolution of territorial disputes governs the territorial dispute between Israel and the Palestinians. The silence of international law on this question has consequences with regard to Israel's liberty to prolong the occupation of the West Bank and to leverage the occupation in the course of peace negotiations with the Palestinians in order to advance a *political* claim to sovereignty over parts of the West Bank.

Part II of this Article provides a brief review of the historical background to the territorial dispute between Israel and the Palestinians. Part III demonstrates that, in and of itself, the status of the West Bank as an occupied territory does not give rise to a Palestinian legal entitlement to the entirety of the West Bank. Part IV reviews the norms that form the tripartite hierarchy, applied by the ICJ in the adjudication of territorial disputes, and proceeds to consider and reject two arguments advancing a claim for Israeli sovereignty over the West Bank in reliance on these norms. The first concerns the provisions of a 1922 international treaty between the League of Nations, on one hand, and Britain, on the other, establishing the Mandate for Palestine.<sup>12</sup> The second concerns the application of the *uti possidetis juris* principle.

The Article proceeds to examine arguments regarding title to the West Bank, which are extraneous to the tripartite hierarchy. The first, considered in Part V, derives a Palestinian territorial entitlement to the entirety of the West Bank from the right of the Palestinian people to self-determination. The second, considered in Part VI, promotes a narrow construction of the prohibition on the acquisition of territory through the use of force, which would support a claim by Israel to sovereignty over parts of the West Bank. The Article finds these arguments unpersuasive. Part VII demonstrates that under customary

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12. *British Mandate for Palestine*, 17 AM. J. INT'L L. SUPP. 164 (1923), available at [http://avalon.law.yale.edu/20th\\_century/palmanda.asp](http://avalon.law.yale.edu/20th_century/palmanda.asp) [https://perma.cc/Q9TR-B6RL] [hereinafter *Palestine Mandate*].

international law, a collective recognition by the international community of Palestinian title to territories currently occupied by Israel would have neither a probative value nor a constitutive effect. Finally, Part VIII considers the consequences of the absence of a norm of international law governing the demarcation of the border between Israel and the Palestinians.

## II. HISTORICAL BACKGROUND TO THE ISRAELI-PALESTINIAN TERRITORIAL DISPUTE

Before 1917, Palestine was a part of the Ottoman Empire. It was relinquished by the Ottoman Empire and came under British control as a result of World War I.<sup>13</sup> Palestine was subsequently committed to the Mandate system, established under Article 22 of the Covenant of the League of Nations (“Article 22”)<sup>14</sup> to dispose with former colonies of Germany and of the Ottoman Empire, relinquished by these powers in the wake of World War I.<sup>15</sup> The Mandate system provided for tutelage of the former colonies by “advanced nations . . . as Mandatories on behalf of the League [of Nations].”<sup>16</sup> In accordance with Article 22, each Mandate was established by an international agreement between the League of Nations (“League”) and a Mandatory,<sup>17</sup> which vested the Mandatory with the power to administer the territory under the supervision and control of the League for the purpose of promoting “the well-being and development”<sup>18</sup> of the people of the territory as well as their right to self-determination.<sup>19</sup> The Mandate regime for Palestine was established in 1922 by way of an international agreement between the League and Britain, designating the latter as the Mandatory.<sup>20</sup> At the time the Mandate of Palestine took effect, its territory encompassed all of present-day Jordan, Israel, the Gaza Strip, and the territories that

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13. CRAWFORD, *supra* note 6, at 422.

14. League of Nations Covenant art. 22.

15. CRAWFORD, *supra* note 6, at 422, 566.

16. League of Nations Covenant art. 22.

17. CRAWFORD, *supra* note 6, at 574; Yoram Dinstein, *The Arab-Israeli Conflict from the Perspective of International Law*, 43 UNIV. N.B. L.J. 301, 304 (1994) (noting that “like all other Mandates, the Mandate for Palestine was an international agreement concluded between the League of Nations, on the one hand, and the Mandatory Power (Britain), on the other”).

18. League of Nations Covenant art. 22.

19. Malcolm N. Shaw, *Peoples, Territorialism and Boundaries*, 3 EUR. J. INT’L L. 478, 479-80 (1997); CRAWFORD, *supra* note 6, at 566-67 (observing that “the principle of self-determination . . . was made applicable to Mandates, . . . which became the first distinct category of self-determination territory”).

20. Palestine Mandate, *supra* note 12; *see also* Dinstein, *supra* note 17, at 304.



are currently under Israeli occupation, including those that are the object of the territorial dispute between Israel and the Palestinians.<sup>21</sup>

Citing a commitment undertaken by Britain toward the Jewish people a few years earlier,<sup>22</sup> the Mandate agreement entrusted Britain with the responsibility to promote “the establishment in Palestine of a national home for the Jewish people, it being clearly understood that nothing should be done which might prejudice the civil and religious rights of existing non-Jewish communities in Palestine . . . .”<sup>23</sup> Article 25 of the Mandate agreement, however, authorized Britain to administer the eastern part of Palestine separately from its western part, and to exclude the eastern part of Palestine from the purview of its obligation to promote the establishment of a national home for the Jewish people.<sup>24</sup> Exercising this authority shortly after assuming its role as a Mandatory, Britain divided the Palestine Mandate into two administrative units: an eastern province, referred to as Transjordan, and a western province, which was subsequently referred to as “Palestine.”<sup>25</sup> In accordance with Article 25 of the Mandate agreement, Britain determined the administrative border between Transjordan and Palestine to be the Jordan River, the Dead Sea to which the Jordan

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21. Abraham Bell & Eugene Kontorovich, *Palestine, Uti Possidetis Juris, and the Borders of Israel*, 58 ARIZ. L. REV. 633, 669 (2016).

22. In a letter of November 2, 1917, the British Secretary of State for Foreign Affairs, Lord Balfour, had issued the following statement, afterwards known as the “Balfour Declaration”:

His Majesty’s Government views with favor the establishment in Palestine of a national home for the Jewish people, and will use their best endeavors to facilitate the achievement of this object, it being clearly understood that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country.

*See* PALESTINE ROYAL COMMISSION, REPORT, 1937, HC Cmd 5479, at 22 (UK). *See also* Palestine Mandate, *supra* note 12, at preamble (providing that “the Mandatory should be responsible for putting into effect the declaration originally made on November 2nd, 1917, by the Government of His Britannic Majesty.”).

23. Palestine Mandate, *supra* note 12, pmb1.

24. Palestine Mandate, *supra* note 12, at art. 25; *see also* CRAWFORD, *supra* note 6, at 423.

25. LEAGUE OF NATIONS, MANDATE FOR PALESTINE TOGETHER WITH A NOTE BY THE SECRETARY-GENERAL RELATING TO ITS APPLICATION TO THE TERRITORY KNOWN AS TRANSJORDAN UNDER THE PROVISIONS OF ARTICLE 25 (1922), *available at* [https://d3n8a8pro7vnm.cloudfront.net/truthmustbetold/pages/93/attachments/original/1448574108/Mandate\\_of\\_Palestine.pdf?1448574108](https://d3n8a8pro7vnm.cloudfront.net/truthmustbetold/pages/93/attachments/original/1448574108/Mandate_of_Palestine.pdf?1448574108) [<https://perma.cc/T6UK-DFD3>].

River flows, and a line stretching south from the Dead Sea to the town of Aqaba by the Red Sea.<sup>26</sup>

Although Transjordan formally remained a part of the Palestine Mandate, in 1928 Britain granted Transjordan extensive self-governing powers,<sup>27</sup> and in 1946, proceeded to recognize the independence of Transjordan as the state of Jordan, effectively terminating the Palestine Mandate there.<sup>28</sup> Commentators thus noted that “[f]or the last two years of the Palestine Mandate (until May 1948), it did not include Transjordan. Upon the independence of Transjordan, the administrative boundary between it and Palestine became the new international boundary, consistent with the doctrine of *uti possidetis juris*.”<sup>29</sup>

In February 1947, Britain referred the question of Palestine to the United Nations, and announced its intention to terminate its presence in Palestine and relinquish its role as Mandatory by August 1, 1948.<sup>30</sup> On November 29, 1947, the UN General Assembly (“General Assembly”) adopted Resolution 181 (II), embracing a plan for the partition of Palestine into two states, Arab and Jewish, and the internationalization of Jerusalem.<sup>31</sup> The bulk of authority takes the view that the adoption of the partition plan by the General Assembly “was intended as no more than a recommendation,”<sup>32</sup> and is therefore not legally binding upon the parties involved. The Jewish national institutions in Palestine accepted the partition plan, but the plan was rejected by the Arab leadership in Palestine as well as by various Arab states.<sup>33</sup>

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26. *Id.* (stipulating that the territory of Transjordan encompasses “all territory lying to the east of a line drawn from a point two miles west of the town of Akaba on the Gulf of that name up the center of the Wady Araba, Dead Sea and River Jordan to its junction with the River Yarmuk”).

27. Bell & Kontorovich, *supra* note 21, at 673; CRAWFORD, *supra* note 6, at 423.

28. CRAWFORD, *supra* note 6, at 423-24; Bell & Kontorovich, *supra* note 21, at 674.

29. Bell & Kontorovich, *supra* note 21, at 674-75.

30. CRAWFORD, *supra* note 6, at 424.

31. G.A. Res. 181 (II), The Plan of Partition with Economic Union, (Nov. 29, 1947).

32. CRAWFORD, *supra* note 6, at 431 (“The conclusion must be that the partition plan, though valid, was intended as no more than a recommendation.”); *see also* Clyde Eagleton, *Palestine and the Constitutional Law of the United Nations*, 42 AM. J. INT’L L. 397, 397 (1948) (noting that “[i]t is clear to any student of the Charter that a resolution of the General Assembly, such as that for the partition of Palestine, is no more than a recommendation, and that it can have no legally binding effect upon any state whatsoever”); Dinstein, *supra* note 17, at 306.

33. CRAWFORD, *supra* note 6, at 424 (noting that “the Zionist League declared its acceptance of the partition plan, but it was rejected by the Arab States and organizations”); Ardi

The Mandate was terminated with the completion of British withdrawal, on May 14, 1948.<sup>34</sup> On that day, the Jewish leadership in Palestine proclaimed the independence of the State of Israel.<sup>35</sup> The termination of the British Mandate was immediately followed by the invasion of Palestine by the armies of the surrounding Arab states, resulting in an armed conflict between these states and the emerging State of Israel. Hostilities ended in 1949 with the signing of armistice agreements between Israel and each of the neighboring Arab states.<sup>36</sup> Following the separation of forces along the lines demarcated by the armistice agreements, Israel controlled seventy-eight percent of the territory of the Palestine Mandate,<sup>37</sup> which far exceeded the territory Israel would have possessed under the partition plan.<sup>38</sup> The remaining territory of the Palestine Mandate was held by Jordan, which occupied the West Bank of the Jordan River, including East Jerusalem (the “West Bank”), and by Egypt, which occupied the Gaza Strip.

The terms of the armistice agreement between Israel and Jordan are of particular significance for the purposes of this Article because the West Bank is the object of the current territorial dispute between Israel and the Palestinians. This agreement states that the armistice line separating the territory controlled by Israel from the West Bank, widely referred to as “the Green Line,” was not considered an international boundary and therefore did not resolve the question of sovereignty over any part of the territory of the Palestine Mandate.<sup>39</sup> Article 2(2) of the Israel-Jordan Armistice Agreement stipulates:

[I]t is . . . recognized that no provision of this Agreement shall in any way prejudice the rights, claims and positions of either Party hereto in the ultimate peaceful settlement of the Palestine question,

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Imseis, *On the Fourth Geneva Convention and the Occupied Palestinian Territory*, 44 HARV. INT’L L.J. 65, 75-76 (2003).

34. CRAWFORD, *supra* note 6, at 425.

35. Declaration of Establishment of the State of Israel (May 14, 1948).

36. See Israeli-Syrian General Armistice Agreement, Isr.-Syria, July 20, 1949, U.N. Doc S/1353; Egyptian-Israeli General Armistice Agreement, Egypt-Isr., Feb. 24, 1949, U.N. Doc. S/1264; Hashemite Kingdom of Jordan and Israel: General Armistice Agreement, Isr.-Jordan, Apr. 3, 1949, U.N. Doc. S/1302 [hereinafter Israel-Jordan Armistice Agreement].

37. Bell & Kontorovich, *supra* note 21, at 679; Imseis, *supra* note 33, at 76.

38. CRAWFORD, *supra* note 6, at 425.

39. Israel-Jordan Armistice Agreement, *supra* note 36, art. VI(9) (stipulating that “[t]he Armistice Demarcation Lines defined in articles V and VI of this Agreement are agreed upon by the Parties without prejudice to future territorial settlements or boundary lines or to claims of either Party relating thereto”). *But see* Dinstein, *supra* note 17, at 312 (arguing that “the Armistice Lines constitute international frontiers”).

the provisions of this Agreement being dictated exclusively by military considerations.<sup>40</sup>

Jordan declared the annexation of the West Bank in 1950,<sup>41</sup> but a near-consensus within the international community has rejected this annexation as illegal and void, and the status of Jordan in relation to the West Bank was widely considered as that of an occupying power rather than a sovereign.<sup>42</sup> The Jordanian occupation of the West Bank lasted until 1967, when an armed conflict erupting between Israel and its neighbors, among them Jordan, resulted in the occupation by Israel of the entire territory of the West Bank.<sup>43</sup> Upon the commencement of the Israeli occupation of the West Bank, no state held sovereign title to that territory.<sup>44</sup>

A series of interim agreements were concluded in the period between 1993 and 1995 between Israel and the Palestine Liberation Organization, as a representative of the Palestinian people (the “Oslo Accords”).<sup>45</sup> The Oslo Accords provided for the transfer by Israel to a newly established Palestinian interim administration of some governing powers in certain parts of the West Bank.<sup>46</sup> Pursuant to the Oslo Accords, the Israeli military in the West Bank redeployed outside

40. Israel-Jordan Armistice Agreement, *supra* note 36, art. II(2).

41. EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION 204 (2012).

42. *Id.* (observing with regard to the annexation by Jordan of the West Bank, “[t]his purported annexation of parts of the former Mandatory Palestine was, however, widely regarded, including by the Arab League, as illegal and void, and was recognized only by Britain, Iraq, and Pakistan”); Adam Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967*, 84 AM. J. INT’L L. 44, 76 (1990) (“There are strong grounds for doubt whether the West Bank and Gaza were, before 1967, simply integral parts of Jordan and Egypt, respectively.”); Yehuda Z. Blum, *The Missing Reversioner: Reflections on the Status of Judea and Samaria*, 3 ISR. L. REV. 279, 281 (1968) (noting that “the Kingdom of Jordan never acquired, from the point of view of international law, the rights of a legitimate sovereign over those parts of former Mandatory Palestine that came under its control in the course of the Palestine hostilities of 1948-49”); Imseis, *supra* note 33, at 78 (noting that “Jordan’s annexation was ‘unanimously denounced’ by the Arab League” and that “[w]ith the exception of Britain and Pakistan, the Jordanian annexation was not recognized by any member of the international community”).

43. Imseis, *supra* note 33, at 79.

44. BENVENISTI, *supra* note 41, at 204 (observing that “neither the West Bank nor Gaza had in 1967 a government that could validly claim to represent its interests as its sovereign”).

45. Declaration of Principles on Interim Self-Government Arrangements, Isr.-Palestine Liberation Organization, Sept. 13, 1993, 32 I.L.M. 1525; Agreement on the Gaza Strip and the Jericho Area, Isr.-Palestine Liberation Organization, May 4, 1994, 33 I.L.M. 622; Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, Isr.-Palestine Liberation Organization, Sept. 28, 1995, 36 I.L.M. 551 [hereinafter Israeli-Palestinian Interim Agreement].

46. BENVENISTI, *supra* note 41, at 210.

Palestinian population centers.<sup>47</sup> The ICJ noted that the transfer of authority to the Palestinians remained, in practice, “partial and limited.”<sup>48</sup> Moreover, the transfer of authority from Israel to the Palestinians was confined to a relatively small portion of the West Bank.<sup>49</sup> Noting that the West Bank and East Jerusalem were occupied by Israel in 1967, the ICJ thus concluded that the Oslo Accords “have done nothing to alter this situation. All these territories (including East Jerusalem) remain occupied territories and Israel has continued to have the status of occupying Power.”<sup>50</sup>

The Oslo Accords did nothing to resolve the territorial dispute between Israel and the Palestinians.<sup>51</sup> The Accords listed the question of borders among the issues to be determined in future permanent status negotiations,<sup>52</sup> emphasizing that “[n]othing in this Agreement shall prejudice or preempt the outcome of the negotiations on the permanent status to be conducted . . . Neither Party shall be deemed, by virtue of having entered into this Agreement, to have renounced or waived any of its existing rights, claims or positions.”<sup>53</sup> A subsequent agreement on borders and other permanent status issues has never been reached.

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47. BENVENISTI, *supra* note 41, at 210.

48. See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, 167, ¶ 77 (July 9); see also Zinaida Miller, *Perils of Parity: Palestine’s Permanent Transition*, 47 CORNELL INT’L L.J. 331, 349 (2014) (noting that “while the [Oslo] Accords assigned a series of responsibilities to the newly-created Palestinian Authority, they left a wide array of issues under Israeli control”).

49. See, e.g., *Planning Policy in the West Bank*, B’TSELEM (Nov. 11, 2017), [http://www.btselem.org/area\\_c/what\\_is\\_area\\_c](http://www.btselem.org/area_c/what_is_area_c) [<https://perma.cc/5ZRH-W8B7>] (explaining that territories defined in the Oslo Accords as “Area C” cover 60% of the West Bank and that “Israel has retained almost complete control of this area, including security matters and all land-related civil matters, including land allocation, planning and construction, and infrastructure”); see also AEYAL GROSS, *THE WRITING ON THE WALL: RETHINKING THE INTERNATIONAL LAW OF OCCUPATION* 183 (2017); Miller, *supra* note 48, at 349.

50. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. Wall Advisory Opinion, at 167, ¶ 78.

51. CRAWFORD, *supra* note 6, at 443 (observing that “the agreements are remarkably unforthcoming on issues of status, no doubt because of fundamental disagreements between the parties.”).

52. Israeli-Palestinian Interim Agreement, *supra* note 45, art. 31(5).

53. Israeli-Palestinian Interim Agreement, *supra* note 45, art. 31(6).

*III. THE STATUS OF THE WEST BANK AS OCCUPIED  
TERRITORY AND THE SCOPE OF THE PALESTINIAN  
TERRITORIAL ENTITLEMENT*

The West Bank is widely considered as occupied territory,<sup>54</sup> although no state held sovereign title to it at the time Israel seized control of it. Does the status of the West Bank as an occupied territory give rise, in and of itself, to a Palestinian legal entitlement to its entirety?

