

Revisiting the ‘Recognition’ of the Palestinians’ Right to Self-Determination: Peoples as Territories

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Abstract

‘[B]ehind every Palestinian there is a great general fact: that he once – and not so long ago – lived in a land of his own called Palestine, which is now no longer his homeland.’¹

The question of whether the Palestinian people, as a people, are entitled to exercise the right to external self-determination has been highly controversial over the years. Divided scholarly research, particularly regarding the attitude of the State of Israel which, at time of writing, has not yet explicitly recognized the Palestinian peoples’ right to emerge as an independent State, serves as evidence to this claim. In 2004, the ICJ in the *Wall* Advisory Opinion observed that the Palestinians’ right to self-determination is *no longer in issue*. This observation serves as the benchmark for this paper to revisit the identification of a people under international law. This paper critically examines whether constitutive and declaratory theories of recognition in statehood can assist in understanding the concept of a people in the law of self-determination. While concluding that neither theory of recognition is satisfactory, this paper argues that application of the right to self-determination, within and beyond the colonial context, is inevitably linked to the territory peoples inhabit. Although the relationship between peoples and territories should come as no surprise, the key element in determining a people is not based on the people but on the status of the territory they inhabit.

1. Introduction

The issue of the statehood of Palestine is remarkably entrenched in the scope of the right to self-determination.² The question of whether the Palestinian people, as a people, are entitled to exercise the right to external self-determination has been highly controversial

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¹ Edward W Said, *The Question of Palestine* (Times Books 1979) 115.

² The Palestinian claim to statehood is primarily based on the right to self-determination. See United Nations, ‘Agenda Item 37: Question of Palestine’ (18 November 1988) UN Doc A/43/827-S/20278 Annex III, Political Communiqué and Declaration of Independence <unispal.un.org/DPA/DPR/unispal.nsf/0/6EB54A389E2DA6C6852560DE0070E392> accessed November 2019.

over the past years. Divided scholarly research,³ particularly regarding the attitude of the State of Israel which, at time of writing, has not yet recognized the Palestinians' right to emerge as an independent and sovereign State in the land of Palestine,⁴ serves as evidence to this claim. On 9 July 2004, the International Court of Justice (ICJ) in its Advisory Opinion concerning the *Legal Construction of a Wall in the Occupied Palestinian Territory, including in and around East Jerusalem (Wall Opinion)*⁵ explicitly reaffirmed this right of the Palestinian people, as a collective people. The Court observed the following:

As regards the principle of the right of peoples to self-determination, the Court observes that the existence of a 'Palestinian people' is *no longer in issue*. Such existence *has moreover been recognized by Israel* in the exchange of letters of 9 September 1993 between Mr Yasser Arafat, President of the Palestine Liberation Organization (PLO) and Mr Yitzhak Rabin, Israeli Prime Minister. In that correspondence, the President of the PLO recognized 'the right of the State of Israel to exist in peace and security' and made various other commitments. In reply, the Israeli Prime Minister informed him that, in the light of those commitments, 'the Government of Israel has decided to recognize the PLO as the representative of the Palestinian people'. The Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip of 28 September 1995 also refers a number of times to the Palestinian people and its 'legitimate rights' (Preamble, paras. 4, 7, 8; Article II, para. 2; Article III, paras. 1 and 3; Article XXII, para. 2). The Court considers that those rights include the right to self-determination, as the General Assembly *has moreover recognized on a number of occasions* (see, for example, resolution 58/163 of 22 December 2003).⁶

Prudent reading of the foregoing observation reveals that the Court wanted to secure that 'everyone' had recognized and agreed on the idea that the Palestinian people are a people legally entitled to self-determination under international law. The designation 'everyone'

³ For those who observe that Palestinians are entitled to the right to self-determination, see John A Collins, 'Self-Determination in International Law: The Palestinians' (1980) 12(1) *Case Western Reserve Journal of International Law* 137; Omar M Dajani, 'Stalled Between Seasons: The International Legal Status of Palestine During the Interim Period' (1997) 26(1) *Denver Journal of International Law and Policy* 33; John Quigley, 'Palestine Declaration of Independence: Self-Determination and the Right of the Palestinians to Statehood' (1989) 7 *Boston University International Law Journal* 1; for the contrary observation, see Marilyn J Berliner, 'Palestinian Arab Self-Determination and Israeli Settlements on the West Bank: An Analysis of Their Legality Under International Law' (1986) 8(3) *Loyola of Los Angeles International and Comparative Law Review* 551; Ilan Dunsky, 'Israel, The Arabs, and International Law: Whose Palestine Is It, Anyway?' (1993) 2 *Dalhousie Journal of Legal Studies* 163; Tal Becker, 'Self-Determination in Perspective: Palestinian Claims to Statehood and the Reality of the Right to Self-Determination' (1998) 32(2) *Israel Law Review* 301.

⁴ For the position of the Israeli government see eg Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Hersch Lauterpacht Memorial Lectures 1995) 235; Henry Siegman, 'The Ultimate Deal: Henry Siegman on the Two-State Solution' (*London Review of Books*, 30 March 2017) <lrb.co.uk/v39/n07/henry-siegman/the-ultimate-deal> accessed 23 December 2019; according to Siegman, Netanyahu's government (2009 until present) 'has never recognised the Palestinian right to national self-determination and statehood in any part of Palestine'; see also E Fiedman, 'Israel has yet to recognize the Palestinian People' (*972 Magazine*, 14 November 2016) <972mag.com/israel-has-yet-to-recognize-the-palestinian-people/123152/> accessed 23 December 2019.

⁵ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Wall Opinion)* (Advisory Opinion) 2004 <icj-cij.org/files/case-related/131/131-20040709-ADV-01-00-EN.pdf> accessed 23 December 2019; The General Assembly of the United Nations (UNGA) requested the International Court of Justice (ICJ) to give an Advisory Opinion on the following question: 'What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the Report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions' UN General Assembly Resolution ES-10/14 (8 December 2013) UN Doc A/RES/10/14.

