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# JOURNAL ON EUROPEAN HISTORY OF LAW



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## Legal History and the Development of Rights of Inhabitants of the West Bank since 1948 pursuant to International Law

Tomáš Mach\*

### Abstract

The piece discusses the legal nature of the West Bank since 1948. It summarizes the history of the Territory since the British conquest from the Ottoman Empire in 1917 up till the 1994 Israel-Jordan peace treaty. Furthermore, it discusses the nature and development of the right to self-determination, ultimately arguing that the West Bank is currently *terra nullius* under Israeli occupation and that (leaving aside wishful thinking of different streams in international relations) under pure principles of customary international law there is no such thing as Palestine, at least not in the territory of the West Bank.

**Keywords:** *terra nullius*; self-determination; statehood; *territorium nullius*; West Bank.

### 1. Introduction

The current administrative situation in what most of the world often calls either the West Bank or the Occupied Palestinian Territories are a contentious issue on planes of international relations and politics. Throughout the 20<sup>th</sup> Century, during the Cold War, the treatment of the West Bank post-1967, which was occupied by Israel in the Six-Day War was one of the points of conflict as a disguised proxy battlefield. The Soviet Block and its satellites supported, trained, and armed<sup>1,2</sup> the PLO for its acts of terror in what the PLO articulated as a struggle for independence. The free world, led by the USA, regarded the PLO as a terrorist organization.<sup>3</sup> It was only after the Cold War was over, in 1993 by the Oslo Accords, that the PLO recognized the existence of Israel and its right to live in peace and Israel recognized the PLO as an entity representing the “Palestinian” people.<sup>4</sup>

In the advisory opinion of 9 July 2004 on the “Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory”<sup>5</sup> (hereinafter the “Advisory Opinion”) the ICJ

came to the conclusion that since both Jordan and Israel were parties to the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) at the time the 1967 conflict broke out, its provisions were applicable to the current situation in the territory and that Israel needs to act in conformity with the provisions of this convention<sup>6</sup>, including *inter alia* the Occupying Power’s duty to refrain from deporting or transferring parts of its own civilian population into the occupied territory.<sup>7</sup>

Nevertheless, given the fact that Jordan had given up its title to the West Bank on 31 July 1988, i.e. prior to the 2004 ruling, the analysis proposed by the ICJ in the aforesaid advisory opinion seems to be far from complex.

The objective of this piece is to analyze the history of the legal status of the West Bank through the lens of an international jurist in order to answer the question as to what duties Israel owes to the native population in the West Bank and whether Israel would be allowed to annex the West Bank if it decided to do so (as the current prime minister of Israel has been repeatedly promising in elections).

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<sup>1</sup> GOLAN, G., The Soviet Union and the PLO since the War in Lebanon. In: *Middle East Journal*, Vol. 40, No. 2, 1986, pp. 285-305, at p. 286 (stable URL: <https://www.jstor.org/stable/4327311>)

<sup>2</sup> <https://web.archive.org/web/20160304124846/http://psi.ece.jhu.edu/~kaplan/IRUSS/BUK/GBARC/pdfs/terr-wd/plo83.pdf> (last visited 24 Oct 2020)

<sup>3</sup> <https://www.law.cornell.edu/uscode/text/22/5201> (last visited 24 Oct 2020)

<sup>4</sup> <https://unispal.un.org/DPA/DPR/unispal.nsf/0/36917473237100E285257028006C0BC5> (last visited 24 Oct 2020)

<sup>5</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, p. 136 (available online at: <https://www.icj-cij.org/public/files/case-related/131/131-20040709-ADV-01-00-EN.pdf> (last visited 24 Oct 2020)).