Article 42 of the Hague Regulations Respecting the Laws and Customs of War on Land (“Hague Regulations”), which have attained the status of customary international law,<sup>55</sup> states that “[t]erritory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.”<sup>56</sup> Occupation is thus defined as “the effective control of a power (be it one or more states or an international organization, such as the United Nations) over a territory to which that power has no sovereign title, without the volition of the sovereign of that territory.”<sup>57</sup> The bulk of authority maintains that effective control of a territory by a foreign state amounts to occupation not only when the state that is the legitimate sovereign of the territory withholds its consent to such control, but also when sovereignty over the territory is vested in no state.<sup>58</sup>

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54. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. at 167, ¶ 78; S.C. Res. 2334, preamble, U.N. Doc. S/RES/2334 (Dec. 23, 2016) (referring to Israel as “the occupying Power” in the “Palestinian Territory occupied since 1967”); Theodor Meron, *The West Bank and International Humanitarian Law on the Eve of the Fiftieth Anniversary of the Six-Day War*, 111 AM. J. INT’L L. 357, 360 (2017) (observing that “the Israeli Supreme Court itself has routinely defined the situation on the West Bank as a territory under belligerent occupation”). For examples of Israeli jurisprudence recognizing the status of the West Bank as occupied territory, see HCJ 7015/02 Ajuri v. The Commander of IDF Forces in the West Bank 56(6) PD 352 ¶¶ 13, 21, 22 (2002) (Isr.); HCJ 2056/04 Beit Sourik Village v. The Government of Israel and the Commander of the IDF Forces in the West Bank 58(5) PD 805 ¶ 1 (2004) (Isr.).

55. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. at 167, ¶ 78.

56. Annex to the Convention on the Law and Customs of War on Land (Hague Convention IV): Regulations Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2295, art. 42.

57. BENVENISTI, *supra* note 41, at 43.

58. Meron, *supra* note 54, at 362-63 (“Article 42 of the Hague Convention No. IV . . . defines territory as occupied when it is actually placed under the authority of a hostile army, without any reference to the legal status of the occupied territory.”); YUTAKA ARAI-TAKAHASHI, *THE LAW OF OCCUPATION: CONTINUITY AND CHANGE OF INTERNATIONAL*

The purpose of this broad definition of occupation was to ensure that the special protections provided to residents of an occupied territory by international humanitarian law extend to all individuals governed by a foreign power.<sup>59</sup> The need for such protections arises whenever the residents of a territory are not the nationals of the state exercising effective control over the territory, regardless of whether or not a dispossessed sovereign can be identified, because such situations are characterized by an “inherent conflict of interests between governments and those governed,”<sup>60</sup> resulting in a “potentially hostile environment”<sup>61</sup> for the local population.

The need for applying the humanitarian protections provided by the law of occupation “to all circumstances in which non-allegiance characterizes the relationship between an administration of territory and the population subject to it”<sup>62</sup> has also resulted in the expansion of the *spatial* scope of occupation to “disputed areas.”<sup>63</sup> But the rationale for defining occupation broadly, which concerns humanitarian protections, does not justify granting any party a territorial title that did not exist before the occupation.<sup>64</sup> Occupation produces title to the territory neither for the occupant nor for any other party, be it another state or a people. International treaty law has gone a long way to reassure states that viewing a territory under their control as occupied, which is necessary for the application of humanitarian protections, does

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HUMANITARIAN LAW, AND ITS INTERACTION WITH INTERNATIONAL HUMAN RIGHTS LAW 52 (2009) (concluding that “the law of belligerent occupation is applicable even where a displaced power was not a lawful sovereign”); Kontorovich, *supra* note 3, at 985 (“The dominant interpretation of the Geneva Conventions is that an ‘occupation’ can arise even in an area that is not the territory of any state.”).

59. BENVENISTI, *supra* note 41, at 59 (“The fact that the individuals are citizens of a different state raises the need to ensure their protection in the potentially hostile environment, . . . which sets in motion the law of occupation.”); Roberts, *supra* note 42, at 46 (noting that one of the primary purposes of the international law of occupation is “ensuring that those who are in the hands of an adversary are treated with humanity. (In this respect the rules on occupations serve a similar purpose to those on prisoners of war and internees.)”).

60. BENVENISTI, *supra* note 41, at 59.

61. BENVENISTI, *supra* note 41, at 59.

62. BENVENISTI, *supra* note 41, at 60.

63. BENVENISTI, *supra* note 41, at 59; *see also* Adam Roberts, *What is Military Occupation?*, 55 *BRITISH Y. B. INT’L L.* 249, 283 (1984) (noting that the law of occupation “is applicable even in cases where there is doubt about the legal status of the territory in question”).

64. Kontorovich, *supra* note 3, at 985 (noting the rationale underlying the broad definition of occupation, which concerns humanitarian protections, Kontorovich maintains that “even if Israel is an occupying power throughout the West Bank for the purposes of substantive humanitarian law, this does not establish that settlement activity [in the West Bank] occurs ‘on the territory’ of a state of Palestine.”).

not diminish their claim to sovereignty over that territory. The First Additional Protocol to the Geneva Conventions (“Protocol I”) explicitly states that “[n]either the occupation of a territory nor the application of the [Geneva] Conventions and this Protocol shall affect the legal status of the territory in question.”<sup>65</sup> It has been noted that the purpose of this provision was “[t]o allay [states’] concerns that by recognizing their status as occupants they might concede their lack of sovereignty claims over the occupied area.”<sup>66</sup> The Eritrea-Ethiopia Claims Commission thus adopted the view that title to an occupied territory may be contested and unclear.<sup>67</sup> This view finds support in the legal literature.<sup>68</sup>

Hence, the conclusion that a territory is occupied does nothing to resolve a territorial dispute concerning it, regardless of whether such dispute is between the occupant and a state that previously administered the territory, or between the former and a people that is yet to obtain statehood.<sup>69</sup> By themselves, the territorial boundaries of occupation do not indicate the location of an international frontier. Determining the scope of Palestinian territorial entitlement requires resorting to legal principles outside the definition of occupation.

#### *IV. THE NORMS DOMINATING ICJ ADJUDICATION OF TERRITORIAL DISPUTES AND THE QUESTION OF TITLE TO THE WEST BANK*

##### *A. The Tripartite Rule*

Reviewing ICJ adjudication of territorial disputes, Brian Sumner noted that “the Court, in analyzing the competing claims for sovereignty involved in territorial disputes, applies a tripartite, hierarchical decision rule that looks first to treaty law, then to *uti possidetis*, and finally to effective control”<sup>70</sup> (“tripartite rule”).

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65. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 4, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I].

66. BENVENISTI, *supra* note 41, at 59.

67. Eritrea-Ethiopia Claims Commission, Partial Award, Central Front, Ethiopia’s Claim no. 2, ¶¶ 28-29 (2004) (rejecting the view that “only territory the title to which is clear and uncontested can be occupied territory”).

68. BENVENISTI, *supra* note 41, at 59.

69. Kontorovich, *supra* note 3, at 985 (noting that “the mere fact of Israeli occupation does not mean the territory falls under Palestinian sovereignty”).

70. Sumner, *supra* note 1, at 1803-04.



Boundary treaties, whereby states determine the border between them or otherwise transfer territory to one another, “constitute a root of title in themselves. They constitute a special kind of treaty in that they establish an objective territorial regime valid *erga omnes*.”<sup>71</sup> In the adjudication of territorial disputes by the ICJ, the content of a boundary treaty is generally conclusive,<sup>72</sup> the title emanating from the treaty defeating contradictory territorial claims based on possession of the territory.<sup>73</sup> The ICJ has confined its resolution of a territorial dispute to the construction and application of a treaty that pertains to the dispute, even if the treaty is unclear.<sup>74</sup>

In the absence of a boundary treaty, the ICJ resolves territorial disputes based on the doctrine of *uti possidetis juris*, if applicable.<sup>75</sup> According to the doctrine of *uti possidetis juris*, states emerging from decolonization or from the breakup of a mother federal state inherit the colonial or federal administrative borders that were in force at the time of independence.<sup>76</sup> *Uti possidetis juris* has been traditionally perceived as a principle regulating the process of decolonization.<sup>77</sup> The ICJ

71. MALCOLM N. SHAW, *INTERNATIONAL LAW* 358 (2014).

72. *Sovereignty over Certain Frontier Land (Belg./Neth.)*, 1959 I.C.J. Rep. 209, 222 (June 20); *Temple of Preah Vihear (Cambodia v. Thail.)*, 1962 I.C.J. Rep. 6, 20-21 (June 15); *Territorial Dispute (Libya/Chad)*, 1994 I.C.J. Rep. 6, 12-13, 28-33 (Feb. 3); *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nig.: Eq. Guinea intervening)*, 2002 I.C.J. Rep. 303, 340-44 (Oct. 10); *see also* Sumner, *supra* note 1, at 1804 (“The existence of a prior boundary treaty or other documentation reflecting interstate agreement as to boundaries (or provisions for their delimitation) is generally dispositive for the court.”).

73. *Cameroon v. Nig.: Eq. Guinea intervening*, 2002 I.C.J. at 352-53; *Belg./Neth.*, 1959 I.C.J. at 227; *see also* Sumner, *supra* note 1, at 1805-06.

74. Sumner, *supra* note 1, at 1804.

75. *Frontier Dispute (Burk. Faso/Mali)*, 1986 I.C.J. 554, Rep. 570, 586-87 (Dec. 22); *Land, Island and Maritime Frontier Dispute (El Sal./Hond.: Nicar. intervening)*, 1992 I.C.J. Rep. 351, 391-92 (Sept. 11); *see also* Sumner, *supra* note 1, at 1804 (“When no international agreement exists, however, the next most dispositive basis for a judgment is *uti possidetis*, if applicable.”).

76. *See* Steven R. Ratner, *Drawing a Better Line: Uti Possidetis and the Borders of New States*, 90 AMJ. INT’L L. 590 (1996) (“Stated simply, *uti possidetis* provides that states emerging from decolonization shall presumptively inherit the colonial administrative borders that they held at the time of independence.”); Conference on Yugoslavia, Arbitration Commission Opinion No. 3, in Alain Pellet, *The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples*, 3 EUR. J. INT’L L. 178, 185 (1992) [hereinafter *Badinter Committee: Opinion No. 3*] (concluding that the purview of the principle of *uti possidetis* extends beyond decolonization and that this principle also determines the borders of states emerging from the dissolution of Yugoslavia); Bell & Kontorovich, *supra* note 21, at 635.

77. Bell & Kontorovich, *supra* note 21, at 635 (noting that “*uti possidetis juris* is widely acknowledged as the doctrine of customary international law that has proven central to determining territorial sovereignty in the era of decolonization”); Bell & Kontorovich, *supra* note 21, at 640-42.

explained the transformative effect that *uti possidetis juris* has on colonial administrative lines, established by the colonizing power:

Such territorial boundaries might be no more than delimitations between different administrative divisions or colonies all subject to the same [colonial] sovereign. In that case, the application of the principle of *uti possidetis* resulted in administrative boundaries being transformed into international frontiers in the full sense of the term . . . *Uti possidetis* [is] a principle which upgraded former administrative delimitations, established during the colonial period, to international frontiers.<sup>78</sup>

*Uti possidetis* also applies to new states emerging from the termination of a Mandate,<sup>79</sup> and its purview has recently been expanded beyond the context of decolonization, to determine the borders of states emerging by way of secession from a mother state or as a result of its dissolution.<sup>80</sup> As in the case of treaty titles, a title emanating from *uti possidetis* defeats territorial claims based on possession of the territory.<sup>81</sup>

If neither treaty law nor *uti possidetis* regulates the territorial dispute, the ICJ would resolve the dispute in favor of the party demonstrating effective control over the territory.<sup>82</sup> This rule of territorial dispute resolution is premised on the doctrine of *original occupation*, which allows a state to gain title to *terra nullius* (i.e., territory that belongs to no one).<sup>83</sup> The ICJ adhered to a narrow

78. Burk. Faso/Mali, 1986 I.C.J. at 566, ¶ 23.

79. Bell & Kontorovich, *supra* note 21, at 648-67 (reviewing the application of *uti possidetis* to terminated Mandates).

80. According to the prevailing view, the boundaries that separated various republics that were parts of a federation become, upon the independence of such republics, international borders. See Badinter Committee: Opinion No. 3, *supra* note 76, at 185; Peters, *supra* note 5, at 110 (“The better view is that today *uti possidetis* has the value of a customary rule which applies to secession beyond the colonial context.”); ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 332 (1995) (noting that “the rule on *uti possidetis* enjoins that States, when achieving independence, must retain the borders they had either when they were under colonial rule, or . . . when they were part of a federated State”); Shaw, *Peoples, Territorialism and Boundaries*, *supra* note 19, at 478, 503 (concluding that *uti possidetis* “extends to all cases of transition to independence”); Bell & Kontorovich, *supra* note 21, at 635.

81. Burk. Faso/Mali, 1986 I.C.J. at 586-87, ¶ 63.

82. *Minquiers and Ecrehos (Fr./U.K.)*, 1953 I.C.J. Rep. 47, 65-69, 72 (Nov. 17); *Sovereignty Over Pulau Ligitan and Pulau Sipadan (Indon./Malay.)*, 2002 I.C.J. Rep. 625, 674-78, 684-86 (Dec. 17); see also Sumner, *supra* note 1, at 1804 (“In cases that do not concern postcolonial borders and that lack manifest consent as to borders, the court is most likely to base its decision on effective control.”).

83. SHAW, INTERNATIONAL LAW, *supra* note 71, at 363 (“Occupation is a method of acquiring territory which belongs to no one (*terra nullius*).”); Hugh Thirlway, *Territorial*

definition of *terra nullius*, which excludes from it any territory inhabited by an organized population,<sup>84</sup> precluding the application of the doctrine of original occupation to such territory. The Permanent Court of International Justice (“PCIJ”) has noted that the acquisition of title to territory through original occupation “involves two elements each of which must be shown to exist: the intention and will to act as sovereign, and some actual exercise or display of such authority.”<sup>85</sup> The degree of exercise of sovereign authority that suffices for a state to secure title under the doctrine of original occupation is measured in relation to the exercise of authority by other states advancing competing claims, sovereignty being conferred upon the state that has exercised the greater degree of authority.<sup>86</sup>

Under the doctrine of *prescription*, title to territory may be transferred from one state to another through the continuous possession of the territory by the latter, manifested in the display of territorial sovereignty, with the acquiescence of the former.<sup>87</sup> Because acquiescence on the part of the original, dispossessed sovereign is essential for prescription, “protests by the dispossessed sovereign may completely block any prescriptive claim.”<sup>88</sup> Both original occupation and prescription are modes of territory acquisition based on effective control, and it was noted that the difference between them “is usually blurred in real life, because often one of the very points in dispute is whether the territory was *terra nullius* or was subject to the sovereignty of the ‘first’ state before the ‘second’ state arrived on the scene.”<sup>89</sup> For the purposes of the present inquiry, this Article refers to the tripartite rule broadly, to describe the web of rules that recognize title to territory on the basis of treaty, the *uti possidetis* doctrine, and effective control.

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*Disputes and their Resolution in the Recent Jurisprudence of the International Court of Justice*, 31 LEIDEN J. INT’L L. 117, 128 (2018).

84. Western Sahara, Advisory Opinion, 1975 I.C.J. Rep. 12, 39, ¶ 80 (July 9) (observing that “the State practice of the relevant period indicates that territories inhabited by tribes or peoples having a social and political organization were not regarded as *terra nullius*”).

85. Legal Status of Eastern Greenland (Den. v. Nor.), 1933 P.C.I.J. (ser. A/B) No. 53 (Sept. 5), at 45-46.

86. *Id.* at 46 (observing that “in many cases the tribunal has been satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other State could not make out a superior claim”).

87. SHAW, INTERNATIONAL LAW, *supra* note 71, at 364-66, 376.

88. SHAW, INTERNATIONAL LAW, *supra* note 71, at 365.

89. PETER MALANCZUK, AKEHURST’S MODERN INTRODUCTION TO INTERNATIONAL LAW 150 (7th ed., 1997).

The ICJ has confined the resolution of territorial disputes to the norms of the tripartite rule, resorting to equity considerations only as an *interpretive* measure in the application of these norms.<sup>90</sup> Some commentators have argued that the Israeli-Palestinian territorial dispute is legally resolved under one or another element of the tripartite rule.<sup>91</sup> Others have sought a resolution of this dispute based on legal principles outside the tripartite rule.<sup>92</sup> The following discussion considers these arguments.

### B. *The Agreement Establishing the Mandate of Palestine*

A commission of jurists appointed by the Israeli government to pronounce on the legality of the construction of settlements in the West Bank by Israel, headed by former Justice of the Supreme Court of Israel, Edmund Levy (“Levy Commission”), advanced a claim for Israeli sovereignty over the West Bank based on the 1922 Mandate agreement establishing the Mandate of Palestine.<sup>93</sup> The Mandate agreement was an international treaty between the League of Nations and Britain, as the Mandatory.<sup>94</sup> Therefore, “it was not only Britain that was bound by the instrument, but also the League of Nations (the international organization in which most of the then-existing States of the world were members).”<sup>95</sup> The Mandate agreement provided that Britain, acting as a Mandatory, would be responsible for promoting “the establishment in Palestine of a national home for the Jewish people, it being clearly understood that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine.”<sup>96</sup>

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90. See discussion *infra* Section V.B.; see also *Frontier Dispute (Burk. Faso/Mali)*, 1986 I.C.J. Rep. 554, 567-68 (Dec. 22) (“It is clear that the Chamber. . . will have regard to equity *infra legem*, that is, that form of equity which constitutes a method of interpretation of the law in force, and is one of its attributes.”).

91. See discussion *infra* Sections IV.B., IV.C..

92. See discussion *infra* Parts V, VI.

93. THE LEVY COMMISSION, REPORT ON THE LEGAL STATUS OF BUILDING IN JUDEA AND SAMARIA (2012) [hereinafter *Levy Commission Report*]; see also *Palestine Mandate*, *supra* note 12.

94. Dinstein, *supra* note 17, at 304.

95. Dinstein, *supra* note 17, at 304.

96. *Palestine Mandate*, *supra* note 12, pmbl. Article 2 of the Mandate agreement further stipulates:

The Mandatory shall be responsible for placing the country under such political, administrative and economic conditions as will secure the establishment of the Jewish

The Levy Commission and others have pointed out that this language grants only the Jewish people the right to establish a national home in Palestine, whereas the non-Jewish communities in Palestine are guaranteed only civil and religious rights,<sup>97</sup> with the implication that “non-Jews would live as a protected minority within the Jewish national home.”<sup>98</sup> Relying on the language of the Mandate agreement, the Levy Commission concluded that Israel “had the full right to claim sovereignty over these territories [the West Bank].”<sup>99</sup> The Commission explained the choice by Israel not to annex the West Bank as a “pragmatic approach in order to allow for peace negotiations with representatives of the Palestinian people and the Arab states.”<sup>100</sup> The Commission also concluded that in view of the national rights conferred by the Mandate agreement on the Jewish people alone, and of the strength of the Israeli claim to sovereignty over the West Bank emanating from these rights, possession of the West Bank by Israel does not amount to occupation.<sup>101</sup> Rather, by assuming control of the West Bank, in 1967, Israel “restored the legal status of the territory to its original status, i.e., territory designated to serve as the national home of the Jewish people.”<sup>102</sup>

The view that Israel holds title to the West Bank, by virtue of the Mandate agreement or otherwise, has been rejected by the ICJ, which held that efforts on the part of Israel to facilitate the integration of parts of the West Bank into Israel were contrary to the principle of the inadmissibility of the acquisition of territory through the use of force,<sup>103</sup> and amounted to a violation of the right of the Palestinian

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national home, as laid down in the preamble, and the development of self-governing institutions, and also for safeguarding the civil and religious rights of all the inhabitants of Palestine, irrespective of race and religion.