⁶ *Wall Opinion* (n 5) [118] (emphasis added).

in this context seems to include both the international community (UN)⁷ and the State of Israel. At first, this observation may appear to be clear with no further complications; however, it raises a fundamental question in the law of self-determination: why did the Court seek Israeli recognition in order to settle the issue of the Palestinian peoplehood? A plausible explanation for this is that the existence of a people within the framework of international law, especially within the context of self-determination, is a matter of recognition. If this is the case, the observation of the Court leads this paper to engage with the popular debate on the two traditional theories of recognition in statehood (the constitutive and declaratory theories) regarding the application of the right to self-determination. In this vein, there are two contiguous principle questions that must be raised: is identifying a people in the legal sense for the purpose of self-determination considered a matter of recognition (the constitutive theory of recognition)? If the answer to the first question is in the negative, how should international law determine that a certain group becomes a people? Are there any *de facto* criteria for peoplehood (the declaratory theory of recognition)?

While concluding that neither the constitutive theory of recognition nor the declaratory theory are satisfactory when it comes to identifying a people in international law, this paper argues that the issue of identifying a people, for the purposes of according them the right to self-determination within and beyond the colonial context, is inevitably linked to the territories which peoples inhabit. Although the relationship between peoples and territories should come as no surprise, the key element in identifying a people is not based on the people but based on the status of the territory. Hence, people must inhabit a territory, in the legal sense, which falls under one of the territorial units entitled to exercise the right to self-determination. In this respect, it is important to examine which territorial units are entitled under international law to exercise this right and whether the Palestinian territory fits into one of them. This paper will then highlight a possible interpretation of the observation of the Court regarding the application of the right to self-determination and its significant consequences in legal scholarship.

A preliminary caveat is warranted regarding this article's approach to the application of the right to self-determination through the lens of the great debate of recognition in statehood. In general, recognition of a State is a term of art in international law and has certain legal consequences regarding the creation of States. One can strongly argue that, although international law does not face the great debate of recognition whenever the textual word is used in other contexts, it is nevertheless essential to demonstrate and explain the basic presumption behind these theories and the role they play in statehood in order to better understand the concept of a people in the law of self-determination. After all, one cannot easily deny that the entitlement of a people to the right to self-determination did not play a crucial role in the creation of States, particularly in decolonization area.⁸

2. The Role of Recognition in Self-Determination

In order to determine whether the existence of a people is a matter of recognition in international law, this section will provide an examination of the popular debate on the constitutive and declaratory theories of recognition in the creation of States, with regard to

⁷ See UNGA Resolution 58/163 (22 December 2003) UN Doc A/RES/58/163 in which the UNGA 'Reaffirms the right of the Palestinian people to self-determination; including the right to their independent State of Palestine.'

⁸ David Raič, *Statehood and the Law of Self-Determination* (Martinus Nijhoff 2002) 437.

the existence of a people in the law of self-determination.

1. The Constitutive Theory of Recognition in Self-Determination

In a 2013 Remark published by the American Society of International Law, Marcelo Kohen observes that ‘recognition with regard to peoples plays a constitutive role, contrary to the situation with regard to the creation of states.’⁹ This assessment implies that people can become a people for the purpose of self-determination exclusively through recognition.¹⁰ If the State of Israel has not recognized the Palestinian people as a people, which today is a highly controversial position,¹¹ does that circumscribe the Palestinian people from becoming the holders of the right to self-determination in international law?

For the time being, the constitutive theory of recognition is not the favored theory in statehood.¹² The acute problems with invoking it in regard to self-determination are identical to the old problems with invoking it in statehood which, *inter alia*, are concerned with ‘how many and whose recognitions are necessary to create the objective legal fact that a new State exists?’¹³ Hersch Lauterpacht, in support of the constitutive theory of recognition in the law of statehood, has suggested a reasonable solution:

[International] personality cannot be automatic and that as its ascertainment requires the prior determination of difficult circumstances of fact and law, there must be *someone* to perform that task. In the absence of a preferable solution, such as the setting up of an impartial international organ to perform that function, the latter must be fulfilled by State already existing. The valid objection is not against the fact of their discharging it, but against their carrying it out as a matter of arbitrary policy as distinguished from legal duty.¹⁴

Therefore, in the view of Lauterpacht, the existence of ‘an impartial international organ’ is the preferable solution for the task of States’ recognition. If international law is required to bestow such a title to *someone*, so that someone can thereby recognize a people in the legal sense, that someone should be by its nature objective, or at least possess external qualifications.¹⁵ According to Kohen, the United Nations General Assembly (UNGA) is preferred for this task.¹⁶ Following this line of thought, the UNGA’s recognition would be sufficient for the recognition of peoplehood. Why then did the Court even consider the Israeli position, which holds a political character, when the peoplehood of Palestinians has indeed been recognized by the UNGA in an enormous set of Resolutions beginning in 1969?¹⁷ Unfortunately, the text of the *Wall* Opinion did not offer any definitive answer.

⁹ Marcelo G Kohen, ‘Remarks by Marcelo G. Kohen’ (2013) 107 Proceedings of the Annual Meeting American Society of International Law 216, 218.

¹⁰ See explanation on the constitutive theory of recognition in James Crawford, *The Creation of States in International Law* (Oxford University Press 2006) 4.

¹¹ See note 4.

¹² For a better understanding of the criticisms directed toward the constitutive theory of recognition in statehood, see William Thomas Worster, ‘Law, Politics, and the Concept of the State in State Recognition Theory’ (2009) 27(1) Boston University International Law Journal 121.

¹³ Jure Vidmar, ‘Territorial Integrity and the Law of Statehood’ (2012) 44(4) The George Washington International Law Review 107.

¹⁴ Hersch Lauterpacht, *Recognition in International Law* (Cambridge University Press 1947) 55.

¹⁵ Kohen (n 9) 218.