<sup>6</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, p. 136 (available online at: <https://www.icj-cij.org/public/files/case-related/131/131-20040709-ADV-01-00-EN.pdf> (last visited 24 Oct 2020)), at p. 177

<sup>7</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, p. 136 (available online at: <https://www.icj-cij.org/public/files/case-related/131/131-20040709-ADV-01-00-EN.pdf> (last visited 24 Oct 2020)), at p. 186 – quoting article 49 of the Fourth Geneva Convention

## 2. The Territory of Contemporary Israel and the West Bank between 1917 and 1994

The Turkish territories in the Middle East, including Jerusalem, were occupied by the British in course of the First World War in 1917. The First Battle of Gaza started on 26 March 1917 and the British troops entered Jerusalem in early December 1917.<sup>8</sup> This ended the factual exercise of sovereignty over these territories by the Ottoman Empire. The Turks later gave up claims to sovereignty to these territories in the Treaty of Ankara of 29 October 1921<sup>9</sup> vis-à-vis France and confirmed this in the Treaty of Lausanne on 24 July 1923, *inter alia*, vis-à-vis Great Britain<sup>10</sup> (the Mandate Power of Palestine as discussed below).<sup>11</sup>

The territories of contemporary Israel and of the West Bank, along with the territory of the Gaza Strip, were converted into a “Class A” Mandate Territory pursuant to Article 22 of the Covenant of the League of Nations under the UK Mandate Administration of Palestine. As of 1 July 1920, the military administration exercised by the UK as an occupying power under customary international law<sup>12</sup> that had been present since occupation back in 1917, turned into a UK civilian administration under the Mandate.

Post-WWII, the UN was preparing the partition of the Mandate of Palestine into two states, a Jewish State in one part of the mandate territory and an Arab state in the other (effectively in Gaza and the West Bank), whilst Jerusalem was to be internationalized (*corpus separatum*) - under the 1947 Partition Plan.<sup>13</sup>

When the UK Mandate ceased to exist and Israel declared independence in 1948, it was in turn attacked by neighboring Arab states. In course of this Arab-Israeli War of 1948, Transjordan (as Jordan was then called) occupied the territory of the West Bank (i.e. the Predominant part of the Territory of what was to become an Arab State in the two-state solution under UN General Assembly Resolution No. 181<sup>14</sup> [the 1947 Partition Plan]) and later incorporated it into its own territory.

Jordan formally annexed the West Bank on 24 April 1950. This annexation met with condemnation and was regarded as void by most of the international community.<sup>15</sup> It was only the United Kingdom (at the same time as formal recognition

of Israel by the UK)<sup>16</sup> and Iraq who recognized this annexation.

The West Bank changed hands again in 1967. On 5 June 1967 Israel, in anticipatory self-defense, strove against Egypt after Egypt had closed the Straits of Tiran in May that year and military preparations for a joint action against Israel by Egypt, Jordan, and Syria had been underway; this opened the Six-Day War. The Jordanian Army began shelling Israel at 10.00 am the same day and thus entered into an armed conflict with Israel. Within two days, the Jordanian Army was driven out of the territory of the West Bank and Israel took control of the West Bank.<sup>17</sup>

Israel, in conformity with international law of customary nature, introduced military administration of the occupied territory.<sup>18</sup> Purely military administration was altered into ‘The Civil Administration’ of the West Bank by Military Order No. 947 of 1981. The Civil Administration was appointed by the commander of the Israeli Military (IDF) and as it remains subordinate to the IDF, so it is in fact a tool of the military occupation of the West Bank, thus in conformity with customary international law. This remains be the situation until nowadays.