Palestine Mandate, *supra* note 12, at art. 2.

97. Levy Commission Report, *supra* note 93, ¶ 7 (“It should be noted here that the mandatory instrument . . . noted only that ‘the civil and religious rights’ of the inhabitants of Palestine should be protected, and no mention was made of the realization of the national rights of the Arab nation.”); Dinstein, *supra* note 17, at 305 (observing, “whereas Jews were granted the right to establish a national home, non-Jews were conceded only civil and religious rights”).

98. Dinstein, *supra* note 17, at 305.

99. Levy Commission Report, *supra* note 93, at ¶ 9.

100. Levy Commission Report, *supra* note 93, at ¶ 9.

101. Levy Commission Report, *supra* note 93, at ¶¶ 5, 65.

102. Levy Commission Report, *supra* note 93, at ¶ 8.

103. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, 182, ¶ 117 (July 9) (citing resolutions adopted by the UN General Assembly and the UN Security Council, which “have referred, with

people to self-determination.<sup>104</sup> The position taken by the ICJ reflects the view that the Green Line “is the starting line from which is measured the extent of Israel’s occupation of non-Israeli territory.”<sup>105</sup> Similarly, the Security Council has unanimously decreed that the annexation by Israel of any part of the occupied West Bank is a violation of international law and is therefore “null and void.”<sup>106</sup> The rejection by the ICJ and the Security Council of the view that Israel holds title to the West Bank or parts thereof carries significant probative weight in the interpretation of the international instruments establishing the Mandate of Palestine.<sup>107</sup>

The main difficulty arising in relation to the interpretation of the Mandate agreement by the Levy Commission concerns the severing of the link between this agreement and its normative premise, namely, Article 22 of the Covenant of the League of Nations, which established the Mandates system.<sup>108</sup> Article 22 founded the Mandates system on the principle that the “well-being and development of such peoples [the peoples inhabiting the Mandated territories] form a sacred trust of civilization.”<sup>109</sup> It is widely agreed that this principle concerned the right of the peoples of the Mandated territories to self-determination.<sup>110</sup> At the time of the establishment of the Mandate of Palestine, the Arab population formed an overwhelming majority of the general population

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regard to Palestine, to the customary rule of ‘the inadmissibility of the acquisition of territory by war’”).

104. *Id.* at 182-84, ¶¶ 118-22.

105. *Id.* at 238, ¶ 11 (separate opinion of Judge al-Khasawneh).

106. S.C. Res. 478, ¶¶ 2-3 (Aug. 20, 1980); *see also* S.C. Res. 2334, ¶ 3 (Dec. 23, 2016) (stating that the Security Council “will not recognize any changes to the 4 June 1967 lines, including with regard to Jerusalem, other than those agreed by the parties through negotiations”).

107. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 103 cmt. b (AM. LAW INST. 1987) (stating that “to the extent that decisions of international tribunals adjudicate questions of international law, they are persuasive evidence of what the law is. The judgments and opinions of the International Court of Justice are accorded great weight.”); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 I.C.J. at 176, 183-84, ¶¶ 99, 120 (relying on Security Council resolutions in the interpretation of international law).

108. League of Nations Covenant art. 22.

109. *Id.*

110. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 I.C.J. at 172, ¶ 88 (“[T]he ultimate objective of the sacred trust referred to in Article 22, paragraph 1, of the Covenant of the League of Nations was the self-determination . . . of the peoples concerned.”); CRAWFORD, *supra* note 6, at 566-67; Shaw, *Peoples, Territorialism and Boundaries*, *supra* note 19, at 479-80.

there, accounting for nearly eighty-nine percent of the inhabitants.<sup>111</sup> James Crawford noted that the commitment to the self-determination of the “peoples” of the Mandated territories, contained in Article 22 of the Covenant, “referred to the actual inhabitants of Mandated territories.”<sup>112</sup> Therefore, had Article 22 not been supplemented by the provisions of the Mandate agreement, “the principle of self-determination, applied to the Mandates by Article 22, would only have concerned the Arab majority resident in the territory. On this basis the creation of Israel would have been an outright violation of self-determination . . . .”<sup>113</sup>

Moreover, Article 22 recognized “communities formerly belonging to the Turkish Empire,”<sup>114</sup> including the population of the Mandate of Palestine, as “independent nations . . . subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone.”<sup>115</sup> Crawford correctly observed that, applied to Palestine, this language recognized only the Arab people of Palestine as an independent nation because only this people fitted the description, “communities formerly belonging to the Turkish Empire.”<sup>116</sup>

Hence, whereas the right of the Arab people in Palestine to a national home in Palestine emanated directly from the terms of Article 22, securing a similar right to the Jewish people required an explicit provision to that effect to be included in the Mandate agreement. The recognition by the Mandate agreement of the right of the Jewish people to establish a national home in Palestine placed that people on a par with the Arab people in view of the terms of Article 22. The argument that the normative framework underlying the Mandate of Palestine yields an Israeli title to the entire territory of the Mandate of Palestine is therefore unpersuasive.

This conclusion finds support in the position of then British Secretary of State for the Colonies, Winston Churchill, pronounced in 1922, shortly after the conclusion of the Mandate agreement. Churchill clarified that the commitment undertaken by the British government to

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111. See J.B. BARRON, SUPERINTENDENT OF THE CENSUS, REPORT AND GENERAL ABSTRACTS OF THE CENSUS OF 1922 (1922) (Palestine).

112. CRAWFORD, *supra* note 6, at 429.

113. CRAWFORD, *supra* note 6, at 426.

114. League of Nations Covenant art. 22.

115. *Id.*

116. CRAWFORD, *supra* note 6, at 429.

promote the establishment of a national home for the Jewish people in Palestine,<sup>117</sup> subsequently incorporated into the Mandate agreement, did not provide that “Palestine as a whole should be converted into a Jewish National Home, but that such a Home should be founded *in Palestine*.”<sup>118</sup>

### C. *The Doctrine of Uti Possidetis Juris*

Abraham Bell and Eugene Kontorovich relied on the doctrine of *uti possidetis juris* to advance an Israeli claim for sovereignty over the entire West Bank.<sup>119</sup> *Uti possidetis juris* provides that “by becoming independent, a new State [emerging from decolonization] acquires sovereignty with the territorial base and boundaries left to it by the colonial power,”<sup>120</sup> the colonial administrative boundaries “being transformed into international frontiers in the full sense of the term.”<sup>121</sup> Once the boundaries of a former colonial administrative unit become the international frontiers of the new state, the territorial entitlement defined by these frontiers consolidates, as “the principle of *uti possidetis [juris]* freezes the territorial title; it stops the clock . . . .”<sup>122</sup>

Bell and Kontorovich observed that the transformation, upon independence, of colonial administrative boundaries into international frontiers means that the first state to emerge within a former colonial administrative unit gains sovereignty over the entire territory of such unit.<sup>123</sup> In other words, the first independence within the administrative unit precludes subsequent ones. Bell and Kontorovich conceded that the application of *uti possidetis juris* may be complicated when several states within an administrative unit achieve independence concurrently.<sup>124</sup> But “where a single state emerges from a given territory, the application of *uti possidetis juris* is easy . . . *uti possidetis*

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117. See Balfour Declaration, *supra* note 22.

118. See Letter from the British Colonial Office to the Zionist Organization, enclosure: British Policy In Palestine (June 3, 1922), Cmd. 1700, at 18, available at <https://unispa1.un.org/DPA/DPR/unispa1.nsf/0/48A7E5584EE1403485256CD8006C3FBE> [<https://perma.cc/3CEP-B7LS>]; see also Orna Ben-Naftali & Rafi Reznik, *The Astro-Nomos: On International Legal Paradigms and the Legal Status of the West Bank*, 14 WASH. U. GLOBAL STUD. L. REV. 399, 423 (2015).

119. See generally, Bell & Kontorovich, *supra* note 21.

120. Frontier Dispute (Burk. Faso/Mali), 1986 I.C.J. Rep. 554, 568, ¶ 30 (Dec. 22).

121. *Id.* at 566, ¶ 23.

122. *Id.* at 568, ¶ 30.

123. Bell & Kontorovich, *supra* note 21, at 646.

124. Bell & Kontorovich, *supra* note 21, at 646.



*juris* requires that the entire territory become the sovereign territory of the newly independent state.”<sup>125</sup>

When the Mandate of Palestine ended, its territory formed a unitary administrative unit.<sup>126</sup> According to Bell and Kontorovich, the application of the principle of *uti possidetis* to the termination of the British Mandate of Palestine in 1948 “seems straightforward”:<sup>127</sup>

Israel was the only state to emerge from the Mandate of Palestine [at its termination, in 1948]. Israel’s independence would thus appear to fall squarely within the bounds of circumstances that trigger the rule of *uti possidetis juris*. Applying the rule would appear to dictate that Israel’s borders are those of the Palestine Mandate that preceded it . . . Given the location of the borders of the Mandate of Palestine, applying the doctrine of *uti possidetis juris* to Israel would mean that Israel has territorial sovereignty over all the disputed areas of Jerusalem, the West Bank, and Gaza.<sup>128</sup>

At the heart of the argument advanced by Bell and Kontorovich lies the assumption that the principle of *uti possidetis juris* overrides the right of the Palestinian people to self-determination.<sup>129</sup> Whether or not the right of peoples to self-determination had acquired the status of customary international law by the time the Mandate of Palestine was terminated,<sup>130</sup> “the Covenant [of the League of Nations] and . . . the Mandate [agreement] specifically applied the principle of self-

125. Bell & Kontorovich, *supra* note 21, at 646.

126. Bell & Kontorovich, *supra* note 21, at 685 (observing that “at the time of [Israel gaining] independence, there was only one administrative unit in Palestine”).

127. Bell & Kontorovich, *supra* note 21, at 636.

128. Bell & Kontorovich, *supra* note 21, at 637, 681-82 (“Israel was the only state that emerged from Mandatory Palestine . . . There was therefore no rival state that could lay claim to using internal Palestinian district lines as the basis of borders. . . . Thus, it would appear that *uti possidetis juris* dictates recognition of the borders of Israel as coinciding with the borders of the Mandate as of 1948.”).

129. Bell & Kontorovich, *supra* note 21, at 635 (“The doctrine [of *uti possidetis*] even applies when it conflicts with the principle of self-determination.”); Bell & Kontorovich, *supra* note 21, at 685 (observing that “*uti possidetis juris* may actually conflict with and override the demands of self-determination”).

130. CRAWFORD, *supra* note 6, at 428 (“It has been argued that since self-determination was not a general rule or principle of international law in 1920 or in 1948, it can have had no application to Palestine at either period.”); Dinstein, *supra* note 17, at 315-16 (observing that “the right of self-determination did not exist in international law when . . . the Mandate for Palestine was adopted. In my opinion, neither was it extant when the Partition Resolution was formulated”).

determination to the territory of Palestine,”<sup>131</sup> granting the right to self-determination to both the Jewish and the Palestinian people.<sup>132</sup> Bell and Kontorovich, however, emphasized that “[t]he rights of multiple nations to self-determination on a given territory should not, *prima facie*, disturb application of the doctrine of *uti possidetis juris*.”<sup>133</sup> They based this conclusion both on ICJ jurisprudence, which acknowledged that *uti possidetis juris* may override the right to self-determination,<sup>134</sup> and on state practice, noting that “many of the states that have had their borders established by *uti possidetis juris* have, in fact, been subject to multiple claims of self-determination; in no case has the existence of an additional nation with a right of self-determination defeated application of the doctrine of *uti possidetis juris*.”<sup>135</sup>

It is widely agreed that the principle of *uti possidetis juris* stands in tension with the right to self-determination and limits that right.<sup>136</sup>

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131. CRAWFORD, *supra* note 6, at 428. Crawford further notes that “Palestine in 1948 constituted a self-determination unit in international law.” CRAWFORD, *supra* note 6, at 428.

132. *See supra* notes 109-18 and accompanying text; *see also* CRAWFORD, *supra* note 6, at 428 (“In effect the Mandate [of Palestine] constituted a trust over the same territory, the beneficiaries of which were two distinct and predictably antagonistic peoples.”); CRAWFORD, *supra* note 6, at 435 (noting that under the Mandate regime both the Jewish people and the Palestinian people had a right to self-determination); Bell & Kontorovich, *supra* note 21, at 684 (acknowledging that “it may be argued that, notwithstanding the silence of the founding documents of the Mandate, the Palestinian Arabs did have a claim to self-determination. General Assembly Resolution 181 of 1947 would have given both the Palestinian Jewish and Palestinian Arab peoples independent states”).

133. Bell & Kontorovich, *supra* note 21, at 684.

134. Frontier Dispute (Burk. Faso/Mali), 1986 I.C.J. Rep. 554, 567, ¶ 25 (Dec. 22); Bell & Kontorovich, *supra* note 21, at 685.

135. Bell & Kontorovich, *supra* note 21, at 685.

136. Burk. Faso/Mali, 1986 I.C.J. at 567, ¶ 25 (“At first sight this principle [*uti possidetis* – A.Z.] conflicts outright with another one, the right of peoples to self-determination. In fact, however, the maintenance of the territorial *status quo* . . . is often seen as the wisest course, to preserve what has been achieved by peoples who have struggled for their independence . . . .”); Conference on Yugoslavia, Arbitration Commission Opinion No. 2, *cited in* Alain Pellet, *The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples*, 3 EUR. J. INT’L L. 178, 184 (1992) [hereinafter Badinter Committee: Opinion No. 2] (“[W]hatever the circumstances, the right to self-determination must not involve changes to existing frontiers at the time of independence (*uti possidetis juris*).”); Peters, *supra* note 5, at 126 (“Roughly speaking, *uti possidetis* normally stands in an antagonistic relationship to the principle of self-determination.”); Farhad Mirzayev, *Abkhazia, in SELF-DETERMINATION AND SECESSION IN INTERNATIONAL LAW* 191, 212 (Christian Walter et al. eds., 2014) (“[T]here are strong grounds to argue that the principle of *uti possidetis* . . . has primacy force over the right to self-determination.”); CASSESE, *SELF-DETERMINATION OF PEOPLES*, *supra* note 80, at 192-93 (noting that *uti possidetis* “is in sharp contrast with [the principle of] self-determination. . . . In this area, the principle of self-determination, instead of influencing the content of international legal rules, has been ‘trumped’ by other, overriding requirements.”).

But the rejection by the ICJ and the Security Council of the view that Israel has sovereignty over the entire territory of the Mandate of Palestine<sup>137</sup> suggests that the argument advanced by Bell and Kontorovich misconceives the *extent* to which *uti possidetis* overrides the right to self-determination. The precedence granted to *uti possidetis* over the right to self-determination manifests in two ways. First, “[a] boundary based on *uti possidetis* will often lead to states which harbor ethnic minorities,”<sup>138</sup> frustrating the national ambitions of such minorities to form a state of their own or to unite with a neighboring state governed by a majority of their ethnicity.<sup>139</sup> Second, after the new state has been established, the border formed under the principle of *uti possidetis* is protected by the principle of the territorial integrity of states,<sup>140</sup> which generally precludes the consolidation of the right of a national minority to external self-determination, that is, the right to secede from the state.<sup>141</sup>

The crux of the right to self-determination, however, is “the right of the majority within a generally accepted political unit to the exercise of power.”<sup>142</sup> Nothing in the jurisprudence of the ICJ or in state practice supports the position that *uti possidetis* may operate to frustrate *this* aspect of self-determination. At the time of the termination of the Mandate of Palestine, the Arab population formed a solid majority within the borders of the Mandate.<sup>143</sup> The State of Israel emerged as a vehicle for the realization of the right of only the Jewish people to self-

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137. See *supra* notes 103-06, and accompanying text.

138. Peters, *supra* note 5, at 119.

139. CASSESE, SELF-DETERMINATION OF PEOPLES, *supra* note 80, at 332 (noting that because of the principle of *uti possidetis*, “the populations living along or close to . . . borders are denied the right freely to choose the State to which they intend to belong. In this case, overriding geopolitical considerations eventually result in the thwarting of self-determination.”).

140. Shaw, *Peoples, Territorialism and Boundaries*, *supra* note 19, at 495 (“Once the new state is established, the principle of *uti possidetis* will give way to the principle of territorial integrity, which provides for the international protection of the new state so created.”).

141. Mirzayev, *supra* note 136, at 212 (“[I]n the conflict between the right to self-determination and the principle of territorial integrity, the former is limited in favor of the latter. External self-determination in the form of secession is not recognized in international law and primacy has been given to the principle of territorial integrity.”).

142. ROSALYN HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS 104 (1963).

143. Special Comm’n on Palestine, Rep. to the General Assembly, U.N. Doc. A/364, ch. IIA, sec. 13 (Sept. 3, 1947), attached to G.A. Res. 181 (II) (Nov. 29, 1947) (estimating the population of Mandatory Palestine at the end of 1946 as follows: Arabs, 1,203,000; Jews, 608,000; others, 35,000).

determination.<sup>144</sup> The exercise by Israel of this role within borders that extend to the entire territory of the Mandate clearly would have violated “the right of the majority within a generally accepted political unit to the exercise of power.”<sup>145</sup> More specifically, the establishment on the entire territory of the Mandate of a state dedicated to the advancement of the right to self-determination of only a minority group would have required divesting the members of the majority group, the Palestinians, of the right to vote for the governing institutions of the state. The tension between the principle of *uti possidetis* and the right to self-determination does not extend to these extremes. An extensive review of the application of *uti possidetis* to terminated Mandates other than the Mandate of Palestine, presented by Bell and Kontorovich, does not reveal cases in which *uti possidetis* was applied to preclude a people representing the majority within a Mandatory administrative unit from advancing its national aspirations, allowing only the minority group to realize such aspirations.<sup>146</sup>

The application of *uti possidetis* presumes that the population within a colonial or Mandatory administrative unit forms a single collective possessing a right to statehood.<sup>147</sup> The terms of the legal regime underlying the Mandate for Palestine, however, refute this presumption. Article 22 of the Covenant of the League of Nations recognized “communities formerly belonging to the Turkish Empire,”<sup>148</sup> including the population of the Mandate of Palestine, as “independent nations.”<sup>149</sup> Such recognition was subject only “to the rendering of administrative advice and assistance by a Mandatory until such time as [these communities] are able to stand alone.”<sup>150</sup> The right

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144. CRAWFORD, *supra* note 6, at 435 (“Israel could be regarded as an expression of the principle of self-determination for the Jewish people of Palestine as at 1948 . . . But there was no equivalent expression for the Palestinian population.”).