¹⁶ *ibid.*

¹⁷ The UNGA has recognized that the Palestinians are entitled to the right of self-determination under international law. See UNGA Resolution 2535(XXIV) (10 December 1969) UN Doc A/RES/2535(XXIV); UNGA Resolution 2649(XXV) (30 November 1970) UN Doc A/RES/2649(XXV); UNGA Resolution 2672(XXV) (8 December 1970) UN Doc A/RES/2672(XXV);

However, this may be a hint that the recognition of the UNGA is not sufficient in certain cases and that the Court requires recognition by other States, ie Israel, in the case of Palestine. This assessment brings us back to the problems of the constitutive theory, which the scholar Lauterpacht tried arduously to settle, through 'imposing' an obligation or duty on existing States to confirm the existence of the newly emerging State by granting recognition.¹⁸ However, the problem with Lauterpacht's solution, in Crawford's view, is that 'State practice demonstrates neither acceptance of a duty to recognize, nor a consistent constitutive view of recognition.'¹⁹ In other words, granting recognition is not a mandatory obligation regarding statehood nor, apparently, regarding peoplehood. On the basis of these arguments, it will therefore be difficult to accept the notion that in particular cases (namely the Palestinian case) the entitlement of a people in international law is a matter of recognition. This is especially so when recognition of the right to self-determination is not mandatory in practice and the recognition of the State oppressing and preventing the people in question from exercising the right to self-determination is required.

2. The Declaratory Theory of Recognition in Self-Determination

If the identification of a people in the law of self-determination is not a matter of recognition, then how should international law determine that a certain group of people becomes the holder of the right to self-determination? Are there any *de facto* criteria for peoplehood? Unlike the constitutive theory, the declaratory theory defines an entity as a State only when the factual criteria of statehood are met.²⁰ The declaratory theory of recognition can be easily grasped from the text of Lauterpacht:

A State exists as a subject of international law -i.e. as a subject of international rights and duties- as soon as it 'exists' as a fact, i.e. as soon as it fulfills the condition of statehood as laid down in international law. Recognition merely declares the existence of that fact ... granting the premises, seems to be most logical and which is often given is that recognition is a political rather than a legal act. Others maintain that its sole legal effect is to establish ordinary diplomatic relations between the recognizing and the recognized State.²¹

The most accepted criteria of statehood are set out in the Montevideo Convention, which was concluded at the Seventh International Conference of American States in Uruguay in 1933.²² Article I of the Montevideo Convention defines a State as a person of international law that should possess the following requirements:

- a) a permanent population;
- b) a defined territory;
- c) government; and

UNGA Resolution 2787(XXVI) (6 December 1971) UN Doc A/RES/2787(XXVI); UNGA Resolution 2949(XXVII) (8 December 1972) UN Doc A/RES/8/2949(XXVII); UNGA Resolution 3236 (22 November 1974) UN Doc A/RES/3236; UNGA Resolution 3375 (11 November 1975) UN Doc A/RES/3375; UNGA Resolution 31/20 (24 November 1976) UN Doc A/RES/31/20.

¹⁸ Lauterpacht (n 14) 78.

¹⁹ Crawford (n 10) 22; see also Hans Kelsen, *General Theory of Law and State* (Transaction Publishers 1949) 223.

²⁰ John O'Brien, *International Law* (Routledge-Cavendish 2011) 172; most writers of contemporary international law consider the declaratory theory as the most accepted theory in State recognition.

²¹ Lauterpacht (n 14) 41.

²² The Montevideo Convention on Rights and Duties of States (adopted 26 December 1933, entered into force 26 December 1934) 165 LNTS 19.

d) capacity to enter into relations with other States.²³

Therefore, based on the declaratory theory, an entity will be a State only after fulfilling the traditional criteria of statehood. In the same manner, to become a people, the people in question must fulfil the factual criteria of peoplehood. What, then, are the criteria of peoplehood in international law? There is no definitive answer to this question and no indication of generally accepted criteria. This turns the quest of providing factual criteria for peoplehood into a matter of art. Jan-Francois Gareau, for example, has tried to address this puzzling inquiry through adopting the first three criteria of the Montevideo Convention. Gareau's explanation behind his approach is as follows:

...the entity aspiring to the status of 'people' must already be configured in such a manner as to allow international law to apprehend it as a potential state. Consequently, the group must exhibit at least an elementary rendition of the three requisite factual conditions that define a state, interlocked (as is the case of the state), to form an entity de facto.²⁴

The factual criteria of peoplehood in the view of Gareau are:

- (1) a coherent population;
- (2) a representative authority; and
- (3) a territorial base.²⁵

While Gareau's suggestion is reasonable, the limitation of external self-determination is a convincing reason for not considering the declaratory theory of recognition in peoplehood. If people exist as soon as they exist then this will open a dangerous door, which international law has thus far avoided through neutrality regarding the right to secession.²⁶ It is not negotiable that both Article 1 of the 1966 International Covenant on Civil and Political Rights²⁷ and paragraph 2 of UNGA Resolution 1514(XV)²⁸ have explicitly recognized that 'All peoples have the right of self-determination'. However, the practice of self-determination in the era of decolonization shows that those who had enjoyed the right to self-determination were basically 'people as a whole' who were granted this right from the beginning, ie through being a colonial people under colonial régimes.²⁹ This practice strongly illustrates that peoplehood is not self-evident.

3. Territories as the Subjects of the Right to Self-Determination

While the Court's observation in the *Wall* Opinion supports the view that the identification

²³ Montevideo Convention (n 22) art 1.

²⁴ JF Gareau, 'Shouting at the Wall: Self-Determination and the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory' (2005) 18(3) *Leiden Journal of International Law* 507.

²⁵ *ibid.*

²⁶ Theodore Christakis, 'Self-Determination, Territorial Integrity and Fait Accompli in the Case of Crimea' (2015) 75 *Heidelberg Journal of International Law* 84 in which it is stated that 'analysis of state practice and *opinio juris* shows that customary international law does not authorize secession'; Vidmar (n 13) 113 in which it is observed that 'International law has adopted a position of neutrality in regard to unilateral secession, an entity is neither prohibited from, nor entitled to.'