In 1994, Israel and Jordan signed a peace treaty. This treaty included delimitation of the international boundary between these states. Annex I to the peace treaty technically determines the international boundary also determines the boundary between Jordan and the West Bank, noting, however, that:

“This line is the administrative boundary between Jordan and the territory which came under Israeli Military government control in 1967. Any treatment of this line shall be without prejudice to the status of that territory.”<sup>19</sup>

Would the above quotation mean that whilst the treaty talks of ‘administrative boundary’ it should be interpreted that there is peace agreed between Jordan and Israel whilst Israel is in occupation of what Jordan had annexed in 1950? This would indeed be an odd situation in international law (and in particular in international relations). The answer is negative, however, since, in 1988, Jordan had given up her claim upon the West Bank on 31 July. She did so 14 years after the 1974 all-Arab meeting in Rabat, Morocco took place, where leaders of the Arab world (incl. King Hussein of Jordan) decided to recognize

<sup>8</sup> ERICKSON, E. J., *Ottoman Army Effectiveness in World War I: A Comparative Study*. Cass Military History and Policy Series. Oxford, 2007, p. 128

<sup>9</sup> League of Nations Treaty Series, vol. 54, pp. 178-193.

<sup>10</sup> League of Nations, Official Journal“. 4. October 1924: 1292

<sup>11</sup> League of Nations Treaty Series, vol. 54, pp. 178-193.

<sup>12</sup> The ICJ correctly recites articles 42 the Regulations Respecting the Laws and Customs of War on Land annexed to the Fourth Hague Convention of 18 October 1907 as being of customary-law-nature, namely that: ‘territory is considered occupied when it is actually placed under the authority of the hostile army, and the occupation extends only to the territory where such authority has been established and can be exercised.’ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, p. 136 (available online at: <https://www.icj-cij.org/public/files/case-related/131/131-20040709-ADV-01-00-EN.pdf> (last visited 24 Oct 2020)), at p. 167

<sup>13</sup> <https://unispal.un.org/DPA/DPR/unispal.nsf/0/7F0AF2BD897689B785256C330061D253> (last visited 20 October 2020)

<sup>14</sup> <https://unispal.un.org/DPA/DPR/unispal.nsf/0/7F0AF2BD897689B785256C330061D253> (last visited 20 October 2020)

<sup>15</sup> BENVENISTI, E., *The International Law of Occupation*. Oxford, 2012, p. 204.

<sup>16</sup> <https://api.parliament.uk/historic-hansard/commons/1950/apr/27/jordan-and-israel-government-decision> (last visited 20 October 2020)

<sup>17</sup> MUTAWI, A. S., *Jordan in the 1967 War*. Cambridge, 2002, p. 140.

<sup>18</sup> On nature of military administration of occupied territories see the Q & A website of the International Committee of the Red Cross: Occupation and international humanitarian law: questions and answers <https://www.icrc.org/en/doc/resources/documents/misc/634kfc.htm>

<sup>19</sup> [https://peacemaker.un.org/sites/peacemaker.un.org/files/IL%20JO\\_941026\\_PeaceTreatyIsraelJordan.pdf](https://peacemaker.un.org/sites/peacemaker.un.org/files/IL%20JO_941026_PeaceTreatyIsraelJordan.pdf) (last visited 20 October 2020).

the PLO as the “sole legitimate representative of the Palestinian people.”<sup>20</sup> In the 1988 address to the nation, King Hussein not only explicitly gave up claim upon the West Bank, but also upon its population as Jordan’s nationals (whilst stressing that those, who acquired nationality with annexation in 1950 were allowed to retain it as long as they found themselves in Jordan):

“We cannot continue in this state of suspension, which can neither serve Jordan nor the Palestinian cause. We had to leave the labyrinth of fears and doubts, towards clearer horizons where mutual trust, understanding, and cooperation can prevail, to the benefit of the Palestinian cause and Arab unity. This unity will remain a goal which all the Arab peoples cherish and seek to realize.