145. See HIGGINS, *supra* note 142.

146. Bell & Kontorovich, *supra* note 21, at 648-67.

147. CASSESE, SELF-DETERMINATION OF PEOPLES, *supra* note 80, at 334-35 (observing that “in the case of the accession of colonial peoples to independence . . . no right has been granted to the ethnic groups making up those peoples freely to choose their international status. Independence . . . has been granted to the colonial people as a whole, regardless of its possible ethnic components”); SUZANNE LALONDE, DETERMINING BOUNDARIES IN A CONFLICTED WORLD: THE ROLE OF *UTI POSSIDETIS* 166 (2002) (noting that “once independence has been achieved, self-determination is interpreted by the international community as a right that belongs to the population of the new state as a whole and that serves to protect its national unity and political independence”).

148. League of Nations Covenant art. 22.

149. *Id.*

150. *Id.*

of the Palestinian people (a community that formerly belonged to the Turkish Empire) to be an “independent nation” flowed directly from the terms of Article 22.<sup>151</sup> The Jewish people could not be regarded as a community formerly belonging to the Turkish Empire,<sup>152</sup> but its right to be an “independent nation” in the territory of Palestine stemmed from the terms of the Mandate agreement between Britain and the League of Nations, which required the former to advance “the establishment in Palestine of a national home for the Jewish people.”<sup>153</sup> Upon termination of the Mandate, Palestine constituted a single administrative unit containing two peoples, each qualifying as an “independent nation” and possessing a right to form a national home in Palestine, a unique phenomenon among the various Mandates.<sup>154</sup> The hostilities surrounding the termination of the Mandate, and the unique character of the emerging State of Israel as a Jewish state, left no doubt that the new state could not accommodate two “independent nations,” each maintaining its own national home. The application of *uti possidetis* to grant Israel sovereignty over the entire territory of the Mandate thus seems contrary to the particular terms of the Mandate.

The justifications offered by Bell and Kontorovich for the application of *uti possidetis* to determine the scope of Israeli sovereignty over the territory of the Mandate of Palestine are unpersuasive. Upgrading of former colonial administrative lines to international frontiers under *uti possidetis* has been viewed by the ICJ as a means of preventing any part of the territory of a former colony from becoming *terra nullius*, and hence precluding claims to the territory by potential colonizing powers.<sup>155</sup> Bell and Kontorovich argue that this traditional justification for the principle of *uti possidetis* applies equally to the case of the Mandate of Palestine, and that granting Israel sovereignty over the entire territory of the Mandate by virtue of Israel being the only state to emerge from the Mandate upon

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151. CRAWFORD, *supra* note 6, at 429.

152. CRAWFORD, *supra* note 6, at 429.

153. Palestine Mandate, *supra* note 12, pmbl.

154. CASSESE, SELF-DETERMINATION OF PEOPLES, *supra* note 80, at 334-35; LALONDE, *supra* note 147, at 166.

155. Land, Island and Maritime Frontier Dispute (El Sal./Hond.: Nicar. Intervening), 1992 I.C.J. Rep. 351, 387, ¶ 42 (Sept. 11) (“[C]ertainly a key aspect of the principle [of *uti possidetis*] is the denial of the possibility of *terra nullius*.”); Frontier Dispute (Burk. Faso/Mali), 1986 I.C.J. Rep. 554, 566, ¶ 23 (Dec. 22) (noting that at the time the former Spanish colonies in America gained independence, the purpose of *uti possidetis* “was to scotch any designs which non-American colonizing powers might have on regions which had been assigned by the former metropolitan State to one division or another, but which were still uninhabited or unexplored”).

its termination was necessary to prevent parts of Palestine from becoming *terra nullius*.<sup>156</sup> Yet the ICJ adhered to a narrow definition of *terra nullius*, which excludes any territory inhabited by an organized population.<sup>157</sup> This suggests that no part of Palestine could become *terra nullius* upon termination of the Mandate, regardless of the location of the Israeli border.<sup>158</sup>

Advocating the application of *uti possidetis* to the territorial dispute between Israel and the Palestinians, Bell and Kontorovich have also touted the role of *uti possidetis* as “a strong force for the stability of borders [that] serves to reduce conflicts.”<sup>159</sup> It is widely agreed that the main justification for the principle of *uti possidetis* is the clarity it provides, which promotes stability of borders and thereby reduces the risk of international and internal armed conflict.<sup>160</sup> The ICJ thus observed with regard to this principle that “its obvious purpose is to prevent the independence and stability of new States being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power.”<sup>161</sup> Yet, applying *uti possidetis* in the manner proposed by Bell and Kontorovich translates into a “winner takes all” resolution of the Israeli-Palestinian territorial dispute, depriving the people that formed the majority group within the Mandate of Palestine of the right to self-determination. The

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156. Bell & Kontorovich, *supra* note 21, at 646 (observing that “one of the main purposes of using *uti possidetis juris* is to avoid a situation in which there is *terra nullius*, i.e., territory without a sovereign. That means that *uti possidetis juris* requires that the entire territory become the sovereign territory of the newly independent state”); Bell & Kontorovich, *supra* note 21, at 685-86 (“To attempt to apply *uti possidetis juris* to any borders other than those of the Mandate would leave the remaining Mandatory territories *terra nullius*, which is exactly the situation the doctrine seeks to avoid.”).

157. Western Sahara, Advisory Opinion, 1975 I.C.J. Rep. 12, 39, ¶ 80 (July 9) (concluding in view of state practice that “territories inhabited by tribes or peoples having a social and political organization” are not considered *terra nullius*).

158. CRAWFORD, *supra* note 6, at 432 (observing that Palestine could not have become *terra nullius* in 1948, because “[t]he category *terra nullius* applies only in limited circumstances, and does not apply to any territory inhabited by an organized population”).

159. Bell & Kontorovich, *supra* note 21, at 643.

160. Peters, *supra* note 5, at 115-16 (“The generally acknowledged function of *uti possidetis* is to secure the stability and finality of borders . . . [T]he stability of boundaries and of states normally helps to safeguard peace. Especially with regard to territorial issues, stability tends to prevent war.”); LALONDE, *supra* note 147, at 3; Shaw, *Peoples, Territorialism and Boundaries*, *supra* note 19, at 503 (noting that “[t]he primary justification of the principle of *uti possidetis* . . . has been to seek to minimize threats to peace and security, whether they be internal, regional or international. This is achieved by entrenching territorial stability at the critical moment of the transition to independence.”).

161. Frontier Dispute (Burk. Faso/Mali), 1986 I.C.J. Rep. 554, 565, ¶ 20 (Dec. 22).

claim that such *legal* resolution of the dispute would promote stability and reduce conflict seems removed from reality.

Bell and Kontorovich acknowledged that their *uti possidetis* argument in favor of Israeli sovereignty over the entire territory of the Mandate of Palestine would have been moot “[i]f an Arab-Palestinian state had achieved independence in 1948, alongside the Jewish one.”<sup>162</sup> They emphasize, however, that “only one state was born in 1948 at the termination of the prior administration. As the Palestine Mandate ended, the state of Israel achieved independence. No other state did.”<sup>163</sup> Bell and Kontorovich did not consider, however, the reasons for the failure of a Palestinian state to emerge upon termination of the Mandate. The 1949 armistice agreement between Israel and Jordan left the West Bank in the hands of Jordan, which, in 1952, annexed it.<sup>164</sup> Jordanian control over the West Bank clearly precluded the establishment of a Palestinian state in this territory. Applying *uti possidetis*, based on such factual reality, to defeat a Palestinian claim to any part of the territory of the Mandate of Palestine would link the application of *uti possidetis* to the results of a war. This contradicts the fundamental precepts of *uti possidetis*, which regard possession to be immaterial for the determination of title, and maintain that “[t]he *status quo post bellum* and the vicissitudes of war do not change boundaries.”<sup>165</sup>

Yoram Dinstein has argued that the annexation of the West Bank by Jordan in 1951 was the result of a free choice made by the Palestinian population of the West Bank to unite with Jordan.<sup>166</sup> As Dinstein noted, “[t]he crux of self-determination is the right of a people to freely determine their political status, up to and including sovereign independence, but there is no duty of establishing a sovereign State. If a people elect to join an existing State, that is indisputably their right within the purview of self-determination.”<sup>167</sup> To the extent that the Palestinians freely chose to join Jordan rather than form an independent state, the right to self-determination requires that such choice not

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162. Bell & Kontorovich, *supra* note 21, at 685.

163. Bell & Kontorovich, *supra* note 21, at 685.

164. Israel-Jordan Armistice Agreement, *supra* note 36; *see also* BENVENISTI, *supra* note 41 and accompanying text.

165. Bell & Kontorovich, *supra* note 21, at 686, 681 (“The doctrine of *uti possidetis juris* . . . rejects possession as grounds for establishing title, favoring instead legal entitlement based upon prior administrative borders.”).

166. Dinstein, *supra* note 17, at 311-12.

167. *Id.* at 316.

operate to their detriment by granting Israel title to the entire territory of the Mandate of Palestine through the application of *uti possidetis*. In conclusion, it seems that the purview of the doctrine of *uti possidetis* does not extend to the circumstances of the Israeli-Palestinian territorial dispute.

The preceding discussion suggests that the tripartite rule does not cover the circumstances of the territorial dispute between Israel and the Palestinians. The inquiry below examines whether this dispute is resolved under legal principles outside the tripartite rule.

#### V. THE RIGHT OF PEOPLES TO SELF-DETERMINATION AND THE DEMARCATION OF INTERNATIONAL BOUNDARIES

The right of peoples to self-determination has acquired the status of a peremptory norm of customary international law.<sup>168</sup> The existence of a Palestinian people vested with the right to self-determination has been widely acknowledged.<sup>169</sup> The right to self-determination is defined in conventional and customary international law as the right of peoples “freely to determine, without external interference, their political status and to pursue their economic, social and cultural development.”<sup>170</sup> It has been noted that “self-determination is, at the most basic level, a principle concerned with the right to be a state.”<sup>171</sup> But does the purview of the legal right to self-determination extend beyond the existence or creation of a state to the demarcation of its

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168. SHAW, *INTERNATIONAL LAW*, *supra* note 71, at 377; CASSESE, *SELF-DETERMINATION OF PEOPLES*, *supra* note 80, at 133-40; Glen Anderson, *A Post-Millennial Inquiry into the United Nations Law of Self-Determination: A Right to Unilateral Non-Colonial Secession?*, 49 *VAND. J. TRANSNAT'L L.* 1183, 1186 (2016) (noting that “self-determination is widely regarded as a peremptory norm (*jus cogens*)”).

169. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, 182-83, ¶ 118 (July 9) (recognizing the right of the Palestinian people to self-determination); G.A. Res. 58/163, art. 1 (Mar. 4, 2004) (reaffirming “the right of the Palestinian people to self-determination, including the right to their independent State of Palestine.”); *see also* Eden, *supra* note 6, at 233 (noting that “[t]here can be little doubt that the Palestinians have a right of self-determination”).

170. G.A. Res. 2625 (XXV), Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, princ. 5(1) (Oct. 24, 1970) [hereinafter Declaration on Principles of International Law]; International Covenant on Civil and Political Rights, art. 1(1), Dec. 19, 1966, 999 U.N.T.S. 171.

171. CRAWFORD, *supra* note 6, at 107. *See also* Declaration on Principles of International Law, *supra* note 170, princ. 5(4) (“The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.”).



borders, or are self-determination interests implicated by border disputes merely a basis for a *political* argument?<sup>172</sup>

The right of a people to self-determination in the form of statehood is eroded when the demarcation of borders excludes a portion of that people from enjoying that right. Moreover, in some cases, the location of the border may result in the deprivation of a portion of a people, “left behind” as a minority group in a neighboring state, of any prospect of pursuing its “economic, social and cultural development”<sup>173</sup> within the borders of that state. The toll that the demarcation of borders may exact on the right to self-determination led several commentators to argue that this right should play a role in the resolution of territorial disputes.<sup>174</sup>

Steven Ratner has advocated for such a role for self-determination, based on an approach that equates self-determination with democracy.<sup>175</sup> Ratner has argued that the right to democratic participation, a derivative of the right to self-determination, extends in the case of emerging states to choice of country. Self-determination, therefore, requires that the demarcation of borders between a new state and its neighbors be affected by the preferences of the inhabitants of the territory in question as to whether to join one state or the other.<sup>176</sup>

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172. MALANCZUK, *supra* note 89, at 157 (“In territorial disputes, legal and political arguments are often used side by side . . . The main political arguments which are used in territorial disputes are the principles of geographical contiguity, of historical continuity and of self-determination . . . Such principles cannot, by themselves, create a legal title to territory.”); *see also* Shaw, *Peoples, Territorialism and Boundaries*, *supra* note 19, at 479 (noting that “[o]ne must, of course, distinguish between the legal right to self-determination and the political expression of the doctrine. The latter will have a far greater application than the former”).

173. *See* Declaration on Principles of International Law, *supra* note 170 and accompanying text.

174. Michal Saliternik, *Expanding the Boundaries of Boundary Dispute Settlement: International Law and Critical Geography at the Crossroads*, 50 *VAND. J. TRANSNAT'L L.* 113, 147 (2017); Ratner, *supra* note 76, at 611-13; Peters, *supra* note 5, at 137; SHAW, *INTERNATIONAL LAW*, *supra* note 71, at 379; LALONDE, *supra* note 147, at 239; Ronen, *supra* note 7, at 16 (contending that “a factual analysis, based on normative elements such as the right to self-determination, allows the conclusion that the [Israeli] settlements [in the West Bank] are within the territory of the state of Palestine”).

175. Ratner, *supra* note 76, at 612 (observing the “trends in state practice toward equating the right of internal self-determination with democracy”); Timothy William Waters, *Contemplating Failure and Creating Alternatives in the Balkans: Bosnia's Peoples, Democracy, and the Shape of Self-Determination*, 29 *YALE J. INT'L L.* 423, 435 (2004) (noting that “[a] recent trend . . . has been the re-expression of self-determination as a right to internal democracy”).

176. Ratner, *supra* note 76, at 613 (observing “the recognition in international law of the primacy of political participation,” Ratner argues: “if the overriding purpose of a state is to permit its people to advance their values through a democratic process, then the formation of a

In view of the principle of the territorial integrity of states, Ratner suggested confining such a role for self-determination to situations in which the preferences of the population do not result in the loss for a state of territory that is already under its sovereignty.<sup>177</sup> This seems to be the case with regard to the territorial dispute between Israel and the Palestinians.

A more limited argument for considering self-determination interests in the demarcation of borders turns on the relationship between the rights to internal and external self-determination. In the case of a people that forms a majority within *part* of the territory of an existing state, but not within the entire population of the state, international law grants supremacy to the principle of the territorial integrity of states over the right to self-determination. International law expects peoples to exercise their right to self-determination by pursuing their economic, social, and cultural development through political participation within the framework of their existing states (“internal self-determination”).<sup>178</sup> There is some support, however, for the view that failure by a state to respect a people’s right to internal self-determination, manifested in the denial of the right to political participation or in other discriminatory policies, gives rise to a right of that people to secede from the state and form a new state or join a neighboring state (“external self-determination”).<sup>179</sup>

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*new* state ought to take that goal into account. One method of promoting this policy is to ensure that the inhabitants of the new state truly seek membership in it and adjust the frontiers so as to produce an acceptable degree of participation.”).

177. Ratner, *supra* note 76, at 613 (noting that “peoples long present in a state offering them full civil rights . . . would seem to have a weak claim to border adjustments that would put them in a neighboring state”).

178. Reference re: Secession of Quebec, (1998) 161 D.L.R. 4th 385, 436 (S.C.C.) (Can.) (The Canadian Supreme Court concluded that “international law expects that the right to self-determination will be exercised by peoples within the framework of existing sovereign states and consistently with the maintenance of the territorial integrity of those states.”); LALONDE, *supra* note 147, at 168; Shaw, *Peoples, Territorialism and Boundaries*, *supra* note 19, at 482 (noting that “[t]he very UN instruments that proclaimed the foundation of self-determination also clearly prohibited the partial or total disruption of the national unity and territorial integrity of existing independent states”); *see also* Mirzayev, *supra* note 136.

179. Advancing this view, ICJ Judge, Yusuf, noted that “if a State fails to comport itself in accordance with the principle of equal rights and self-determination of peoples, an exceptional situation may arise whereby the ethnically or racially distinct group denied internal self-determination may claim a right of external self-determination or separation from the State.” *See* Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010, I.C.J. Rep. 618, 622-23 ¶ 12 (July 22) (separate opinion by Yusuf, J.); *see also* CASSESE, SELF-DETERMINATION OF PEOPLES, *supra* note 80, at 120 (noting that “a racial or religious group may attempt secession, a form of external self-determination,

Commentators have argued that the relationship between internal and external self-determination also has an *ex ante* effect on the demarcation of international borders. According to this view, the border between an emerging state and its neighbors must be determined with a view to ensuring that a national or ethnic group does not become part of a state that is likely to deny it the right to political participation necessary for the realization of the right to internal self-determination.<sup>180</sup>

Some of the commentators advocating a role for self-determination considerations in the demarcation of borders have argued that such considerations should override at least some of the elements of the tripartite rule, when the former conflict with the latter.<sup>181</sup> Others have advocated for a residual role for self-determination considerations, when the application of the tripartite rule does not suffice to establish a border.<sup>182</sup> As shown below, however,

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when it is apparent that internal self-determination is absolutely beyond reach”). This view is controversial, however. See Rosalyn Higgins, *Postmodern Tribalism and the Right to Secession—Comments*, in *PEOPLES AND MINORITIES IN INTERNATIONAL LAW* 30, 33 (1993) (doubting that the denial of the right to internal self-determination gives rise to a legal right to secession); Anderson, *supra* note 168, at 1241 (concluding that, outside the context of decolonization, only peoples subjected to “human rights abuses *in extremis* (ethnic cleansing, mass killings, or genocide)” have a right to external self-determination).

180. Ratner, *supra* note 76, at 612 (arguing that the right to internal self-determination “does open the door to drawing borders so that individuals will not simply be part of an oppressed minority in a new state . . . . When a new state is formed, its territory ought not to be irretrievably predetermined but should form an element in the goal of maximal internal self-determination.”); Saliternik, *supra* note 174, at 147 (maintaining with regard to the determination of borders, “[a]rguably, the right to internal self-determination—understood as the right of all groups within a state to effectively participate in political decision making—should play a crucial role here. This means that, all other things being equal, if the prospects of a certain community to enjoy equal political rights in one country seem to be higher than in the other, it should stay with the country with more political rights”); see also LALONDE, *supra* note 147, at 239 (maintaining that current international instruments recognizing the right to self-determination “may suggest that *new* states ought to be delineated in such a way as to encourage governments that represent ‘the whole people belonging to the territory without distinctions as to race, creed, or color’”).