²⁷ International Covenant on Civil and Political Rights (adopted 19 December 1966, entered into force 23 March 1976) 999 UNTS 171 art 1(1).

²⁸ UNGA Resolution 1514(XV) (14 December 1960) UN Doc A/RES/1514(XV) para 2 (emphasis added); there were 89 votes in favor, 0 against, and 9 abstentions (Australia, Belgium, Dominican Republic, France, Portugal, Spain, Union of South Africa, United Kingdom and the United States).

²⁹ This issue will be discussed in Section 3.1.

of peoples is a matter of recognition, the debate on the theories of recognition indicates that both theories carry pros and cons. Thus, one can plausibly conclude that neither theory of recognition is sufficient to identify peoples in international law. This leads to the question of how the Court in the *Wall* Opinion determined that the Palestinian people are a people for the purposes of self-determination. As will be deliberated in this section, determining the subjects of the right to self-determination depends on the factual and legal status of the territory which they inhabit, both within and beyond the colonial context. This section will further examine the possible interpretation of the observation of the Court regarding the existence of the Palestinians' right to self-determination.

3.1 Territories of Self-Determination in the Colonial Context

The concept of self-determination formulated in the UN Charter was a laconic designation. Therefore, it was extremely hard, if not impossible, to assess or speculate on the meaning of self-determination as it appeared in the UN Charter without any further explanation.³⁰ The popular scholarly debate on whether self-determination had emerged as a principle or right in its early stages is not so relevant at the present time,³¹ due to the development of customary law in the years following the establishment of the UN Charter, especially in the decolonization era, which consequently confirmed its context.³²

As previously mentioned, the UN Charter and subsequent UNGA Resolutions neither differed nor provided for which category of peoples are entitled to the right of self-determination. As it appears in the UN Charter, self-determination is attached to peoples without preclusions.³³ In addition, paragraph 2 of Resolution 1514(XV) states that '*All peoples* have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.'³⁴ Thus, it can be speculated that the right to self-determination applies to all peoples without any particular provisions. Nevertheless, while the right to self-determination appears explicitly in Articles 1(2) and 55 of the UN Charter,³⁵ the prevalent view is that it is also implicit in Chapter XI (Declaration Regarding Non-Self-Governing Territories) and Chapter XII (International Trusteeship System) of the UN Charter.³⁶

Hence, determining which peoples are entitled to self-determination seems to be

³⁰ Raič (n 8) 201.

³¹ For those who consider self-determination as a right see Cassese (n 4) 43; Hans Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems* (The Lawbook Exchange Ltd 2000) 51; according to Kelsen, the interpretation of the principle of 'equal rights and self-determination of peoples' can be assumed to indicate 'sovereign equality' among States and not with reference to peoples, since States are the sole, legitimate holders of rights in international law; in contrast, see Quigley (n 3) 9; Quigley stresses that self-determination is a legal right. The UN Charter was legislated in five different languages: Chinese, French, Russian, English and Spanish. While the Chinese, Russian, English and Spanish texts refer to self-determination in Article 1(2) as a 'principle', the French text, *droit des peuples à disposer d'eux-mêmes*, refers to it as a 'right'; by virtue of Article 33(3) of the Vienna Convention on the Law of Treaties, when a multilateral treaty is conducted in two or more languages: '[t]he terms of the treaty are presumed to have the same meaning in each authentic text.' Within this context, '[s]ince principle is the ambiguous term, it must be read to mean "right".'.

³² Raič (n 8) 199.

³³ See Charter of the United Nations (UN Charter) (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI arts 1(2) and 55.

³⁴ UNGA Resolution 1514(XV) (14 December 1960) UN Doc A/RES/1514(XV) para 2 (emphasis added).

³⁵ UN Charter (n 33) arts 1(2), 55.

³⁶ Raič (n 8) 200; Crawford (n 10) 114.

inevitably linked to the territories which peoples inhabit.³⁷ Within this context, there are various methods of explanation by different authors. For example, Gareau views ‘peoples as territories.’³⁸ In general, only the population of a State was considered as a people in the legal sense. This population was embodied in national institutional terms. However, this established consensus dramatically changed in the era of decolonization, especially in light of the obligations of ‘sacred trust’, which the UN inherited from the League of Nations. As explained by Gareau:

In labelling territories as non-self-governing, the UN effectively withdrew the legitimacy of the sovereign title thereon from the metropolitan power... Contrary to the power it held upon the territories placed under its trusteeship, the UN did not enjoy direct control over the mandates, and even less upon non-self-governing parts of colonial empires. Accordingly, the UN could not claim the authority to apportion territory according to its own determination of the demographic or ethnic composition of the lands, and it did not have the legal capacity to single out which groups could be construed as peoples for purposes of self-determination. On the other hand, neither did the colonial power: a partition of the territory effected either before or after the exercise of self-determination would not be condoned ... As a result, there evolved through the history of decolonization a second type of group regarded as ‘peoples’ by international law: the population of a non-self-governing territory is presumed to contain one people for the purposes of its self-determination. In the terms inherited from the decolonization era, a “people” was, and to a great extent still is, a territory.³⁹

Remarkably, the practice of self-determination in the era of decolonization shows in an unequivocal manner that it was mainly colonial régimes (territories) that had enjoyed the right to self-determination,⁴⁰ either by emerging as an independent State or in association or integration with another State.⁴¹ As observed by James Falkowski, ‘[i]n the overwhelming majority of cases, the United Nations has not applied the international trust provisions to “peoples,” but has applied it to “colonial units”.’⁴² This practice was also in complete harmony with the theory of salt-water.⁴³ The theory of salt-water requires the non-self-governing territory to be ‘geographically separate and... distinct ethnically and/or culturally from the country administering it.’⁴⁴ Commentators have argued that this narrow interpretation of the right of self-determination did not only exclude and protect strong States such as China and the Soviet Union, but also excluded ‘ethnic groups within a colonial territory who regarded “the majority rule” as alien or oppressive.’⁴⁵

³⁷ UNGA Resolution 1514(XV) (15 December 1960) UN Doc A/RES/1541(XV) principle I; for the first time this Resolution categorizes which peoples are entitled to self determination: ‘Chapter XI should be applicable to territories which were then known to be of the colonial type.’