At the same time, it has to be understood in all clarity, and without any ambiguity or equivocation, that our measures regarding the West Bank concern only the occupied Palestinian land and its people. They naturally do not relate in any way to the Jordanian citizens of Palestinian origin in the Hashemite Kingdom of Jordan. They all have the full rights of citizenship and all its obligations, the same as any other citizen irrespective of his origin. They are an integral part of the Jordanian state to which they belong, on whose soil they live, and in whose life and various activities they participate. Jordan is not Palestine and the independent Palestinian state will be established on the occupied Palestinian territory after its liberation, God willing. There the Palestinian identity will be embodied, and there the Palestinian struggle shall come to fruition, as confirmed by the glorious uprising of the Palestinian people under occupation.”<sup>21</sup>

The 1994 peace treaty between Israel and Jordan thus needs to be viewed in the context of Jordan having had given up territorial claims to the West Bank in 1988 and expressed support to a future creation of an independent state of Palestine.

### 3. Israeli Policy under Criticism

In course of the occupation of the West Bank Israel pursues a policy of settlements through which she gradually alters the demographics of the West Bank. This policy is subject to a long-standing and repeated criticism from the United Nations, last time by UN Security Council Resolution 2334 (2016).<sup>22</sup>

Along with the creation of the settlements that alter demographics of the West Bank it has been also the construction of the Wall to prevent terrorists from infiltration the State of Israel proper, a construction accompanied by destruction of private property in the occupied territory, which has been subject to continuing criticism by the United Nations. It was also this very policy that led to the Advisory Opinion of 9 July 2004 on the “Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory”,<sup>23</sup> in which the court heavily criticized these practices of Israel.

Nevertheless, as the current author briefly noted in the introduction to these pieces, the analysis presented in the aforesaid Advisory Opinion was far from complex. In fact, the court avoided articulating certain facts altogether, so that the overall connotation of the ruling was one that just selectively showed how bad Israel was in the eyes of the majority of the members of the Court.

For instance, in paragraph 101 of the ruling, the court observes as follows:

“101. In view of the foregoing, the Court considers that the Fourth Geneva Convention is applicable in any occupied territory in the event of an armed conflict arising between two or more High Contracting Parties. Israel and Jordan were parties to that Convention when the 1967 armed conflict broke out. The Court accordingly finds that that Convention is applicable in the Palestinian territories which before the conflict lay to the east of the Green Line and which, during that conflict, were occupied by Israel, there being no need for any enquiry into the precise prior status of those territories.”

It avoided altogether the question of the precise status of those territories.

Instead, the court, in paragraph 117 of the Advisory Opinion proclaimed that:

“117. The Court would recall that both the General Assembly and the Security Council have referred, with regard to Palestine, to the customary rule of “the inadmissibility of the acquisition of territory by war (see paragraph 74 and 87 above).”

These two paragraphs of the same Advisory Opinion read:

“74. On 22 November 1967, the Security Council unanimously adopted resolution 242 (1967), which emphasized the inadmissibility of the acquisition of territory by war and called for the “Withdrawal of Israel armed forces from territories occupied in the recent conflict”, and “Termination of all claims or states of belligerency.”

87. The Court first recalls that, pursuant to Article 2, paragraph 4, of the United Nations Charter:

“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.”

On 24 October 19713, the General Assembly adopted resolution 2625 (XXV), entitled “Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States” (hereinafter “resolution 2625 (XXV)”), in which it emphasized that “No territorial acquisition resulting from the threat or use of force shall be recognized as legal.” As the Court stated in its Judgment in the case concerning Military and Paramilitary Activities in and

<sup>20</sup> [http://www.kinghussein.gov.jo/88\\_july31.html](http://www.kinghussein.gov.jo/88_july31.html) (last visited 24 October 2020)

<sup>21</sup> [http://www.kinghussein.gov.jo/88\\_july31.html](http://www.kinghussein.gov.jo/88_july31.html) (last visited 24 October 2020)

<sup>22</sup> See also UN SC Resolutions: 242 (1967), 338 (1973), 446 (1979), 452 (1979), 465 (1980), 476 (1980), 478 (1980), 1397 (2002), 1515 (2003), and 1850 (2008).