181. Peters, *supra* note 5, at 137 (“The application of *uti possidetis* can . . . be set aside on the basis of material considerations, notably respect for a concerned people’s right to self-determination, exercised in proper procedures.”); Saliternik, *supra* note 174, at 147 (maintaining that “in some cases, the need to secure the right of people to internal self-determination may provide an independent justification for modifying an *uti possidetis* or treaty-based boundary line”); Ratner, *supra* note 76, at 611-13.

182. SHAW, *INTERNATIONAL LAW*, *supra* note 71, at 379 (“Self-determination cannot be used to further larger territorial claims in defiance of internationally accepted boundaries of sovereign states, but it may be of some use in resolving cases of disputed and uncertain frontier lines on the basis of the wishes of the inhabitants.”).

neither state practice nor the jurisprudence of the ICJ on border disputes supports a rule of customary international law that assigns self-determination considerations a role in the demarcation of international boundaries.

#### A. State Practice

State practice as evidence of customary international law does not indicate that the purview of the right to self-determination extends to the demarcation of international boundaries. The bulk of authority supports the view that UN General Assembly resolutions could serve as evidence of customary international law to the extent that they are indicative of *opinio juris*.<sup>183</sup> The General Assembly has unanimously adopted a series of resolutions elaborating on the content and legal consequences of the right to self-determination. Among these are the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations;<sup>184</sup> the Declaration on the Occasion of the Fiftieth Anniversary of the United Nations;<sup>185</sup> and the Declaration on the Rights of Indigenous Peoples.<sup>186</sup> None of these resolutions links the right to self-determination to the demarcation of international borders, nor does such an understanding of the right to self-determination find support in treaties recognizing that right.<sup>187</sup>

The reluctance of the international community to introduce a border demarcation rule that would accommodate self-determination interests has been manifest in the recent extension of the principle of *uti possidetis* to cover situations of secession and dissolution of states outside the colonial context.<sup>188</sup> A commission chaired by Judge Robert Badinter, advising the European Community on legal questions

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183. Michael Byers, *The Shifting Foundations of International Law: A Decade of Forceful Measures Against Iraq*, 13 EUR. J. INT'L L. 21, 31 (2002); HIGGINS, *supra* note 142, at 5-7; David A. Koplow, *ASAT-Isfaction: Customary International Law and the Regulation of Anti-Satellite Weapons*, 30 MICH. J. INT'L L. 1187, 1231 (2009); Scott W. Lyons, *Ineffective Amnesty: The Legal Impact on Negotiating the End to Conflict*, 47 WAKE FOREST L. REV. 799, 810, n. 59 (2012).

184. Declaration on Principles of International Law, *supra* note 170, princ. 5.

185. G.A. Res. 50/6, Declaration on the Occasion of the Fiftieth Anniversary of the United Nations (Oct. 24, 1995).

186. G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples, arts. 3-5 (Sept. 13, 2007).

187. See, e.g., International Covenant on Civil and Political Rights, art. 1(1), Dec. 19, 1966, 999 U.N.T.S. 171.

188. See *supra* note 80 and accompanying text.

associated with the breakup of Yugoslavia (“Badinter Commission”), applied an expansive interpretation of the purview of *uti possidetis*. The Commission maintained that “[u]ti possidetis, though initially applied in settling decolonization issues in America and Africa, is today recognized as a general principle,”<sup>189</sup> and therefore applies outside the context of decolonization to determine the borders of states emerging by way of secession from the mother state or as a result of the dissolution of the latter.<sup>190</sup>

Steven Ratner noted that the conclusions of the Badinter Commission “go well beyond accepted notions of *uti possidetis*,”<sup>191</sup> a principle that traditionally derived its normative force from “the universally agreed policy goal it was serving—orderly decolonization.”<sup>192</sup> Yet the position of the Badinter Commission has become the prevailing interpretation of customary international law, as evidenced by “the practice of states during the dissolution of the former Soviet Union, Yugoslavia and Czechoslovakia, apparently sanctifying the former internal administrative lines as interstate frontiers.”<sup>193</sup> Expanding the purview of *uti possidetis* beyond decolonization imposes a substantial toll on the right to self-determination and promotes instability “by leaving significant populations both unsatisfied with their status in new states and uncertain of political participation there.”<sup>194</sup> It has been noted that this development in the law amounted to “hiding behind inflated notions of *uti possidetis*”<sup>195</sup> to avoid boundary demarcation based on considerations of self-determination.<sup>196</sup>

The reluctance of the international community to move beyond the tripartite rule, manifest in the extension of the purview of *uti possidetis*, seems to reflect the general disinclination of international law to balance competing claims in the international arena. Proponents

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189. Badinter Committee: Opinion No. 3, *supra* note 76, at 185.

190. Badinter Committee: Opinion No. 3, *supra* note 76, at 185.

191. Ratner, *supra* note 76, at 614.

192. Ratner, *supra* note 76, at 614.

193. Ratner, *supra* note 76, at 590; *see also* Shaw, *Peoples, Territorialism and Boundaries*, *supra* note 19, at 499-500 (reviewing state practice that supports the expansion of the purview of *uti possidetis* to non-colonial situations.); Saliternik, *supra* note 174, at 124-25.

194. Ratner, *supra* note 76, at 591; *see also* CASSESE, SELF-DETERMINATION OF PEOPLES, *supra* note 80, at 332.

195. Ratner, *supra* note 76, at 591.

196. Ratner, *supra* note 76, at 591 (“By hiding behind inflated notions of *uti possidetis*, state leaders avoid engaging the issue of territorial adjustments—even minor ones—which is central to the process of self-determination.”).

of a role for self-determination in the demarcation of borders acknowledge that the preferences of the population affected by the location of the border should not be the *only* consideration taken into account.<sup>197</sup> A new norm on border demarcation, developed either to supplement or to replace the existing tripartite rule, would require adjudicators to consider a variety of equitable criteria, including the preferences of the people affected, economic considerations, the effect of border location on the viability of a state, security interests, and historical claims.<sup>198</sup> Such criteria would often point in different directions and would have to be balanced, a process amenable to politicization. Balancing of this type is generally repugnant to international law. Commentators have noted that “although a balancing procedure is often used in the context of US constitutional law, there is no equivalent in international law and limited authority for introducing a balancing approach into international law.”<sup>199</sup>

## B. *The Jurisprudence of the International Court of Justice*

### 1. The Tripartite Rule and Equity Considerations

A study from 2004 on ICJ adjudication of territorial disputes has demonstrated the exclusivity of the norms forming the tripartite rule (i.e., boundary treaties, *uti possidetis juris*, and the doctrine of effective control) in the demarcation of international borders.<sup>200</sup> The study shows that ICJ jurisprudence does not deem territorial claims based on self-determination considerations,<sup>201</sup> economic interests, geography,

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197. Saliternik, *supra* note 174, at 151-52 (proposing that international borders be determined by balancing human-oriented interests and the interest in boundary stability); Ratner, *supra* note 76, at 620-23 (addressing the various considerations to be weighed in determining the location of international boundaries, among them equitable considerations). Ratner noted that “while leaving much to the biases of arbitrators, equity offers some framework within which courts can take account of a variety of relevant factors.” Ratner, *supra* note 76, at 623.

198. *See* Ratner, *supra* note 76, at 621 (proposing considerations that should be taken into account in the application of a new norm on border demarcation); Saliternik, *supra* note 174, at 146-51; Sumner, *supra* note 1, at 1789-90 (discussing geographical, economic, cultural and historical justifications for territorial claims).

199. Courtney W. Howland, *The Challenge of Religious Fundamentalism to the Liberty and Equality Rights of Women: An Analysis Under the United Nations Charter*, 35 COLUM. J. TRANSNAT’L L. 271, 326, n. 246 (1997); *see also* Laker Airways v. Sabena, 731 F.2d 909, 950 (D.C. Cir. 1984) (“This court is ill-equipped to ‘balance the vital national interests of the United States and the [United Kingdom] to determine which interests predominate.’”).

200. Sumner, *supra* note 1, at 1792-1804.

201. The study considers territorial claims based on self-determination considerations as “cultural claims.” Sumner, *supra* note 1, at 1785-86.

and history to be protected by any rule on border demarcation, either contradictory or residual to the tripartite rule.<sup>202</sup>

The normative web of the tripartite rule covers the circumstances of the vast majority of border disputes;<sup>203</sup> the one between Israel and the Palestinians is a rare exception. The absence of ICJ jurisprudence applying border demarcation rules that are residual to the tripartite rule does not attest, in and of itself, to a rejection by the ICJ of such rules, as “the definitive formulation of a particular rule may well await a situation requiring its application.”<sup>204</sup> Yet, the approach of the ICJ toward the concept of *equity* in the demarcation of borders suggests a rejection of the possibility of developing additional border demarcation rules based on self-determination interests or economic claims, to be applied independently of the tripartite rule in the event the latter does not resolve the dispute.

The ICJ noted that “equity as a legal concept is a direct emanation of the idea of justice.”<sup>205</sup> The application of *equity praeter legem* (i.e., equity as a residual, independent rule of decision “filling in gaps and interstices in the law”<sup>206</sup>) to border demarcation could bring into play self-determination and economic claims when none of the elements of the tripartite rule is applicable.<sup>207</sup> But when the evidence before the ICJ did not allow the resolution of a territorial dispute by a straightforward application of the tripartite rule, the Court explicitly rejected the possibility of resorting to equity as an independent border demarcation rule.<sup>208</sup> Under such circumstances, the Court recognized the role of equity in border demarcation only as an *interpretive* principle (i.e.,

202. Sumner, *supra* note 1, at 1807 (observing that “these categories [of territorial claims] do not form part of the court’s tripartite hierarchy” and did not guide the Court in the adjudication of border disputes).

203. See Sumner, *supra* note 1, at 1792-808 (reviewing the adjudication by the International Court of Justice of territorial disputes).

204. CRAWFORD, *supra* note 6, at 428.

205. Continental Shelf (Tunisia/Libya), 1982 I.C.J. Rep. 18, 60, ¶ 71 (Feb. 24).

206. Maritime Delimitation in the Area between Greenland and Jan Mayen (Den. v. Nor.), 1993 I.C.J. Rep. 38, 231, ¶ 65 (Jun. 14) (separate opinion by Weeramantry, J.).

207. *Id.* at 223-24, ¶ 38 (equity considerations in the demarcation of maritime boundaries include “economic impact.”); Frontier Dispute (Burk. Faso/Niger), Judgment, 2013 I.C.J. Rep. 44, 160 (Apr. 16) (separate opinion by Daudet, J.) (resolving a border dispute in a manner that secures the essential interests of the local population is “justified from the point of view of equity”).

208. Frontier Dispute (Burk. Faso/Mali), 1986 I.C.J. Rep. 554, 567, ¶ 28 (Dec. 22) (“It is clear that the Chamber cannot decide *ex aequo et bono* in this case . . . it must also dismiss any possibility of resorting to equity *contra legem*. Nor will the Chamber apply equity *praeter legem*.”).

*equity infra legem*)<sup>209</sup> applied to the tripartite rule, compensating for the lack of evidence that would otherwise preclude the application of the tripartite rule.<sup>210</sup> In *Burkina Faso v. Mali*, the Court emphasized that applying *equity infra legem* “is not a matter of finding simply an equitable solution, but an equitable solution derived from the applicable law,”<sup>211</sup> which in the case at hand was the principle of *uti possidetis*.<sup>212</sup> Limiting the role of equity to the application of the tripartite rule makes equitable considerations immaterial to the territorial dispute between Israel and the Palestinians, which is not governed by any of the norms of the tripartite rule.

## 2. A New Trend in the International Adjudication of Border Disputes?

Detecting an erosion of the traditional tripartite rule of border dispute resolution, Michal Saliternik has identified a “recent adjudicatory trend of incorporating human-oriented considerations into boundary dispute settlement.”<sup>213</sup> This observation hinges largely on the recent decisions of the Permanent Court of Arbitration (“PCA”) in the *Abyei* case<sup>214</sup> and of the ICJ in *Burkina Faso v. Niger*.<sup>215</sup> Yet, the argument that these decisions represent a “development [that] arguably amounts to a paradigm shift in the adjudication of international boundary disputes”<sup>216</sup> is unpersuasive.

### a. The Abyei Case

The decision by the PCA concerned a territorial dispute between the government of Sudan, representing the northern regions of the country, and the Sudanese People’s Liberation Movement, representing the emerging state of South Sudan, regarding the Abyei area located between the two territories.<sup>217</sup> A Comprehensive Peace Agreement (“Peace Agreement”) concluded between the parties in

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209. *Id.* at 567-68, ¶ 28 (noting that the Court “will have regard to equity *infra legem*, that is, that form of equity which constitutes a method of interpretation of the law in force, and is one of its attributes”).

210. *Id.* at 632-33, ¶¶ 148-50 (resorting to equity in the application of *uti possidetis*).

211. *Id.* at 568, ¶ 28.

212. *Id.* at 632-33, ¶¶ 148-50.

213. Saliternik, *supra* note 174, at 116, 118.

214. Delimiting Abyei Area (Gov. of Sudan v. Sudan People’s Liberation Movement/Army), Final Award, 48 I.L.M. 1245 (Perm. Ct. Arb. 2009).

215. Frontier Dispute (Burk. Faso/Niger), Judgment, 2013 I.C.J. Rep. 44 (Apr. 16).

216. Saliternik, *supra* note 174, at 135.

217. Gov. of Sudan v. Sudan People’s Liberation Movement/Army, 48 I.L.M. at ¶¶ 1, 102.



2005 provided for a referendum among the population of South Sudan on the question of whether the South would become an independent state.<sup>218</sup> A separate Protocol concerning the Abyei area, attached to the Peace Agreement (“Abyei Protocol”), provided that the inhabitants of Abyei would determine in another referendum whether this area remains part of Sudan or joins the potentially independent state of South Sudan.<sup>219</sup> The Abyei Protocol also appointed a Boundaries Commission to demarcate the boundaries of the Abyei area,<sup>220</sup> which would determine who is eligible to vote in the Abyei referendum and the extent of the territory gained by either Sudan or South Sudan following the results of the referendum.<sup>221</sup>

Referencing a past decision by the British Colonial government of Sudan on the demarcation of the boundaries of the Sudanese province of Kordofan, the Abyei Protocol described the Abyei area as “the area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905”<sup>222</sup> (“demarcation formula”), and instructed the Boundaries Commission to demarcate the boundaries of the Abyei area in accordance with this formula.<sup>223</sup> But the area defined by the demarcation formula was susceptible to two different interpretations, either as the *area* of the nine Ngok Dinka chiefdoms *that was* transferred to Kordofan in 1905 (territorial interpretation), or as the area of *the nine Ngok Dinka chiefdoms that were* transferred to Kordofan in 1905 (tribal interpretation).<sup>224</sup> The Boundaries Commission adopted the tribal interpretation, which was unfavorable to the government of Sudan because it resulted in a significant expansion of the Abyei area to the north, compared to a demarcation of the area under the territorial interpretation.<sup>225</sup> The decision by the

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218. *Id.* ¶¶ 110, 118.

219. Protocol between the Government of the Republic of Sudan and the Sudan People’s Liberation Movement/Army on the Resolution of Abyei Conflict, art. 1.3, May 26, 2004 [hereinafter Abyei Protocol], *as incorporated into* the Comprehensive Peace Agreement between the Government of the Republic of Sudan and the Sudan People’s Liberation Movement/Army ch. IV at 63, Jan. 9, 2005 [hereinafter Comprehensive Agreement].

220. Abyei Protocol, *supra* note 219, art. 5.

221. Abyei Protocol, *supra* note 219, arts. 1.3, 5.1.

222. Abyei Protocol, *supra* note 219, art. 1.1.2.

223. Abyei Protocol, *supra* note 219, art. 5.1.

224. Gov. of Sudan v. Sudan People’s Liberation Movement/Army, 48 I.L.M. at ¶ 232.

225. *Id.* ¶¶ 558-570 (reviewing the reasoning provided by the Boundaries Commission); ABYEI BOUNDARIES COMMISSION, ABYEI BOUNDARIES COMMISSION REPORT 11, 20-22 (2005) (positions of the parties and conclusions); Saliternik, *supra* note 174, at 129.

Boundaries Commission was rejected by Sudan,<sup>226</sup> and the parties subsequently agreed to refer the decision for review to the PCA.<sup>227</sup> Examining the reasonableness rather than the correctness of the findings of the Boundaries Commission, the PCA upheld the tribal interpretation.<sup>228</sup> Turning first to a textual interpretation of the demarcation formula, the PCA stated:

A purely grammatical approach to the interpretation of these terms . . . does not yield any determinative conclusion as to their ordinary meaning. There is no conclusive method for determining, by recourse to the text alone, whether “transferred” relates to “area,” suggesting a territorial dimension, or whether it relates to “the nine Ngok Dinka chiefdoms,” suggesting a more tribal dimension. Both propositions are equally tenable.<sup>229</sup>

A textual interpretation of the demarcation formula thus led the PCA to conclude that the tribal interpretation “was not unreasonable and accordingly did not constitute an excess of mandate.”<sup>230</sup> The PCA augmented its textual analysis by pointing to the object and purpose of the Peace Agreement and of the Abyei Protocol, which concerned the achievement of peace in Sudan, promoting “the right of the people of Southern Sudan to self-determination . . . .”<sup>231</sup> Observing that the territorial interpretation “could result in splitting the Ngok Dinka community,”<sup>232</sup> and implying that such result could compromise both peace and the right to self-determination,<sup>233</sup> the PCA concluded that “it was not unreasonable to interpret the Formula in a predominantly tribal manner, that interpretation being more likely to encompass the whole of the Ngok Dinka people.”<sup>234</sup>

Saliternik suggested that “the emphasis that the PCA placed on the parties’ desire to promote self-determination and peace . . . represented a clear departure from the adjudicatory approach adopted by international tribunals in earlier boundary dispute cases,”<sup>235</sup>

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226. *Gov. of Sudan v. Sudan People’s Liberation Movement/Army*, 48 I.L.M. at ¶¶ 137, 168.

227. *Id.* ¶ 3.

228. *Id.* ¶ 571.

229. *Id.* ¶ 580.

230. *Id.* ¶ 582.

231. *Id.* ¶¶ 587, 588-89.

232. *Id.* ¶ 595.

233. *Id.* ¶ 596.