³⁸ Gareau (n 24) 508.

³⁹ *ibid* 509.

⁴⁰ See generally United Nations, ‘International Trusteeship System’ <un.org/dppa/decolonization/en/history/international-trusteeship-system-and-trust-territories> accessed 28 January 2020; United Nations, ‘List of former Trust and Non-Self-Governing Territories’ <un.org/dppa/decolonization/history/former-trust-and-nsgts> accessed 28 January 2020.

⁴¹ *ibid*; by virtue of principle VI of GA Resolution 1541(XV), self-determination can be implemented in three ways: (a) emergence as a sovereign independent State; (b) free association with an independent State; or (c) integration with an independent State.

⁴² James E Falkowski, ‘Secessionary Self-Determination: A Jeffersonian Perspective’ (1991) 9(2) Boston University International Law Journal 226.

⁴³ Raič (n 8) 206.

⁴⁴ See UNGA Res 1541 (15 December 1960) UN Doc A/RES/1541(XV) principle VI, which defines the criteria of a non-self-governing territory.

⁴⁵ Gerry J Simpson, ‘The Diffusion of Sovereignty: Self-Determination in the Post-Colonial Age’ (1996) 32(2) Stanford Journal of International Law 273; Rosalyn Higgins, *The Development of International Law*

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However, the right to self-determination was not limited to non-self-governing territories and trust territories. The ICJ on 2 June 1971, in its Advisory Opinion concerning the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (Namibia Opinion)*, has confirmed that the right to self-determination is also applicable to mandate territories. The Court stated that:

...the subsequent development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them. The concept of the sacred trust was confirmed and expanded to all ‘territories whose peoples have not yet attained a full measure of self-government’ (Art. 73). Thus it clearly embraced territories under a colonial régime. Obviously, the sacred trust continued to apply to League of Nations mandated territories on which an international status had been conferred earlier. A further important stage in this development was the Declaration on the Granting of Independence to Colonial Countries and Peoples (General Assembly resolution 1514 (XV) of 14 December 1960), which embraces all peoples and territories which ‘have not yet attained independence’. Nor is it possible to leave out of account the political history of mandated territories in general.⁴⁶

From a similar standpoint, David Raič argues that ‘interpretation of the right of self-determination in the light of the principle of territorial integrity was that a “people” as the holder of the right of self-determination was primarily *territorially* defined.’⁴⁷ The principle of territorial integrity is rooted within the core of the sovereignty of a State. Territorial integrity ‘refers to the material elements of the State, namely the physical and demographic resources that lie within its territory (land, sea and airspace) and delimited by the State’s frontiers.’⁴⁸

Broadly speaking, the establishment of territorial integrity was within the context of the use of force between States. The rationale behind it is, *inter alia*, ‘to maintain status quo in the world order.’⁴⁹ The legal framework which protects the territorial integrity of a State can be traced back to Article 10 of the Covenant of the League of Nations, which stresses ‘[t]he Members of the League undertake to respect and preserve as against external aggression the *territorial integrity* and existing political independence of all Members of the League.’⁵⁰ Likewise, Article 4(2) of the UN Charter reads ‘All Members shall refrain in their international relations from the threat or use of force against the *territorial integrity* or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.’⁵¹ Clearly, both the UN Charter and the Covenant of League of Nations draw a distinct link between the use of force and the territorial integrity of a State. In that sense, States have the right to protect their own territorial integrity from an act of aggression commenced by other States. Furthermore, the right to territorial integrity is

through the Political Organs of the United Nations (Oxford University Press 1963) 104 wherein Higgins argues that ‘self-determination practice refers to the right of the majority within a generally accepted political unit to the exercise of power’; see also Christakis (n 26) 84.

⁴⁶ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (Advisory Opinion) [1971] ICJ Reports 16.

⁴⁷ Raič (n 8) 208 (emphasis added).

⁴⁸ Christos L Rozakis, ‘Territorial Integrity and Political Independence’, *Encyclopaedia of Public International Law* (vol IV, 1987) 481.

⁴⁹ Edita Gzoyan and Lily Banduryan, ‘Territorial Integrity and Self-Determination: Contradiction or Equality’ (2011) 2(10) 21 *Century* 97.

⁵⁰ Covenant of the League of Nations (adopted 28 June 1919, entered into force 1 October 1920) art 10 (emphasis added).

⁵¹ UN Charter (n 33) art 2(4) (emphasis added).

mentioned frequently in UN General Assembly Resolutions⁵² and in various international instruments such as the Helsinki Final Act⁵³ and the Charter of the Organization of American States.⁵⁴

While most of the documents on the principle of territorial integrity focus on the scope of the use of force between existing States, the development of the right to external self-determination in the context of decolonization made the principle applicable regarding the territory of the colony. Paragraph 6 of UNGA Resolution 1514(XV) states that: ‘Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.’⁵⁵ According to Raič, the principle of territorial integrity protected:

- (1) the integrity of the colonial territory from aggressions by other States before independence (or other mode of implementation of the right to self-determination), and simultaneously
- (2) the territorial integrity of the colony after its independence, by prohibiting secessionist groups of peoples inside the State from invoking the right to self-determination as they wished (since secession was and is not authorized under international law).⁵⁶

The foregoing views greatly support the argument that peoples were not seen as the subjects of the right to self-determination; rather, the subjects were the territories which the peoples inhabit. It is widely accepted that the relevant territorial units for the purposes of self-determination are non-self-governing territories, trust territories and mandate territories. The question of whether additional territories exist beyond the colonial type is open to debate. Before addressing this issue, it is necessary to examine whether the Palestinian territory falls into one of these categories.