<sup>23</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, p. 136 (available online at: <https://www.icj-cij.org/public/files/case-related/131/131-20040709-ADV-01-00-EN.pdf> (last visited 24 Oct 2020)).

against Nicaragua (*Nicaragua v. United States of America*), the principles as to the use of force incorporated in the Charter reflect customary international law (see I. C. J. Reports 1986, pp. 98-101, paras. 187-190); the same is true of its corollary entailing the illegality of territorial acquisition resulting from the threat or use of force.”

These conclusions of the Court are (i) simply not true, (ii) would not stand the test of proving content of customary law, and (iii) cannot be applied to the situation in the West Bank for the reasons discussed below.

Whilst one may agree that Article 2(4) of the UN Charter was, in 1967, applicable to both Israel and Jordan as UN Member States, and perhaps the general prohibition of aggressive warfare may have also acquired (possibly) customary nature by 1967 (although state practice in 1950 Korea, 1956 Hungary, 1956 Egypt, etc.- just to name a few- may indeed indicate otherwise), there is nothing in Article 2(4) of the UN Charter that would talk of territorial gains from defensive use of force. Moreover, last time the current writer checked, General Assembly Resolutions were not of normative nature and customary law was to be tested upon the presence of *usus longaevus* and *opinion iuris*. The observations made in paragraph 117 of the Advisory Opinion are therefore misleading and wrong. Neither in 1948 nor 1967, was it Israel who attacked Jordan or conducted aggressive warfare in the first place.

Stephen M. Schwebel, who would later be president of the ICJ between 1997 and 2000, observed as early as 1970 in the *American Journal of International Law*:<sup>24</sup>

“As a general principle of international law, as that law has been reformed since the League, particularly by the Charter, it is both vital and correct to say that there shall be no weight to conquest, that the acquisition of territory by war is inadmissible. But that principle must be read in particular cases together with other general principles, among them the still more general principle of which it is an application, namely, that no legal right shall spring from a wrong, and the Charter principle that the Members of the United Nations shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state. So read, the distinctions between aggressive conquest and defensive conquest, between the taking of territory, legally held and the taking of territory illegally held, become no less vital and correct than the central principle itself.

Those distinctions may be summarized as follows: (a) A state acting in the lawful exercise of its right of self-defense may seize and occupy foreign territory as long as such seizure and occupation are necessary to its self-defense. (b) As a condition of its withdrawal from such territory, that state may require the institution of security measures reasonably designed to ensure that that territory shall not again be used to mount a threat or use of force against it of such a nature as to justify the exercise of self-defense. (c) Where 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.

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 Arab neighbors. This is indicated by the fact that Israel responded to Egypt’s prior closure of the Straits of Tiran, its proclamation of a blockade of the Israeli port of Elath, and the manifest threat of the U.A.R.’s use of force inherent in its massing of troops in Sinai, coupled with its ejection of UNEF. It is indicated by the fact that, upon Israeli responsive action against the U.A.R., Jordan initiated hostilities against Israel. It is suggested as well by the fact that, despite the most intense efforts by the Arab states and their supporters, led by the Premier of the Soviet Union, to gain condemnation of Israel as an aggressor by the hospitable organs of the United Nations, those efforts were decisively defeated. The conclusion to which these facts lead is that the Israeli conquest of Arab and Arab-held territory was defensive rather than aggressive conquest.

The facts of the 1948 hostilities between the Arab invaders of Palestine and the nascent state of Israel further demonstrate that Egypt’s seizure of the Gaza strip, and Jordan’s seizure and subsequent annexation of the West Bank and the old city of Jerusalem, were unlawful. Israel was proclaimed to be an independent state within the boundaries allotted to her by the General Assembly’s partition resolution. The Arabs of Palestine and of neighboring Arab states rejected that resolution. But that rejection was no warrant for the invasion by those Arab states of Palestine, whether of the territory allotted to Israel, to the projected, stillborn Arab state, or to the projected, internationalized city of Jerusalem. It was no warrant for attack by the armed forces of neighboring Arab states upon the Jews of Palestine, whether they resided within or without Israel. But that attack did justify Israeli defensive measures, both within and, as necessary, without the boundaries allotted her by the partition plan (as in the new city of Jerusalem). It follows that the Egyptian occupation of Gaza, and the Jordanian annexation of the West Bank and Jerusalem, could not vest in Egypt and Jordan lawful, indefinite control, whether as occupying Power or sovereign: *ex injuria jus non oritur*.