234. *Id.*

235. Saliternik, *supra* note 174, at 130-31.

ascribing an increased role to human-oriented interests such as self-determination and peace in the adjudication of border disputes.<sup>236</sup> This proposition seems to overstate the role attributed by the PCA to the interests in peace and self-determination in the demarcation of the border. In interpreting the demarcation formula—a treaty provision—the PCA explicitly followed the requirements of Article 31 of the Vienna Convention on the Law of Treaties, which provides for a textual interpretation of treaties, informed by their object and purpose.<sup>237</sup> Nothing in the reasoning of the PCA suggests a willingness to “stretch” the language of the demarcation formula to accommodate the interests in peace and self-determination, as the PCA concluded that the territorial and tribal interpretations “are equally tenable” under a purely grammatical approach to interpretation.<sup>238</sup>

#### b. Burkina Faso v. Niger

The interests of the population affected by border demarcation were also taken into consideration by the ICJ in the *Burkina Faso v. Niger* case, in 2013.<sup>239</sup> The border dispute between Burkina Faso and Niger concerned, among other issues, the demarcation of the border near the Bossébangou village, which is situated a few hundred meters from the Sirba River, on its right bank.<sup>240</sup> The Court was called upon to determine whether the boundary was located *in* the Sirba River or on its right bank between the river and the village.<sup>241</sup> The former location was clearly more favorable to Bossébangou villagers, for whom the river is an essential source of water. In their Special Agreement on referring the dispute to the ICJ, the parties requested the Court to follow the course of an administrative boundary described in an *Arrêté* (“order”) issued in 1927 by the French colonial authorities, and if the *Arrêté* were not sufficiently clear, to follow the line shown on an official French map from 1960.<sup>242</sup>

The Court found the guidance provided by the *Arrêté* to be sufficiently clear with regard to this segment of the border, relying on

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236. Saliternik, *supra* note 174, at 135.

237. *Gov. of Sudan v. Sudan People’s Liberation Movement/Army*, 48 I.L.M. at ¶¶ 575, 583; *see also* Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331.

238. *See supra* note 229 and accompanying text.

239. *Frontier Dispute (Burk. Faso/Niger)*, Judgment, 2013 I.C.J. Rep. 44 (Apr. 16).

240. *Id.* at 85, ¶ 100.

241. *Id.* at 85, ¶ 101.

242. *Id.* at 50, ¶ 2.

a textual interpretation of the Arrêté to conclude that the boundary passed in the Sirba River along its median line.<sup>243</sup> Locating the boundary on the right bank, between the river and the village, would have meant that the boundary crossed the river at Bossébangou.<sup>244</sup> The Arrêté, however, described the boundary as “*reaching* the River Sirba at Bossébangou.”<sup>245</sup> According to the Court ruling, “it is significant that, in describing the relevant section of the frontier, the Arrêté uses the verb ‘reach’ rather than ‘cut,’”<sup>246</sup> as this wording indicates that the boundary did not cross the river but rather passed in it.<sup>247</sup>

Having concluded its textual analysis, the Court proceeded to remark:

Moreover, there is no evidence before the Court that the River Sirba in the area of Bossébangou was attributed entirely to one of the two colonies. In this regard, the Court notes that the requirement concerning access to water resources of all the people living in the riparian villages is better met by a frontier situated in the river than on one bank or the other.<sup>248</sup>

The invocation by the Court of the interest the villagers have in access to water resources was viewed as a manifestation of its increased willingness to introduce human-oriented considerations into boundary demarcation, eroding the exclusive reliance on the traditional tripartite rule in border dispute resolution.<sup>249</sup> But the reasoning of the ICJ suggests that the Court leaned toward the view that according to a purely grammatical interpretation of the Arrêté, the border is located in the river, and invoked the interests of the villagers merely as an additional consideration, augmenting its linguistic reasoning.<sup>250</sup> It is

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243. *Id.* at 85, ¶ 101.

244. *Id.*

245. *Id.* at 77, ¶ 70 (emphasis added).

246. *Id.* at 85, ¶ 101.

247. *Id.*

248. *Id.*

249. Saliternik, *supra* note 174, at 132-36.

250. In his Separate Opinion, Judge Daudet took the view that the border runs along the right bank of the river, contrary to the determination by the Court. *See* Frontier Dispute (Burk. Faso/Niger), Judgment, 2013 I.C.J. Rep. 44, 163 (Apr. 16) (separate opinion by Daudet, J.). Judge Daudet’s conclusion regarding the location of the border resulted from a grammatical interpretation of the words “reaching the River Sirba at Bossébangou,” which differs from that of the Court. *Id.* at 160-61. Saliternik relies on Judge Daudet’s view to assert that “the court made a remarkable move” by adopting “a creative interpretation of the *Arrêté* that secured the water needs of local populations, even though it knew that the boundary line thus determined might be different from the historic colonial boundary.” Saliternik, *supra* note 174, at 132. However, the disagreement between the majority opinion and Judge Daudet regarding the

noteworthy that Judge Daudet, who concluded in a Separate Opinion that a textual interpretation of the Arrêté supports the view that the border separates the village from the river, advocated such a ruling by the Court, notwithstanding the interests of the affected villagers.<sup>251</sup>

In another Separate Opinion, Judge Cançado Trindade stated that “people and territory go together”<sup>252</sup> and that “consideration of frontiers cannot ignore or overlook the human factor.”<sup>253</sup> This language implies that in the view of Judge Cançado Trindade, human-oriented considerations may affect the demarcation of international frontiers independently of the traditional rules of border demarcation, and perhaps override these. This view, however, does not find support in the reasoning delivered by the Court.

In conclusion, the judgment of the ICJ in *Burkina Faso v. Niger* and the decision of the PCA in the Abyei case do not suggest the existence of an independent rule on border demarcation that concerns self-determination or any other human-oriented consideration.

### 3. The Wall Advisory Opinion

In its Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (“Wall Advisory Opinion”), the ICJ examined whether the construction by Israel of a wall within the occupied West Bank violated Israel’s obligations under international law.<sup>254</sup> As observed by Judge Kooijmans, concurring with the Court in a Separate Opinion, “[t]he Court has refrained from taking a position with regard to territorial rights and the question of permanent status.”<sup>255</sup> The Court considered, however, the compatibility of the construction of the wall with the right of the Palestinian people to self-determination.<sup>256</sup>

The Court observed that the route of the wall would leave a large number of Palestinians within the area located between the wall and the

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grammatical interpretation of the *Arrêté* does not suffice to infer a “remarkable move” by the Court of the type observed by Saliternik.

251. Frontier Dispute (Burk. Faso/Niger), Judgment, 2013 I.C.J. Rep. 44, 163 (Apr. 16) (separate opinion by Daudet, J.) (“I am aware . . . that in terms of equity this solution is not satisfactory. However . . . I think that it should have been the solution chosen by the Court.”).

252. *Id.* at 126 (separate opinion by Cançado Trindade, J.).

253. *Id.* at 132-33.

254. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, 167, ¶ 77 (July 9).

255. *Id.* at 228, ¶ 30 (separate opinion of Kooijmans, J.).

256. *Id.* at 182-84, ¶¶ 118-22.

Green Line, separating them from the rest of the occupied West Bank.<sup>257</sup> Noting that the area between the wall and the Green Line would also include most Israeli settlements illegally established in the West Bank, and that the construction of the wall would likely contribute to the departure of Palestinians from this area,<sup>258</sup> the Court expressed concern that the wall would facilitate the *de facto* integration of this area into Israel.<sup>259</sup> Considering the effect that the wall would have on the ability of the Palestinian people to exercise its right to self-determination, the Court thus stated:

[The Court] cannot remain indifferent to certain fears expressed to it that the route of the wall will prejudge the future frontier between Israel and Palestine, and the fear that Israel may integrate the settlements and their means of access. The Court considers that the construction of the wall and its associated régime create a “fait accompli” on the ground that could well become permanent, in which case, and notwithstanding the formal characterization of the wall by Israel, it would be tantamount to *de facto* annexation.<sup>260</sup>

In view of the effect that the wall would likely have on the permanent status of parts of the occupied territories, the Court concluded that the construction of the wall “severely impedes the exercise by the Palestinian people of its right to self-determination, and is therefore a breach of Israel’s obligation to respect that right.”<sup>261</sup> It has been argued that this conclusion implies that the entire territory under Israeli occupation falls within the Palestinian territorial entitlement by virtue of the right of the Palestinian people to self-determination.<sup>262</sup> But the violation of the right to self-determination found by the Court concerned a measure that could “prejudge the future frontier between Israel and Palestine.”<sup>263</sup> The concern of the Court that the frontier might be “prejudged” suggests that it did not view the Green Line as the existing boundary of the Palestinian territorial

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257. *Id.* at 184, ¶ 122.

258. *Id.*

259. *Id.* ¶¶ 121-22.

260. *Id.* ¶ 121.

261. *Id.* ¶ 122.

262. Ronen, *supra* note 7, at 13 (citing the ICJ’s conclusion that the construction of the Wall violates the right of the Palestinian people to self-determination, Ronen notes, “by implication, the area beyond the Green Line (the 1949 Armistice Lines) and the separation barrier, including the settlements, falls within the entitlement . . . of the Palestinian state”).

263. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, 184, ¶ 121 (July 9).

entitlement, but rather considered that such boundary is yet to be determined.<sup>264</sup> As noted by Kontorovich, “[i]f the Green Line was the recognized ‘frontier,’ the Wall would not prejudice it, but rather simply infringe on it. Thus if the . . . ICJ advisory opinion show[s] anything, it is that the border between Israel and Palestine remains in substantial dispute.”<sup>265</sup>

This view finds support in the Separate Opinion of Judge al-Khasawneh, who concurred with the Advisory Opinion of the Court.<sup>266</sup> Judge al-Khasawneh subscribed to the view that the Green Line “is the starting line from which is measured the extent of Israel’s occupation of non-Israeli territory,”<sup>267</sup> but he immediately proceeded to state that “there is no implication that the Green Line is to be a permanent frontier.”<sup>268</sup>

The holding of the ICJ in the Wall Advisory Opinion indicates that the right to self-determination provides partial, *negative* protection to self-determination interests arising in relation to border disputes. Although the right to self-determination does not support a positive legal rule on the demarcation of international borders, it precludes Israel from taking measures that are contrary to Palestinian self-determination interests, before an agreement has been reached between Israel and the Palestinians resolving the territorial dispute. This view seems consistent with Antonio Cassese’s assessment of the role of international law with regard to the territorial dispute between Israel and the Palestinians, which holds that international law “confine[s] itself to an essentially negative stand, that is to withholding its endorsement of the de facto situation [i.e., Israel’s possession of the West Bank] . . . By and large international law does not seem to provide a solution in *positive* terms.”<sup>269</sup>

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264. Kontorovich, *supra* note 3, at 988 (noting that “in the view of the Court, there was no recognized frontier between the two entities”).

265. Kontorovich, *supra* note 3, at 988.

266. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. at 238, ¶ 11 (separate opinion by al-Khasawneh, J.).

267. *Id.*

268. *Id.*

269. Antonio Cassese, *Legal Considerations on the International Status of Jerusalem*, 3 THE PALESTINE Y.B. OF INT’L L. 13, 37 (1986); see also CASSESE, SELF-DETERMINATION OF PEOPLES, *supra* note 80, at 131, 188. Cassese maintains that “one of the consequences of the body of international law on self-determination is that at present no legal title over territory can be acquired in breach of self-determination,” and that, therefore, “assuming that the legal regime of the Arab territories occupied by Israel in 1967 is uncertain because Jordan never acquired a sovereign title . . . Israel cannot acquire such title on the strength of customary rules relating to

C. *The Territorial Dimension of the Right to Statehood*

The essence of the right to statehood, guaranteed to the Palestinian people under the principle of self-determination, concerns title to territory. “States are territorial entities,”<sup>270</sup> and therefore statehood “implies exclusive control over *some* territory.”<sup>271</sup> Yet, the territorial criterion for statehood set forth by international law has virtually no effect on the resolution of territorial disputes. Although the possession of “a defined territory” is one of the conditions for the existence of a state,<sup>272</sup> “there appears to be no rule prescribing the minimum area of that territory.”<sup>273</sup> Hence, “states may occupy an extremely small area,”<sup>274</sup> the smallest state recognized under international law having a territory of merely 0.4 square kilometers.<sup>275</sup> Note that international law does not require that a state have defined borders, as long as a core territory of any size is clearly under its sovereignty.<sup>276</sup> Therefore, “claims [by other states] to less than the entire territory of a new state, in particular boundary disputes, do not affect statehood.”<sup>277</sup> Similarly, although a permanent population is a necessary requirement for statehood,<sup>278</sup> there is no minimum limit on the size of that population.<sup>279</sup>

Clearly, Israel may not restrict the exercise by the Palestinian people of its right to statehood to a diminutive portion of the Palestinian

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acquisition of territory.” CASSESE, SELF-DETERMINATION OF PEOPLES, *supra* note 80, at 188. Cassese notes, however, that “there is legal uncertainty about who is the holder of sovereign rights over the territories [occupied by Israel],” and that the rules on self-determination “do not offer any proper guidelines for this situation.” CASSESE, SELF-DETERMINATION OF PEOPLES, *supra* note 80, at 131.

270. CRAWFORD, *supra* note 6, at 46.

271. CRAWFORD, *supra* note 6, at 48.

272. Convention on Rights and Duties of States art. 1, Dec. 26, 1933, 165 L.N.T.S. 19 [hereinafter Montevideo Convention] (stipulating that “[t]he State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other States.”); CRAWFORD, *supra* note 6, at 47 (noting that “the best known formulation of the basic criteria for statehood is that laid down in Article I of the Montevideo Convention”).

273. CRAWFORD, *supra* note 6, at 46.

274. CRAWFORD, *supra* note 6, at 46.

275. CRAWFORD, *supra* note 6, at 46. (noting that the territory of the Vatican is merely 0.4 square kilometers).

276. CRAWFORD, *supra* note 6, at 48-52; Eden, *supra* note 6, at 231 (noting that “there is ample evidence in State practice (not least in the example of Israel itself) to conclude that a State does not require exactly defined or undisputed borders to exist”).

277. CRAWFORD, *supra* note 6, at 49.

278. Montevideo Convention, *supra* note 272, art. 1.

279. CRAWFORD, *supra* note 6, at 52.



population of the West Bank. Such an attempt would strip Palestinian statehood of its significance as a manifestation of the principle of self-determination, and would thus undercut the right of the Palestinian people to statehood, regardless of the formal criteria for the existence of a state. This would shift the territorial dispute between Israel and the Palestinians from the realm of the law on border demarcation to the domain of the right to statehood guaranteed to the Palestinian people under the principle of self-determination. Nevertheless, this link between self-determination and title to territory would have little effect on the resolution of the territorial dispute between Israel and the Palestinians, as the bulk of the Palestinian population resides in population centers that make up relatively small portions of the West Bank, to which Israel is not likely to lay claim.<sup>280</sup>

*VI. PURVIEW OF THE PRINCIPLE OF THE INADMISSIBILITY  
OF THE ACQUISITION OF TERRITORY THROUGH THE USE OF  
FORCE*

Stephen Schwebel and Yehuda Blum have argued that the fundamental norm of international law precluding the acquisition of territory through the use of force is qualified in a manner that would allow Israel to obtain sovereignty over the West Bank based on its occupation of that territory.<sup>281</sup> According to this view, “[w]here the prior holder of territory had seized that territory unlawfully, the state which subsequently takes that territory in the lawful exercise of self-defense has, against that prior holder, better title.”<sup>282</sup> Observing that Jordan gained possession of the West Bank in 1948 through the unlawful use of force,<sup>283</sup> and that this territory was subsequently relinquished by Jordan in 1967 and came under Israeli occupation through the lawful use of force by Israel in the exercise of its right to self-defense,<sup>284</sup> Schwebel and Blum concluded that Israel has better

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280. See Disengagement Plan of Prime Minister Ariel Sharon – Revised, *supra* note 4 (specifying the scope of Israeli territorial claims in relation to the West Bank).

281. Stephen M. Schwebel, *What Weight to Conquest?*, 64 AM. J. INT’L L. 344, 345-47 (1970); Blum, *supra* note 42, at 293-94, 295 n.60.

282. Schwebel, *supra* note 281, at 346.

283. Schwebel, *supra* note 281, at 346; Blum, *supra* note 42, at 283 (observing that the invasion by Jordan of the territory of Mandatory Palestine in 1948 violated the prohibition on the use of force contained in Article 2(4) of the UN Charter).

284. Schwebel, *supra* note 281, at 346 (“The facts of the June, 1967, ‘Six Day War’ demonstrate that Israel reacted defensively against the threat and use of force against her by her

title to the West Bank than Jordan does,<sup>285</sup> which opens the door for Israeli sovereignty over the territory. Schwebel thus maintained that “modifications of the 1949 armistice lines among those states within former Palestinian territory are lawful,”<sup>286</sup> including “substantial alterations—such as recognition of Israeli sovereignty over the whole of Jerusalem.”<sup>287</sup> Similarly, according to Blum, “[s]ince . . . no State can make a legal claim [to the West Bank] that is equal to that of Israel, this relative superiority of Israel may be sufficient, under international law, to make Israel’s possession of Judea and Samaria [the West Bank] virtually undistinguishable from an absolute title, to be valid *erga omnes*.”<sup>288</sup>

As noted above, both the ICJ and the Security Council took the view that the inadmissibility of the acquisition of territory through the use of force extends to the circumstances of the Israeli occupation of the West Bank, and that the annexation by Israel of any part of the West Bank would therefore amount to a violation of international law.<sup>289</sup> The rejection by the ICJ and the Security Council of the view that Israel holds title to the West Bank or parts thereof carries significant probative value in the interpretation of customary international law.<sup>290</sup>

The refusal by the international community to qualify the application of the rule on the inadmissibility of the acquisition of territory by force concerns the interpretation of the self-defense exception to the prohibition on the use of force. As explained by Antonio Cassese:

[Self-defense] does not legitimize the acquisition of territory . . .  
At least since 1945, sovereignty cannot be acquired through military conquest, not even when the territory was previously unlawfully controlled by another state, or when force is resorted to

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Arab neighbors”); Blum, *supra* note 42, at 294 (noting that Israel obtained control of the West Bank “lawfully”).

285. Schwebel, *supra* note 281, at 346; Blum, *supra* note 42, at 294 (“The legal standing of Israel in the territories in question is thus that of a State which is lawfully in control of territory in respect of which no other States can show a better title.”).

286. Schwebel, *supra* note 281, at 346-47.

287. Schwebel, *supra* note 281, at 347.

288. Blum, *supra* note 42, at 295 n.60.

289. *See supra* notes 103-06 and accompanying text.

290. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 103 cmt. b (AM. LAW INST. 1987); Prosecutor v. Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, ¶¶ 133-134 (Int’l Crim. Trib. for the Former Yugoslavia, Oct. 2, 1995) (relying on Security Council resolutions as evidence of customary international law).

in order to repel an unlawful attack. The ban on the use of force and military conquest, laid down in the [UN] Charter, is too sweeping and drastic to make allowance for such qualifications.<sup>291</sup>

This interpretation of the prohibition on the use of force and its self-defense exception is reinforced by the right of peoples to self-determination, which is cast aside by the approach that balances competing Israeli and Jordanian titles as the basis for Israeli sovereignty over the West Bank.<sup>292</sup> The reasoning of the ICJ in the *Wall Advisory Opinion* indicates that before an agreement between Israel and the Palestinians has been reached, the right to self-determination precludes any measure that would prejudice the future frontier between Israel and the Palestinians and is contrary to self-determination interests.<sup>293</sup> Although the right to self-determination does not generate a rule on the demarcation of borders based on the principle that the border follows the population, it precludes, in the case of territory not under the sovereignty of any state, the granting of sovereignty to any party contrary to the self-determination interests of the local population and over its objections.<sup>294</sup>

#### VII. THE ROLE OF INTERNATIONAL RECOGNITION IN THE RESOLUTION OF TERRITORIAL DISPUTES

What is the legal significance of the position taken by the international community in relation to a particular border dispute? Yael Ronen has suggested that international recognition of a state's title to territory may resolve a territorial dispute, granting such title over the objection of the other party to the dispute.<sup>295</sup> Addressing the boundaries of Palestinian territorial entitlement, Ronen argued: "How wide a state's territory extends depends on international recognition of its

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291. Cassese, *Legal Considerations on the International Status of Jerusalem*, *supra* note 269, at 305-06; *see also* Orna Ben-Naftali, Aeyal M. Gross, Keren Michaeli, *Illegal Occupation: Framing the Occupied Palestinian Territory*, 23 *BERKELEY J. INT'L L.* 551, 573 (2005) ("[T]he most convincing basis for the rejection of the argument that legitimizes the acquisition of territory through use of force in self-defense is the frequent inability to distinguish between the aggressor and the victim in a particular conflict.").

292. Imseis, *supra* note 33, at 97 (noting that the argument for Israeli title to the West Bank, advanced by Blum, "fails to take into account the effect of the international law on self-determination of peoples").

293. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, 182-84, ¶¶ 118-22 (July 9).

294. *See supra* note 269 and accompanying text.

295. Ronen, *supra* note 7, at 13.

sovereignty rather than on effective control . . . It therefore remains to explore the extent of territory that is internationally recognized as falling within Palestine’s sovereignty.”<sup>296</sup> It is unclear whether, according to this view, an international recognition that carries such legal weight must represent a near-consensus within the international community, or whether the position of a vast majority of states, falling short of a near-consensus, suffices. Ronen concluded that “Palestine’s territory is internationally recognized as comprising the West Bank, Gaza Strip and East Jerusalem,”<sup>297</sup> subject, perhaps, to minor modifications,<sup>298</sup> and that such recognition is determinative of the realm of Palestinian sovereignty.

The view that the international community overwhelmingly recognizes a Palestinian entitlement to the entire territory of the West Bank, subject to minor modifications, is supported by Resolution 2334, adopted unanimously by the Security Council in December 2016.<sup>299</sup> Resolution 2334 refers to the West Bank in its entirety as “the *Palestinian* territory occupied since 1967;”<sup>300</sup> it expresses grave concern “that continuing Israeli settlement activities are dangerously imperiling the viability of the two-State solution based on the 1967 lines;”<sup>301</sup> and it calls for a peaceful solution to the conflict that would bring “an end to the Israeli occupation that began in 1967,”<sup>302</sup> presumably referring to the entire occupied territory.

#### A. *The Probative Significance of International Recognition of Title to Territory*

International recognition may have a probative value in the determination of title to territory.<sup>303</sup> This view finds support in the jurisprudence of the Permanent Court of International Justice (“PCIJ”).

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296. Ronen, *supra* note 7, at 13.

297. Ronen, *supra* note 7, at 16.

298. Ronen, *supra* note 7, at 14 (observing that “there is no international consensus on the route which the determination of borders of Palestine should follow once agreed with Israel”).

299. S.C. Res. 2334, *supra* note 54.

300. S.C. Res. 2334, *supra* note 54, at pmb. (emphasis added).

301. S.C. Res. 2334, *supra* note 54, at pmb.

302. S.C. Res. 2334, *supra* note 54, at ¶ 9.

303. ROBERT Y. JENNINGS, *THE ACQUISITION OF TERRITORY IN INTERNATIONAL LAW* 38 (1963) (observing that “all forms of acknowledgment of a legal or factual position may be of great probative or evidentiary value even when not themselves an element in the substantive law of title. Recognition-and also acquiescence-is likely, therefore, for that reason alone, to have a prominent place in territorial questions.”).

In the *Eastern Greenland* case,<sup>304</sup> which concerned competing claims to sovereignty over Eastern Greenland by Denmark and Norway, the PCIJ considered recognition by uninvolved states of the sovereignty of Denmark over the disputed territory as evidence supporting the Danish claim to the territory.<sup>305</sup>

Yet recognition by uninvolved states of title to territory has evidentiary value only if it can be linked to a rule of international law that pertains and can be applied to the territorial dispute in question. It is the rule of international law that grants a state title to territory. Granting an *evidentiary* role to recognition can relate only to the correct application of such a rule in the particular circumstances of the case at hand. For example, in the *Eastern Greenland* case, the probative significance of the recognition by uninvolved states of the sovereignty of Denmark over Eastern Greenland was linked to the application by the PCIJ of the effective control element of the tripartite rule.<sup>306</sup> The position of uninvolved states appeared to have been one of the considerations supporting the conclusion reached by the Court that the activities of Denmark in Eastern Greenland demonstrated “the two elements necessary to establish a valid title to sovereignty, namely: the intention and will to exercise such sovereignty and the manifestation of State activity.”<sup>307</sup>

The preceding discussion demonstrated the absence of a rule of customary international law on the demarcation of borders that is applicable to the territorial dispute between Israel and the Palestinians. Such rule (e.g., a potential rule granting the right to self-determination a prominent role in the demarcation of borders) may emerge in the future only on the basis of state practice that is, among others, general and consistent,<sup>308</sup> thus transcending the circumstances of the Israeli-Palestinian dispute. In the absence of a link between the position of uninvolved states and a substantive rule of customary international law

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304. *Legal Status of Eastern Greenland* (Den. v. Nor.), 1933 P.C.I.J. (ser. A/B) No. 53 (Sept. 5), at 45-46.

305. *Id.* at 51-52, 54-60. *See also* JENNINGS, *supra* note 303, at 38 (“One need look no further than the *Eastern Greenland* case to see both the anxiety of Denmark to collect recognitions from third States of her pretensions over Greenland, and the importance which the Court was willing to attach to them.”).

306. *Den. v. Nor.*, 1933 P.C.I.J. (ser. A/B) No. 53 at 63.

307. *Id.*

308. Customary international law arises from “a general and consistent practice of states followed by them from a sense of legal obligation.” *RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES* § 102(2) (AM. LAW INST. 1987).

that is applicable to this territorial dispute, the former cannot be *evidence* of title to territory.

It is necessary to examine, however, whether international recognition of title to territory may also have a *constitutive* effect, recognition being “itself a root of title or at least an ingredient in a root of title and not merely evidence.”<sup>309</sup> This inquiry raises two questions. First, is there a rule of *customary international law*, either overriding or supplementing the tripartite rule, which grants the international community, acting through United Nations organs or otherwise, the power to determine title to territory? Second, does the UN Charter vest either the General Assembly or the Security Council with such power?

*B. The Constitutive Consequences of International Recognition of Title to Territory*

1. The Significance Under Customary International Law of International Recognition of Title to Territory

International recognition may facilitate the acquisition of territory by a state through possession. If part of the territory possessed by an emerging state is claimed by another state, “a sufficient number of recognitions of the new State clearly implying recognition of its title to the disputed territory would presumably destroy the claim [of the other state],” resolving the territorial dispute in favor of the new state.<sup>310</sup>

International recognition has a more limited role when it comes to the acquisition by an existing state of part of the territory of another state through prescription. Prescription flows from possession of the territory in question (i.e., the exercise of effective control over the territory), manifested in continuous display of territorial sovereignty, with the acquiescence of the original, dispossessed sovereign.<sup>311</sup> Generally, “where the possession of the territory is accompanied by emphatic protests on the part of the former sovereign, no title by prescription can arise, for such title is founded upon the acquiescence of the dispossessed state, and in such circumstances consent by third states is of little consequence.”<sup>312</sup> Yet, there is some support for the view that recognition by a *large number* of uninvolved states of the

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309. JENNINGS, *supra* note 303, at 38 (exploring this question).

310. JENNINGS, *supra* note 303, at 38.

311. *See supra* notes 87-88 and accompanying text.

312. SHAW, *INTERNATIONAL LAW*, *supra* note 71, at 373.

sovereignty of the possessing state may substitute for the requirement of acquiescence by the dispossessed sovereign and thereby consolidate the transfer of title through prescription over the objection of the latter.<sup>313</sup> In other words, recognition by a large segment of the international community “may possibly validate an unlawful acquisition of territory.”<sup>314</sup>

International recognition, however, may contribute to the consolidation of title to territory only when it augments existing possession. Robert Jennings observed:

It must be emphasized . . . that it is only in a context of effective possession that recognition of a situation by third States can be a mode of consolidation of title. It may, so to speak, assist and accelerate a process for which the condition *sine qua non* is an existing effective possession; there is no evidence from practice to suggest that recognition by third States can by itself operate to create a title to territory not in possession.<sup>315</sup>

ICJ jurisprudence on the resolution of border disputes has not resorted to the position of the international community either to supplement the tripartite rule or to deviate from it.<sup>316</sup> More important, state practice does not sufficiently support a rule of customary international law that grants the international community broad powers of territorial disposition. Rejecting the view that the international community may, by way of a General Assembly resolution, determine the territory of states, Kontorovich noted that “General Assembly votes on membership of new states in the Organization never express a view on their borders, even when these are in substantial dispute.”<sup>317</sup>

In 1977, the General Assembly pronounced on the question whether the Walvis Bay is a part of South Africa or of Namibia.<sup>318</sup> A General Assembly resolution declared that “Walvis Bay is an integral

313. SHAW, *INTERNATIONAL LAW*, *supra* note 71, at 376; Cassese, *Legal Considerations on the International Status of Jerusalem*, *supra* note 269, at 31 (noting that title to territory may not be transferred through the use of force “until such time as the overwhelming majority of states (or the competent organs of the United Nations) decide legally to recognize the change of status of the territory.”).

314. SHAW, *INTERNATIONAL LAW*, *supra* note 71, at 376.

315. JENNINGS, *supra* note 303, at 40-41.

316. *See generally*, Sumner, *supra* note 1, at 1792-1809 (reviewing ICJ adjudication of border disputes).

317. Kontorovich, *supra* note 3, at 987 (concluding that “determining the territory of states goes beyond any recognized powers of the General Assembly”).

318. G.A. Res. 32/9 (D), ¶¶ 7-8 (Nov. 4, 1977).

part of Namibia<sup>319</sup> and condemned South Africa “for the decision to annex Walvis Bay, thereby attempting to undermine the territorial integrity and unity of Namibia.”<sup>320</sup> Subsequently, the Security Council adopted Resolution 432, taking note of the position pronounced by the General Assembly<sup>321</sup> and declaring that “the territorial integrity and unity of Namibia must be assured through the reintegration of Walvis Bay within its territory.”<sup>322</sup> The language of the Resolution, which considers the reintegration of Walvis Bay within Namibia necessary for maintaining the territorial integrity of Namibia, could be read as a recognition by the Security Council of a Namibian legal entitlement to Walvis Bay, possibly in reliance on the position of the General Assembly. A joint statement by the five Western members of the Security Council, upon adoption of Resolution 432, however, suggests otherwise.<sup>323</sup> Delivered by Cyrus Vance, the US Secretary of State, the statement clarifies that the Resolution does not discuss the legal status of the Walvis Bay<sup>324</sup> and “does not prejudice the legal position of any Party.”<sup>325</sup> Rather, the Western members of the Council allowed the adoption of the Resolution in view of “arguments of a geographic, political, social cultural, and administrative nature which support the union of Walvis Bay with Namibia.”<sup>326</sup> The position of the Western members of the Security Council also implies that they did not view the stance taken by the General Assembly as having legal consequences with regard to the status of Walvis Bay.<sup>327</sup>

Examining the legal effect of acts of collective recognition of title to territory, carried out by the international community without the consent of an affected party, James Crawford maintained that “[i]t cannot be expected . . . that collective recognition will play a major or predominant role in matters of territorial status.”<sup>328</sup> This conclusion extends to territorial dispositions by multilateral treaty. A survey by Crawford of the prevalent international practice of determining title to

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319. *Id.* ¶ 7.

320. *Id.* ¶ 8.

321. S.C. Res. 432, pmb. (Jul. 27, 1978).

322. *Id.* ¶ 1.

323. *United Nations Security Council: Resolutions and Statements on Namibian Independence*, 17 I.L.M. 1305, 1307 (1978).

324. *Id.* at 1307.

325. *Id.* at 1308.

326. *Id.*

327. *Id.* at 1307 (stating that “the question of Walvis Bay would have to be the subject of negotiations between the Parties concerned”).

328. CRAWFORD, *supra* note 6, at 540.



territory by multilateral treaty suggests that such dispositions were generally carried out with the consent of the affected parties.<sup>329</sup> Crawford identified only two exceptions in the past two centuries, both concerning the territorial dispute between Romania and Russia regarding sovereignty over Bessarabia, in which a multilateral treaty transferred title to territory without the consent of an affected state,<sup>330</sup> and concluded that such dispositions “were probably unlawful.”<sup>331</sup>

Antonio Cassese cites statements made by Israeli officials in support of the assertion that Israel implicitly undertook to grant the United Nations a limited oversight role with regard to any future settlement of the question of Jerusalem.<sup>332</sup> According to this view, “the Israeli statements precluded Israel from making any decision on the status of Jerusalem without the approval of the United Nations,” requiring that any future agreement between Israel, Jordan, and the Palestinians on the status of Jerusalem receive UN approval as a condition of its lawfulness.<sup>333</sup> Cassese does not argue, however, that Israeli statements recognized any positive UN powers to determine title to any part of Jerusalem. To the extent that Israeli statements confer upon the United Nations any powers of disposition regarding Jerusalem, those are confined to a passive role of merely approving an agreement reached by the parties to the territorial dispute.<sup>334</sup> Cassese recognized that “[u]nder international law a definitive settlement can only be achieved by dint of agreement between the parties concerned and subject to the consent of the United Nations.”<sup>335</sup> Cassese thus acknowledged that any powers of territorial disposition the international community has, do not exceed those that were vested in it by the consent of the affected parties.

In conclusion, under customary international law, broad international recognition of title to territory may confer such title on a party to a territorial dispute, over the objection of the other party, only

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329. CRAWFORD, *supra* note 6, at 505-35.

330. CRAWFORD, *supra* note 6, at 509, 513, 517-18.

331. CRAWFORD, *supra* note 6, at 535.

332. Cassese, *Legal Considerations on the International Status of Jerusalem*, *supra* note 269, at 18-20.

333. Cassese, *Legal Considerations on the International Status of Jerusalem*, *supra* note 269, at 21.

334. Cassese, *Legal Considerations on the International Status of Jerusalem*, *supra* note 269, at 20.

335. Cassese, *Legal Considerations on the International Status of Jerusalem*, *supra* note 269, at 37.

if the former is in possession of the territory. Therefore, broad international recognition of Palestinian title to territories occupied by Israel would not grant the Palestinians such title, because the Palestinians are not in possession of these territories. A convergence of Israeli possession of the occupied West Bank and a broad international recognition of Israeli title to this territory could, in theory, yield Israeli title to the territory, but such international recognition is not forthcoming.

## 2. The Powers of Territorial Disposition Granted to the General Assembly and to the Security Council under the UN Charter

The international forum that is best suited to reflect a consensus or near-consensus within the international community is the UN General Assembly. The General Assembly may resolve a territorial dispute provided that all states that are parties to the dispute empowered the General Assembly to do so.<sup>336</sup> The General Assembly and its predecessor, the League of Nations, have also been granted powers of territorial disposition with regard to territories administered under the Mandates System established by Article 22 of the Covenant of the League of Nations, which was subsequently replaced by the International Trusteeship System, established under the UN Charter.<sup>337</sup> The UN Charter, however, does not support a broader authority of the General Assembly to determine title to territory, because the powers it grants to the General Assembly are generally “recommendatory and

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336. CRAWFORD, *supra* note 6, at 546 (“Just as a State may delegate to a group of States the authority to dispose of its territory, so it may delegate such authority to an international organization.”); CRAWFORD, *supra* note 6, at 551-52 (noting that “it is not necessarily contrary to [the UN General Assembly’s] ‘constitutional structure’ for such powers [of territorial disposition] to be conferred on it.”).

337. League of Nations Covenant art. 22; U.N. Charter chs. XII, XIII. There are currently no territories administered under the Trusteeship system. CRAWFORD, *supra* note 6, at 567. James Crawford has noted:

The novelty of the Mandate (and Trusteeship) systems was the extent of international supervision and control over the Mandatory, and in particular over the ultimate disposition of the territory . . . The crux of the non-sovereign position of the Mandatory or Administering Authority was that it could not unilaterally determine the status of the territory. That required international action, normally exercised through the competent League or United Nations body.

CRAWFORD, *supra* note 6, at 573.

advisory only,”<sup>338</sup> not extending to the adoption of resolutions that are legally binding on states.<sup>339</sup>

The UN Charter assigns “primary responsibility for the maintenance of international peace and security” to the Security Council.<sup>340</sup> To enable the Security Council to carry out this responsibility, the Charter vests in the Council, acting under Chapter VII of the Charter, the power to issue resolutions that are legally binding on all states, and to take the necessary measures to compel states to abide by their legal obligations under such resolutions.<sup>341</sup> The Security Council can exercise Chapter VII powers only after having determined, pursuant to Article 39 of the Charter, the existence of a threat to international peace and security, breach of the peace, or act of aggression.<sup>342</sup> The legal limitations on the powers granted to the Security Council under Chapter VII of the Charter are unclear,<sup>343</sup> but it is widely agreed that those powers are immensely broad.<sup>344</sup>

It may be argued that the authority of the Security Council to respond to threats to international peace and security does not extend to determining territorial rights. According to ICJ Judge Gerald Fitzmaurice:

Even when acting under Chapter VII of the Charter itself, the Security Council has no power to abrogate or alter territorial rights, whether of sovereignty or administration . . . It was to keep

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338. CRAWFORD, *supra* note 6, at 551.