3.2 The Palestinian Territory’s Status Within Self-Determination Units

3.2.1 Non-Self-Governing Territory

The principle of the non-self-governing territory is regulated in Chapter XI of the UN Charter. Article 73 defines this as a territory whose ‘people has not yet attained a full measure of self-government.’⁵⁷ There are two main arguments supporting the idea that the Palestinian territory is not a non-self-governing territory. Formally, according to the official webpage of the UN, there are currently seventeen territories with non-self-

⁵² See UNGA Resolution 2525(XXV) (24 October 1970) UN Doc A/RES/25/2525(XXV) principle (a); UNGA Resolution 3314(XXIX) (14 December 1974) UN Doc A/RES/3314(XXIX) art 1.

⁵³ Organisation for Security and Cooperation in Europe (OSCE), Final Act of Helsinki (1 August 1975) arts I, II, IV.

⁵⁴ Charter of the Organization of American States (adopted 30 April 1948, entered into force 13 December 1951) 119 UNTS 1609 art 1, which stipulates: ‘The American States establish by this Charter the international organization that they have developed to achieve an order of peace and justice, to promote their solidarity, to strengthen their collaboration, and to defend their sovereignty, their territorial integrity and their independence. Within the United Nations, the Organization of American States is a regional agency.’

⁵⁵ UNGA Resolution 1514(XV) (14 December 1960) UN Doc A/RES/1514(XV) para 6 ‘Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.’

⁵⁶ Raič (n 8) 206; see also SKN Blay, ‘Self-Determination Versus Territorial Integrity in Decolonization’ (1986) 18(2) *International Law and Politics* 443.

⁵⁷ UN Charter (n 33) art 73.

governing status and the Palestinian territory is not labeled as one of these.⁵⁸ Substantively, ascertaining that the Palestinian territory is non-self-governing would present it as a territory without a governor. This evaluation contradicts the presence of the Palestinian National Authority (PNA) as the formal government since 1994. The question of whether the PNA possesses effective and stable control over the Palestinian territory is not relevant within this context. Yet, there are some scholars who argue that even though the PNA is the formal government of the Palestinian territory, the territory acquires the 'requisite characteristics' of a non-self-governing unit mainly because the Israeli government continues to demonstrate a general degree of control over it.⁵⁹

3.2.2 Trust Territory and Mandate Territory

The Trusteeship system, which is embodied in Article 76 of the UN Charter, holds an identical purpose to Article 22 of the Mandate system of the League of Nations.⁶⁰ The purpose of these systems is to 'promote the political, economic, social, and educational advancement of the inhabitants... towards self-government or independence as may be appropriate to the particular circumstances.'⁶¹ The trust territories, according to the UN, ceased to exist in 1994. The last trust territorial unit was Palau of the Pacific Islands, which exercised the right of self-determination by associating with the United States in 1994.⁶² With regard to the Palestinian territory, Allan Gerson argues that Israel holds the status of 'trustee-occupant' over the West Bank.⁶³ According to Omar Dajani's assessment, bestowing upon Israel the title of trustee-occupant would be 'naïve, if not cynical,'⁶⁴ as Israel's interests in the Palestinian territory would contradict the obligations of the sacred trust that were set out in Article 73 of the UN Charter, which requires the trustee 'to promote to the utmost... the well-being of the inhabitants of these territories.'⁶⁵

As for the mandate territories, it is well known that Historical Palestine was under the administration of the British from 1922, classified as type A in the Mandate for Palestine. However, the territories of the Historical Palestine ceased to be so after Britain relinquished any title for the land and conveyed Palestine to the UN in 1947.⁶⁶ Although the Partition Plan, which was recommended by the UN in 1947, failed to secure the establishment of two neighboring States (a Jewish State and an Arab State), the Palestinian territory cannot hold the title of a mandate territory.

⁵⁸ For further information regarding the non-self-governing territories, see United Nations, 'Non-self-governing Territories' <un.org/dppa/decolonization/en/nsqt> accessed 28 January 2020; these territories are: Western Sahara, Anguilla, Bermuda, British Virgin Islands, Cayman Islands, Falkland Islands (Malvinas), Montserrat, Saint Helena, Turks and Caicos Islands, United States Virgin Islands, Gibraltar, American Samoa, French Polynesia, Guam, New Caledonia, Pitcairn and Tokelau.

⁵⁹ Dajani (n 3) 47.

⁶⁰ Raič (n 8) 200.

⁶¹ UN Charter (n 33) art 76(b).

⁶² For the list of Trust Territories that have achieved self-determination, see United Nations, 'International Trusteeship System' <un.org/dppa/decolonization/en/history/international-trusteeship-system-and-trust-territories> accessed 28 January 2020.

⁶³ Allan Gerson, 'Trustee-Occupant: The Legal Status of Israel's Presence in the West Bank' (1973) 14(1) *Harvard International Law Journal* 45.

⁶⁴ Dajani (n 3) 48; see also comment by A Roberts, 'What is a Military Occupation?' in Marcelo G Kohen (ed), *Territoriality and International Law* (Elgar 2016) 620.

⁶⁵ UN Charter (n 33) art 73.

⁶⁶ Gareau (n 24) 510.