If the foregoing conclusions that (a) Israeli action in 1967 was defensive and (b) Arab action in 1948, being aggressive, was inadequate to legalize Egyptian and Jordanian taking of Palestinian territory, are correct, what follows?

It follows that the application of the doctrine of according no weight to conquest requires modification in double measure. In the first place, having regard to the consideration that, as between Israel, acting defensively in 1948 and 1967, on the one hand, and her Arab neighbors, acting aggressively in 1948 and 1967, on the other, Israel has better title in the territory of what was Palestine, including the whole of Jerusalem, than do Jordan and Egypt (the U.A.R. indeed has, unlike Jordan, not asserted sovereign title), it follows

<sup>24</sup> SCHWEBEL, S., What Weight to Conquest? In: *The American Journal of International Law*, Vol. 64, No. 2, 1970, pp. 344-347.

that modifications of the 1949 armistice lines among those states within former Palestinian territory are lawful (if not necessarily desirable), whether those modifications are, in Secretary Rogers' words, "insubstantial alterations required for mutual security" or more substantial alterations - such as recognition of Israeli sovereignty over the whole of Jerusalem."<sup>25</sup>

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The current writer, therefore, submits that in case the Court were to venture into analyzing the legal status of these territories by institutions of customary international law, it would have had to arrive upon quite different conclusions. Perhaps this may have been the reason why the Court avoided such analysis in the first place.

First of all, the Court avoided the articulation upon the question of whether the 1950 annexation of the West Bank by Trans-Jordan was legal or not. The predominant stance in the international community (with the exception of the United Kingdom and Iraq) was that the 1950 annexation through aggressive warfare was illegal (and thus non-existent on the plane of international law). It seems too, from the above citation of paragraph 101 of the Wall Advisory Opinion that, whilst stopping short of saying it, the court, by carefully talking of Jordan and Israel as parties to the convention and talking of 'Palestinian Territories' or 'occupied territory' impliedly treats the 1950 incorporation of the West Bank into (Trans-)Jordan as illegal.

The current writer observed on this matter in an earlier piece that "The International Court of Justice, via a rather complicated construction, did not favor Israel's view that the territories that had been acquired in 1967 from the Jordan, would before the Jordanian invasion 1948 be *terra nullius*<sup>25</sup> and that since Jordan did not incorporate them into its statehood, they would remain *terra nullius* when acquired by Israel in 1967 (including East Jerusalem)."<sup>26</sup> In the same piece, the current writer also observed – on the plane of law and contrary to the factual situation on the ground 'that the Arab territories, which from today's point of view are under Arab autonomous administration were in between 1948 – 1967 under occupation by the Kingdom of Jordan.'<sup>27,28</sup> This conclusion seems to be legally in line with the afore quoted piece by Schwebel.

However, there may be another way of looking upon the situation in 1948 and subsequently in 1988 and onwards in the West Bank. This another view, a legally-technical one, is perhaps *freer from passion*, to borrow the words of Aristotle:

#### 4. Acquisition of Land without a Master: Terra Nullius and Territorium Nullius

When Trans-Jordan invaded the West Bank in course of the Arab attack upon Israel (and the other part of the former Mandated Territory of Palestine) in 1948 there was no sovereign that would claim title to the West Bank. Turkey had renounced her titles in 1921 and 1923 respectively in the treaties of Ankara and Lausanne. In the latter, it did so vis-à-vis the Mandate Administrator of the Territory, the United Kingdom. By the time of the attack, the United Kingdom had also ended the mandate. The local Arab population had not organized itself into statehood pursuant to, by then, customary definition of statehood by the Montevideo Convention, namely (a) a permanent population, (b) defined territory, (c) government, and (d) capacity to enter into relations with other states. Whilst the West Bank (and Gaza) were (ad (b)) territories with (ad (a)) permanent populations, there was never formed a government that would be in a capacity to enter into international relations by the time of the Trans-Jordanian invasion, nor capable of controlling the permanent population on the territory. In fact, instead of aiding the creation of an Arab state in part of the former Mandate Territory of Palestine, the neighboring Arab states ran the territory over with their military boots.

International Law, although labelled to be a law inter nations, is one that is concerned with the right and duties of a perfectly defined closed set of subjects of this normative system, amongst whom states are *primi inter pares*.

Whilst peoples do possess some limited rights and duties under contemporary international law (including customary law) in relation to the institution of self-determination, in 1948 this was quite not the case yet. Decolonization as a complex process that eventually lead to the observation by the ICJ that there indeed exists a right to self-determination as a customary institution,<sup>29</sup> was merely starting to unfold then.

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Simsarian observed after a study conducted under the auspices of Philip C. Jessup and Charles Cheney Hyde at Columbia Law School in the 1930s<sup>30</sup> that occupation of *terra nullius* has been a practice of customary nature.<sup>31</sup> He was predominantly discussing the acquisition of land in North America. Simsarian observed that whilst 'discovery with symbolic taking was considered sufficient in state practice from the latter part of the

<sup>25</sup> For this view see The Levy Commission Report, p. 7 (English translation online: <https://www.regavim.org/wp-content/uploads/2014/11/The-Levy-Commission-Report-on-the-Legal-Status-of-Building-in-Judea-and-Samaria2.pdf>)

<sup>26</sup> MACH, T., From the Balfour Declaration to the Creation of the State of Israel: The Issue of Legal Importance of this Declaration, Its Historical Role, and Consequences of the Arab Attack upon the Newly Proclaimed State of Israel on the Plane of Public International Law. In: *Journal on European History of Law*, Vol. 10, No. 1, 2019, p. 131.

<sup>27</sup> *Ibid.*, p. 130.

<sup>28</sup> *Ibid.*, pp. 345-347.

<sup>29</sup> discussed in detail below.

<sup>30</sup> FITZMAURICE, A., Discovery, Conquest, and Occupation of Territory. In: Fassbender, Bardo and Peters, Anne (Eds.) *The Oxford Handbook of The History of International Law*. Oxford, 2014, p. 859

<sup>31</sup> SIMSARIAN, J. The Acquisition of Legal Title to Terra Nullius. In: *Political Science Quarterly*, Vol. 53, No., 1938, p. 111-128 at p. 111

fifteenth to the end of the seventeenth century' as to establish legal title to terra nullius, in the first quarter of the nineteenth-century occupation of terra nullius was 'regarded as an essential concomitant in the acquisition of terra nullius.'<sup>32</sup>

'Occupation', the taking of unowned land was a common state practice of European colonial Empires. It was based on philosophical fundaments from ancient Greece and Rome that unless there is agricultural cultivation to land, i.e. settled life-style with the farming of crops, there is no private ownership in terms of title to land. Banner<sup>33</sup> quotes Justin, Virgil, and Ovid in this context, namely:

"The Scythians "have no fixed boundaries", observed the second-century writer, Justin, because "they do not engage in agriculture... Instead, they pasture their cattle and sheep throughout the year and live a nomadic life in the desolate wilds." It was only when "Ceres first taught men to plough the land," Virgil explained, that land was first divided. When there were "[n]o ploughshares to break up the landscape." Ovid agreed, there were no surveyors [p]egging out the boundaries of estates."<sup>34</sup> Humans had once been wanderers, without property in land, but when they settled down and began farming, they simultaneously established property rights."