339. Voting Procedure on Questions relating to Reports and Petitions Concerning the Territory of South-West Africa, Advisory Opinion, 1955 I.C.J. Rep. 67, 115 (June 7) (stating that, generally, UN General Assembly resolutions “are not legally binding upon the Members of the United Nations . . . and are in the nature of recommendations”); Stephen M. Schwebel, *The Effect of Resolutions of the U.N. General Assembly on Customary International Law*, 73 ASIL PROCEEDINGS 301 (1979) (observing that “the General Assembly of the United Nations lacks legislative powers. Its resolutions are not, generally speaking, binding on the States Members of the United Nations or binding in international law at large”).

340. U.N. Charter art. 24.

341. U.N. Charter arts. 25, 39, 41-42.

342. U.N. Charter art. 39.

343. For an extensive review of the legal literature and of the jurisprudence of international tribunals addressing the legal limitations on Security Council powers, see Joy Gordon, *The Sword of Damocles: Revisiting the Question of Whether the United Nations Security Council is Bound by International Law*, 12 CHI. J. INT’L L. 605 (2012).

344. Ian Johnstone, *Legislation and Adjudication in the UN Security Council: Bringing Down the Deliberative Deficit*, 102 AM. J. INT’L L. 275, 299 (2008) (“Articles 24 and 25 [of the UN Charter], and Chapter VII confer broad authority on the Council to take whatever measures it deems necessary to maintain and restore international peace and security.”); CRAWFORD, *supra* note 6, at 552 (arguing that the powers of the Security Council under Chapter VII “would seem to be limited only by the discretion, and the voting procedure, of the Council.”).

the peace, not to change the world order, that the Security Council was set up.<sup>345</sup>

There is some support, however, for the view that “the UN Security Council . . . could adopt a binding resolution ending a territorial dispute by determining the boundary in question.”<sup>346</sup> This broad interpretation of Security Council authority has been justified on grounds that “the determination of a boundary is a means to maintain international peace and security.”<sup>347</sup> Security Council practice supporting this view is scarce.<sup>348</sup>

Although it is unclear whether a Security Council resolution may directly determine the boundaries of Palestinian territorial entitlement, there is little doubt that the Council may do so indirectly. A resolution requiring Israel to withdraw its military from all of the West Bank or from parts thereof would be well within Security Council powers.<sup>349</sup> Compliance by Israel with its obligation to abide by such resolution would presumably result in the possession by a Palestinian state of the territory evacuated by the Israeli military. Palestinian possession of the territory, together with international recognition of Palestinian title, would evolve into Palestinian sovereignty.

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345. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Afr.) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. Rep. 16, 294 (June 21) (separate opinion of Fitzmaurice, J.).

346. SHAW, INTERNATIONAL LAW, *supra* note 71, at 376. *See also* CRAWFORD, *supra* note 6, at 552 (submitting that the Security Council would be competent to require the consent of a state to the transfer of parts of its territory to another state “if such transfer was regarded as necessary to ‘maintain or restore international peace and security’”); Peters, *supra* note 5, at 130-31 (arguing that the revision by a Security Council resolution of boundaries established on the basis of *uti possidetis* “would seem to fall within the Council’s general mandate”).

347. Peters, *supra* note 5, at 131. Peters notes, however, that “[t]he problem with such a procedure is that it has the taste of a dictate of the Great Powers, which is charged with negative historical connotations.” Peters, *supra* note 5, at 131.

348. In the wake of the First Gulf War, the Security Council adopted Resolution 687, demanding, among others, that Iraq and Kuwait respect the inviolability of the international border previously established by a treaty between the two states. *See* S.C. Res. 687, ¶¶ 2, 4 (Apr. 3, 1991). Malcolm Shaw cites this Resolution in support of the view that the Security Council is authorized to determine an international boundary. *See* SHAW, INTERNATIONAL LAW, *supra* note 71, at 376 n.198. It seems, however, that Resolution 687 protected the inviolability of an already established border, rather than having a constitutive function of determining the border.

349. The authority of the Security Council to require a state to withdraw its military from a particular territory is not limited to territory occupied by that state, and extends to the state’s own territory. *See, e.g.*, S.C. Res. 1244, ¶ 3 (June 10, 1999) (demanding “that the Federal Republic of Yugoslavia . . . begin and complete verifiable phased withdrawal from Kosovo of all military, police and paramilitary forces according to a rapid timetable”).

In the wake of the 1967 war, the Security Council adopted Resolution 242 on the situation in the Middle East.<sup>350</sup> Article 1 of the Resolution states that the Council:

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

- (i) Withdrawal of Israel armed forces from territories occupied in the recent conflict;
- (ii) Termination of all claims or states of belligerency and respect for and 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 recognized boundaries free from threats or acts of force.<sup>351</sup>

By itself, Resolution 242 is a mere recommendation, as it was adopted under Chapter VI of the UN Charter, which concerns the exercise by the Council of its non-binding powers.<sup>352</sup> This conclusion also emanates from the language of the Resolution, which envisions a negotiated agreement between Israel and its neighbors regarding the application of the general principles stated in the Resolution.<sup>353</sup> Both Israel and the Palestinians have declared their acceptance of the Resolution.<sup>354</sup> It has been noted that this acceptance “constituted a commitment to negotiate in good faith.”<sup>355</sup> But because the Resolution contained only guidelines for a negotiated settlement, “the acceptance of the document did not commit the parties to a specific outcome.”<sup>356</sup>

More important, the Resolution is notoriously ambiguous on whether it calls for an Israeli withdrawal from *some* of the territories occupied since 1967 or from *all* of these territories,<sup>357</sup> and the

350. S.C. Res. 242 (Nov. 22, 1967).

351. *Id.* at ¶ 1.

352. Ruth Lapidoth, *Security Council Resolution 242 at Twenty Five*, 26 *ISR. L. REV.* 295, 299 (1992) (observing that “the Resolution was a mere recommendation, since in the debate that preceded its adoption the delegates stressed that they were acting under Chapter VI of the Charter”).

353. *Id.* at 300 (“The contents of the Resolution also indicate that it was a recommendation, for the majority of its stipulations constitute a framework, a list of general principles which can become operative only after detailed and specific measures have been agreed upon . . .”).

354. *Id.*

355. *Id.*

356. *Id.*

357. Arthur J. Goldberg, *United Nations Security Council Resolution 242 and the Prospects for Peace in the Middle East*, 12 *COLUM. J. TRANSNAT’L L.* 187, 190-91 (1973).

acceptance by Israel of the Resolution is clearly premised on the view that the Resolution “calls upon the parties to negotiate and reach agreement on withdrawal and agreed boundaries, without indicating the extent and the location of the recommended withdrawal.”<sup>358</sup> Former US Supreme Court Justice, Arthur Goldberg, opined that “the withdrawal language of the Resolution would seem to indicate that its patent ambiguities and the differing interpretations of the parties can only be resolved after negotiations of one kind or another between the parties.”<sup>359</sup> In view of the ambiguity of the withdrawal provision of Resolution 242, the recommendatory nature of the Resolution upon its adoption by the Security Council, and the interpretation that underlies Israel’s acceptance of the Resolution, it seems that Resolution 242 does not impose on Israel a legal obligation that would resolve the territorial dispute between Israel and the Palestinians.

Similarly, Security Council Resolution 2334, which seems to recognize a Palestinian legal entitlement to the entire West Bank,<sup>360</sup> does not involve the exercise by the Security Council of its binding powers under Chapter VII of the UN Charter, which could have made the Resolution constitutive of such territorial entitlement.

*VIII. THE LEGAL CONSEQUENCES OF THE ABSENCE OF A  
LEGAL PRINCIPLE GOVERNING THE TERRITORIAL DISPUTE  
BETWEEN ISRAEL AND THE PALESTINIANS*

The preceding discussion suggests that there are large parts of the occupied West Bank to which no party to the Israeli-Palestinian dispute holds title. This Part argues that the absence of a sovereign over large parts of the West Bank allows Israel to prolong its occupation of these territories, and brings the Israeli political claim to sovereignty over some of the West Bank within the sphere of interests that Israel may legitimately promote in negotiating the end of occupation.

Any inquiry into the extent of an occupant’s liberty to prolong the occupation or into the range of interests that an occupant may legitimately promote in negotiating the end of occupation is inherently confined to occupations resulting from the lawful use of force (“lawfully created occupation”). Occupations emanating from an unlawful use of force on the part of the occupant represent a continuing

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358. Lapidoth, *supra* note 352, at 311.

359. Goldberg, *supra* note 357, at 191.

360. S.C. Res. 2334, *supra* note 54; *see also supra* notes 299-302 and accompanying text.

violation of the international prohibition against the use of force.<sup>361</sup> Because customary international law recognizes no exception to the obligation of states to cease an internationally wrongful conduct,<sup>362</sup> such occupation must be terminated unconditionally.<sup>363</sup> Examining whether Israel may prolong the occupation and leverage it to advance a claim to some of the occupied territories, this Article follows the prevailing view in the legal literature, which holds that this occupation resulted from the lawful use of force in self-defense on the part of Israel.<sup>364</sup>

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361. An amendment to the Rome Statute of the International Criminal Court, adopted by consensus in 2010, provides that one of the acts that qualify as an “act of aggression” is “the invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack.” See Review Conference of the Rome Statute Res. RC/Res.6, Amendments on the Crime of Aggression to the Rome Statute of the International Criminal Court (June 11, 2010). Similarly, The Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States, adopted by consensus by the UN General Assembly, states that “the territory of a State shall not be the object of military occupation resulting from the use of force in contravention of the provisions of the Charter.” See Declaration on Principles of International Law, *supra* note 170, princ. 1(10). The ICJ held that this General Assembly resolution is indicative of customary international law. See *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶¶ 188, 191 (June 27).

362. Oliver Corten, *The Obligation of Cessation*, in *THE LAW OF INTERNATIONAL RESPONSIBILITY* 545, 548 (James Crawford, Alain Pellet & Simon Olleson eds., 2010) (“In law, a State must and can always put an end to a continuing breach”); Rep. of the Inter’l Law Comm’n, Draft Articles on Responsibility of States for Internationally Wrongful Acts, at 88-89, U.N. Doc. A/56/10 (2001), available at [http://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf) [<https://perma.cc/7XWX-LDLC>].

363. Yael Ronen, *Illegal Occupation and its Consequences*, 41 *ISR. L. REV.* 201, 228 (2008) (noting that “an illegal occupation must, under the general laws of state responsibility, be terminated immediately and without prior negotiations”).

364. See, e.g., YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENSE* 206-207 (2011); THOMAS M. FRANCK, *RECOURSE TO FORCE* 105 (2002); CASSESE, *SELF-DETERMINATION OF PEOPLES*, *supra* note 80, at 131 (noting that the use of force by Israel in 1967, resulting in the occupation of the West Bank, did not violate the prohibition against the use of force contained in the UN Charter, since Israel “acted under Article 51 [of the Charter], that is, in self-defence”); GEOFFREY R. WATSON, *THE OSLO ACCORDS: INTERNATIONAL LAW AND THE ISRAELI-PALESTINIAN PEACE AGREEMENTS* 30 (2000); GEORGE P. FLETCHER, *A CRIME OF SELF-DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL* 20-21 (1988); Michael P. Scharf, *Clear and Present Danger: Enforcing the International Ban on Biological and Chemical Weapons Through Sanctions, Use of Force, and Criminalization*, 20 *MICH. J. INT’L L.* 477, 491-92 (1999) (“The United Nations appeared to recognize the right of anticipatory self-defense when Israel launched a preemptory airstrike against Egypt, precipitating the 1967 ‘Six Day War.’ Many countries supported Israel’s right to conduct defensive strikes prior to armed attack and draft resolutions condemning the Israeli action were soundly defeated in the Security Council and the General Assembly.”). *But see*, John Quigley, *The Oslo Accords: International Law and the Israeli-Palestinian Peace Agreement*, 25 *SUFFOLK TRANSNAT’L L. REV.* 73, 81 (2001) (“Israel’s claim of self-defense in the 1967 war is factually implausible”).

Commentators have argued that even in the case of a lawfully created occupation, an occupant may not attempt to perpetuate the occupation or advance a claim to parts of the occupied territory in the course of negotiations for a peaceful solution ending the occupation. Eyal Benvenisti explained:

The occupant has a duty under international law to conduct negotiations in good faith for a peaceful solution. It would seem that an occupant which proposes unreasonable conditions, or otherwise obstructs negotiations for peace for the purpose of retaining control over the occupied territory, could be considered a violator of international law.<sup>365</sup>

It has been argued that this violation of international law concerns the prohibition on the use of force.<sup>366</sup> According to this view, international law allows a state to occupy foreign territory as an extension of the self-defense exception to the prohibition on the use of force.<sup>367</sup> Hence, “the subjection of the right to self-defense to the necessity requirement . . . could imply that the occupation becomes an act of aggression when it no longer serves the initial purpose of defending against the aggressor who has been defeated.”<sup>368</sup> Other commentators submitted that attempts on the part of an occupant to perpetuate the occupation would amount to a violation of the right to self-determination.<sup>369</sup>

Yet the proposed limits on the liberty of an occupant to prolong the occupation, whether viewed as an extension of the prohibition on the use of force or as a manifestation of the right to self-determination, concern the protection of sovereignty, whether sovereignty vested in a state or in a people.<sup>370</sup> The connection between the prohibition on the

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365. BENVENISTI, *supra* note 41, at 245.

366. BENVENISTI, *supra* note 41, at 349 (proposing to “view the continued rule of the recalcitrant occupant as an aggression”).

367. BENVENISTI, *supra* note 41, at 17.

368. BENVENISTI, *supra* note 41, at 17.

369. CASSESE, SELF-DETERMINATION OF PEOPLES, *supra* note 80, at 55, 99; Ben-Naftali, Gross & Michaeli, *supra* note 291, at 553-56, 592, 597-600 (inferring from the right to self-determination and from the principle regarding the inalienability of sovereignty through actual or threatened use of force a “reasonable time” limit on the duration of occupation.).

370. Ronen, *Illegal Occupation and its Consequences*, *supra* note 363, at 208 (noting that the purpose of the principles of international law supporting a time limit on the duration of occupation “is to safeguard the sovereignty of the ousted or prospective sovereign, or, in modern-day parlance, the right to self-determination of the local population.”); Ben-Naftali, Gross & Michaeli, *supra* note 291, at 554 (linking the limits on the legality of occupation to the notion that “sovereignty is vested in the population under occupation” and to the principle of the



use of force and the requirements of the right to self-determination on one hand, and an occupant's efforts to prolong the occupation on the other, which turns on the disruption of sovereignty, is severed when it is not possible to identify a sovereign. Put differently, the rationale for limiting the permissibility of a lawfully created occupation concerns the challenge that occupation presents to the international order "by severing the link between sovereignty and effective control in the occupied territory."<sup>371</sup> This rationale is negated in the absence of any party holding title to the territory in question under the norms of territory acquisition and border demarcation. The preceding discussion demonstrated that the right to self-determination does not grant the Palestinians title over most of the occupied territory.<sup>372</sup> If the right to self-determination does not grant a party to a territorial dispute *title* to the territory in question, it is difficult to see how it grants that party a right of *possession* over the territory.

The absence of Palestinian title over significant parts of the occupied West Bank thus leaves Israel free to prolong their occupation and leverage its possession of the territory to advance a *political* claim for parts of the territory in the course of negotiations for a peaceful solution that would terminate the occupation. Israel may agree to recognize Palestinian sovereignty over certain parts of the occupied territories, to which neither Israel nor the Palestinians currently hold title, terminating their occupation in exchange for Palestinian recognition of Israeli sovereignty over other such parts.

Although the right to self-determination does not support a Palestinian legal claim to sovereignty over much of the occupied territories, or possession thereof, the holding of the ICJ in the Wall

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inalienability of sovereignty, which precludes transfer of sovereignty from the population of the occupied territory to the occupant). The Rome Statute of the International Criminal Court terms a violation by a state of the prohibition on the use of force an "act of aggression." Rome Statute of the International Criminal Court art. 8bis, Jul. 17, 1998, U.N. Doc. A/CONF.183/9. The Statute then proceeds to elaborate on the types of conduct that would qualify as an act of aggression. As far as a lawfully created occupation is concerned, the only conduct by an occupant described as amounting to an act of aggression is "any annexation by the use of force of the territory of another State or part thereof." *Id.*, art. 8bis(2)(a). It was argued that refusal by an occupant to negotiate withdrawal from the occupied territory may amount to de facto annexation and thus fall within the definition of an act of aggression. See BENVENISTI, *supra* note 41, at 340. Yet the requirement that the annexation apply to "the territory of another State or part thereof" demonstrates that the inclusion of annexation within the definition of aggression aims to protect existing sovereignty.

371. Ben-Naftali, Gross & Michaeli, *supra* note 291, at 554.

372. See discussion *infra* Part V.

Advisory Opinion suggests that this right provides partial, negative protection for the Palestinian *political* claim for sovereignty over the territory.<sup>373</sup> The right of the Palestinian people to self-determination precludes any measure taken by Israel that would prejudge the future frontier between Israel and the Palestinians and that is contrary to Palestinian self-determination interests, before an agreement has been reached between Israel and the Palestinians resolving the territorial dispute.<sup>374</sup> Such prohibited measures include both domestic legal ones, amounting to the annexation of occupied territory by Israel, and actions advancing the *de facto* integration of occupied territory into Israel, such as the establishment of Israeli settlements, the construction of the wall addressed in the Wall Advisory Opinion, and similar measures.<sup>375</sup> Furthermore, measures promoting the integration of parts of the occupied West Bank into Israel typically amount to violations of rules of international humanitarian law.<sup>376</sup>

#### IX. CONCLUSION

International law is silent on the question of sovereignty over much of the territories occupied by Israel. The normative sway of the tripartite rule does not cover the circumstances of the territorial dispute between Israel and the Palestinians. Although the principle of self-determination supports a Palestinian right to statehood, its purview does not extend to the demarcation of the Palestinian territorial entitlement. The bulk of the international community recognizes a Palestinian entitlement to the whole of the West Bank, but because of the lack of Palestinian possession of this territory—a corollary of the status of the West Bank as an occupied territory—such international recognition carries no constitutive effect.

The absence of any international norm that either determines the scope of Palestinian territorial entitlement or authorizes the international community to do so leaves Israel free to prolong its

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373. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136 (July 9).

374. *Id.* at 182-84, ¶¶ 118-22.

375. *Id.* at 182-84, ¶¶ 118-22; 166-67, ¶ 75.

376. The main manifestation of a policy of *de facto* annexation, the establishment of settlements by the occupant within the occupied territory, constitutes violation of international humanitarian law. *Id.* at 183-84, ¶ 120. *See also* Ben-Naftali, Gross & Michaeli, *supra* note 291, at 579-92, 601-06 (reviewing violations of international humanitarian law on the part of Israel that amount to *de facto* annexation of the occupied West Bank).

occupation of the West Bank and leverage it to advance territorial claims in peace negotiations with the Palestinians. At the same time, both the right of the Palestinian people to self-determination and the norms of international humanitarian law prohibit Israel from taking measures that would prejudge the future status of the West Bank before an agreement is reached between Israel and the Palestinians resolving the territorial dispute.