3. The Existence of Self-Determination Units Outside the Colonial Context

3.1. Alien Subjugation, Domination and Exploitation: Occupation

Although the right to self-determination was primarily granted within the context of decolonization, State practice and UN Resolutions in the early 1970s extended it to include peoples that are subjected to alien domination or foreign occupation.⁶⁷ UN General Assembly Resolution 2625(XXV) stated ‘that subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle [self-determination], as well as a denial of fundamental human rights, and is contrary to the [UN] Charter.’⁶⁸ Notably, this Resolution has opened the door to other putative situations where external self-determination exists beyond the colonial context.⁶⁹

Several authors have pointed out, however, that the concept of ‘alien domination/subjection’ is laconic and left undefined within this context.⁷⁰ James Summers, in the second edition of his book, *Peoples and International Law*,⁷¹ has attempted to identify the meaning of this concept by referring to several international human rights instruments such as the African Charter on Human and Peoples’ Rights (Article 20)⁷² and the Arab Charter on Human Rights 2004 (Article 2(3)).⁷³ According to Summers’s assessment, the ‘clearest reference’ that can assist in understanding this concept emerged in 1974 after the adoption of UN General Assembly Resolution 3314(XXIX) on the ‘Definition of Aggression’. Accordingly, acts of aggression, particularly the acts mentioned in Article 3 of Resolution 3314(XXIX), ‘could in any way prejudice the right to self-determination, freedom and independence’ of peoples that are: (1) under colonial régimes (2) under racist régimes or (3) under other forms of alien domination.⁷⁴

For the first type, there is no legal issue or ambiguity. The second and third types seem to be engaged with Article 1(4) of Additional Protocol I of 1977 to the 1949 Geneva Conventions, in which it is stipulated that:

The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.⁷⁵

Here, again, the text of Article 1(4), focusing on ‘situations’ and ‘régimes’ further verifies

⁶⁷ See UNGA Resolution 2625(XXV) (24 October 1970) UN Doc A/RES/2625(XXV); this Resolution was the first to refer to different peoples who were entitled to the right to self-determination, beyond the colonial context.

⁶⁸ *ibid.*

⁶⁹ Cassese (n 4) 90; Cassese views that UNGA Resolution 2625(XXV) ‘makes it clear that “alien subjugation, domination and exploitation” may exist outside a colonial system.’

⁷⁰ *ibid.* 92.

⁷¹ James Summers, *Peoples and International Law* (Brill Nijhoff 2014) 533.

⁷² African Charter on Human and Peoples’ Rights (adopted 27 June 1981, entered into force 21 October 1986) 21 ILM 58 art 20: ‘2. Colonized or *oppressed peoples* shall have the *right to free themselves from the bonds of domination* by resorting to any means recognized by the international community. 3. *All peoples* shall have the right to the assistance of the States parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural’ (emphasis added).

⁷³ League of Arab States, Arab Charter on Human Rights (adopted 15 September 1994, entered into force 16 March 2008) 12 IHRR 893 art 2(3).

⁷⁴ UNGA Res 3314(XXIX) (14 December 1974) UN Doc A/RES/3314(XXIX) art 3.

⁷⁵ Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 art 1(4).

that the right to self-determination is determined by the status of territories. These territories are primarily involved with armed conflicts, where the inhabitants are circumscribed from exercising the right to self-determination. As Andres Sureda wrote: "Thus "colonial occupation" is put on the same level as occupation resulting from the use of armed force. In both cases, the determining factor is that the present status of the territories is being maintained against the will of the inhabitants."⁷⁶

In a 1980 UN report concerning the 'Implementation of United Nations Resolutions', Hector Gros Espiell, Special Rapporteur to the UN, delivered an explanation on the expression 'alien domination':

...the right of peoples to self-determination exists as such in modern international law, with all the consequences that flow therefrom, where a people is subject to any form or type of colonial and alien domination of any nature whatsoever. In keeping with what is stated in the foregoing paragraph, the notion of colonial and alien domination is broader than - though it includes - the notion of foreign occupation, and hence the right of peoples to self-determination may arise and be typified in other situations in addition to those where there is merely foreign occupation. Clearly, however, the foreign occupation of a territory - an act condemned by modern international law and incapable of producing valid legal effects or of affecting the right to self-determination of the people whose territory has been occupied - constitutes an absolute violation of the right to self-determination. Every people subject to any form or type of colonial or alien domination possesses the right to self-determination, and no distinction can be drawn between one people and another for the purpose of recognizing the existence of this right if there is the necessary evidence of colonial or alien domination of the people or peoples in question.⁷⁷

Notwithstanding the foregoing explanations, in practice the notion of self-determination in a situation where peoples are under alien domination is far more complicated.⁷⁸ According to Antonio Cassese, a scholar who supports the argument that external self-determination applies to territories whose peoples are subjected to foreign domination, argues that practice in this field faces difficulties, in relation to both State practice and UN practice. First, State practice in this field is not sufficient because (1) there are limited sources and records of this practice and (2) even after finding records of State practice, 'this practice normally does not consist of actual State behavior in international dealings, but rather of declarations setting out the State's views on the matter.'⁷⁹ Secondly, UN practice regarding situations of alien domination and foreign occupation is 'ineffective'.⁸⁰ UN practice is centered around the adoption of Resolutions requesting the occupying powers to cease from their actions and to respect the peoples' inherent right to self-determination. However, in most cases, occupying powers developed a habit of ignoring these Resolutions without further explanation. Cassese presents two reasons for the failure of UN practice in situations of alien domination:

First, in all these cases, one of the permanent members of the Security Council was either directly involved in or had a strong interest in the outcome of the conflict; this destroyed all hopes of effective multilateral action. Second, for practical reasons, it proved difficult to enforce the resolutions that had been passed.⁸¹

⁷⁶ A Rigo Sureda, *The Evolution of the Right of Self-Determination: A Study of United Nations Practice* (Sijthoff 1973) 261.

⁷⁷ See UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, 'Report by Special Rapporteur Hector Gros Espiell on The Right to Self-Determination: Implementation of United Nations Resolutions' (1980) UN Doc/CN.4/Sub.2/405/Rev.1 para 43.

⁷⁸ Cassese (n 4) 92.

⁷⁹ *ibid* 94; Cassese presents situations such as Afghanistan, Cambodia, the territories occupied by Israel, Grenada, East Timor, Kuwait and Namibia.

⁸⁰ *ibid* 98.

⁸¹ *ibid*.

In sum, various international instruments and UN Resolutions demonstrate that the right to self-determination exists outside the colonial context. Although the methods of enforcement within UN Resolutions and State practice are not so successful, this should not cast doubt as to the existence of the right.⁸² As in the colonial context, the key element in determining which peoples are entitled to exercise the right of self-determination is based on the territory they inhabit (here, territories under alien occupation and racist régimes). However, while territories in the colonial context are easily defined (non-self-governing territory, trust territory and mandate territory), it is difficult to ascertain which territorial units are relevant in the context of the right to self-determination outside the colonial context and what criteria apply to their establishment.

3.3.2 Possible Interpretation of the *Wall* Advisory Opinion

The principle of territorial identification indicates that, in order to convey legal rights to peoples in international law, these peoples must inhabit a territory in the legal sense, which falls under one of the territorial units entitled to exercise the right to self-determination. From this angle, one could assume that the ICJ had settled that the right to self-determination in the case of Palestine is 'no longer in issue' because the Palestinian territory constitutes a legal unit of self-determination. In this vein, from reading paragraphs 70 to 78 of the *Wall* Opinion, some scholars speculate that the modification of the Palestinian territory from colonial territory to occupied territory did not prevent the Court, which holds a similar viewpoint to the UNGA, from seeing the Palestinian territory as a colonial-type that is plainly entitled to self-determination.⁸³ Although this view is reasonable in terms of the historical facts and predicaments of that territory, it remains difficult to accept the observation that the Palestinian territory can be classified as an unadulterated colonial territory.⁸⁴

From the viewpoint of the present study, it is not clear whether the Court presented the case of Palestine as a case which falls within the colonial context; however, what is clear is that, according to the Court, the Palestinian territory constitutes an occupied territorial unit under customary law:

The territories situated between the Green Line (see paragraph 72 above) and the former eastern boundary of Palestine under the Mandate were occupied by Israel in 1967 during the armed conflict between Israel and Jordan. Under customary international law, these were therefore occupied territories in which Israel had the status of occupying Power. Subsequent events in these territories, as described in paragraphs 75 to 77 above, 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.⁸⁵

As previously mentioned, the defining element for the application of self-determination within and beyond the colonial context is territory. A possible interpretation is that the occupation of the Palestinian territory settled the issue of applying the right to external self-determination to the Palestinian people. Hence, the Palestinian territory as an occupied territory constitutes a unit entitled to exercise the right to self-determination. This

⁸² *ibid.*

⁸³ Gareau (n 24) 509; see also Gentian Zyberi, 'Self-Determination Through the Lens of the International Court of Justice' (2009) 56(3) *Netherlands International Law Review* 440; Zyberi assesses that '[t]he Palestinian case can be seen as an interrupted case of decolonization, where the armed conflict and occupation by Israel and subsequent events have resulted in a denial of the right to self-determination to the Palestinian people.'

⁸⁴ See Section 3.1.

⁸⁵ *Wall* Opinion (n 5) [136], [78].

argument can also find support in the Separate Opinion of Judge Higgins, wherein she stated that the case of Palestine was the first case in which the Court adopted the perspective that self-determination applies to post-colonial situations.⁸⁶ This assessment is highly significant in the law of self-determination, not only because viewing the issue from this perspective means the Court has recognized the existence of external self-determination outside the colonial context for the first time, but also because it included the occupied territory as a unit of self-determination in international law. Whether other territories besides colonial territories and occupied territories constitute a self-determination unit is open to question. For the time being, the Court has been silent and nothing further can be said in the abstract.

4. Conclusion

The entitlement of the Palestinian people to invoke the right to self-determination was not unquestionable, as evidenced by various scholarly research and with regard to the attitude of the State of Israel which, at time of writing, has not yet recognized the Palestinians' right to emerge as an independent State in the land of Palestine. However, the ICJ in the *Wall* Opinion has reaffirmed that the Palestinians' right to self-determination is *no longer in issue*. This observation raises a few interesting questions regarding the identification of a people for the application of the right to self-determination in general and particularly regarding the entitlement of the Palestinian people and the territory they inhabit.

The first question is whether the Court views the existence of self-determination as a matter of recognition. This observation leads to the question of whether the traditional theories of recognition (constitutive and declaratory) can assist in identifying a people for the purpose of self-determination. Neither theory of recognition is satisfactory in identifying peoples in international law. The constitutive theory requires the State oppressing the people in question to recognize them as a people. This requirement is puzzling because State practice does not demonstrate an obligation for existing States to grant recognition in international law. While the declaratory theory is the more accepted theory in terms of statehood, in relation to peoplehood it is not satisfactory, mainly because (1) there are no accepted, factual criteria of peoplehood and (2) the practice of self-determination in the decolonization era shows to a large extent that peoplehood is not a mere fact.

Articulation of the theories of recognition leads to the second question: how does international law determine a people for the purposes of the application of the right to self-determination? The examination of UN practice and State practice demonstrates that the key element in identifying peoples is inevitably linked to the territories they inhabit. This assessment helps to interpret the observation of the ICJ regarding the existence of the Palestinian people. From this angle, one could assume that the Court had settled the Palestinians' right to self-determination because the Palestinian territory constitutes a legal unit of self-determination. In this regard, there are those who argue that the modification of the Palestinian territory from a colonial territory to occupied territory did not prevent the Court from seeing the Palestinian territory as a colonial territory in its nature. However, the Palestinian territory cannot be labeled as one of the units of self-determination because it is not a colonial territory. This paper suggests that a possible interpretation is that the occupation of the Palestinian territory is the primary reason which has settled the issue of applying the right to external self-determination to the Palestinian people. Hence, occupied territories serve as self-determination units. This interpretation of the observation of the

⁸⁶ See *Wall* Opinion (n 5) separate opinion Judge Higgins [29]–[30].

Court is not only significant because it applied self-determination outside the colonial context for the first time, but also because it included the occupied territory as a territorial unit entitled to exercise the right to self-determination outside the colonial context.

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