Banner<sup>35</sup> carries on to observe that this chain of thoughts continues to modern times and was endorsed by Lock, Grotius, and Pufendorf. He points out to Emmer de Vattel, who in his Law of Nations observed, as follows:

"§ 209. There is another celebrated question, to which the discovery of the new world has principally given rise. It is asked whether a nation may lawfully take possession of some part of a vast country, in which there are none but erratic nations whose scanty population is incapable of occupying the whole? We have already observed (§ 81), in establishing the obligation to cultivate the earth, that those nations cannot exclusively appropriate to themselves more land than they have occasion for, or more than they are able to settle and cultivate. Their unsettled habitation in those immense regions cannot be accounted a true and Legal possession; and the people of Europe, too closely pent up at home, finding land of which the savage stood in no particular need, and of which they made no actual and constant use, were lawfully entitled to take possession of it, and settle it with colonies. The earth, as we have already observed, belongs to mankind in general, and was designed to furnish them with subsistence: if each nation had, from the beginning, resolved to appropriate to itself a vast country; that the people might live only by hunting, fishing, and wild fruits, our

globe' would not be sufficient to maintain a tenth part of its present inhabitants. We do not, therefore, deviate from the views of nature in confining the Indians within narrower limits. However, we cannot help praising the moderation of the English puritans who first settled in New England; who, notwithstanding their being furnished with a charter from their sovereign, purchased of the Indians the land of which they intended to take possession. This laudable example was followed by William Penn, and the colony of Quakers that he conducted to Pennsylvania."<sup>36</sup>

Banner then observes, that whilst in Australia, due to the civic organization of the Aboriginals (and their rather Neolithic state of cultural development) the British Empire treated the land as *terra nullius*, it was not the case in New Zealand with the Maori as landowners.<sup>37</sup>

The difficulty with applying the principle of *terra nullius* to the situation in the West Bank, or in fact to any territory that is inhabited by a permanent population lacking statehood, is twofold.

First, it appears that well by the mid-18<sup>th</sup> Century, as de Vattel, again, seems to show in his *opinion doctoris*, it was established that if there was a people practicing agriculture, the principle could not apply:

"§ 203. Hitherto we have considered the nation merely with respect to itself, without any regard to the country it possesses. Let us now see it established in a country which becomes its own property and habitation. The earth belongs to mankind in general; destined by the Creator to be their common habitation, and to supply them with food, they all possess a natural right to inhabit it, and to derive from it whatever is necessary for their subsistence, and suitable to their wants. But when the human race became extremely multiplied, the earth was no longer capable of furnishing spontaneously, and without culture, sufficient support for its inhabitants; neither could it have received proper cultivation from wandering tribes of men continuing to possess it in common. It, therefore, became necessary that those tribes should fix themselves somewhere and appropriate to themselves portions of land, in order that' they might, without being disturbed in their labour, or disappointed of the fruits of their industry, apply themselves to render those lands fertile, and thence derive their subsistence. Such must have been the origin of the rights of property and dominion: and it was a sufficient ground to justify their establishment. Since their introduction, the right which was common to all mankind is individually restricted to what each lawfully possesses. The country which a nation inhabits, whether that nation

<sup>32</sup> Ibid.

<sup>33</sup> BANNER, S., Why Terra Nullius? Anthropology and Property Law in Early Australia. In: *Law and History Review*, Spring, 2005, p. 95-131, at p. 101

<sup>34</sup> JUSTIN, *Epitome of the Philippic History of Pompeius Trogus*. trans. J.C. Yardley. Atlanta, 1994, p. 27; VIRGIL, *Georgics*, trans. Smith Palmer Bovie. Chicago, 1956, p. 10. OVID, *The Erotic Poems*. trans. Peter Green. London, 1982), p. 153 (cited via: BANNER, S., Why Terra Nullius? Anthropology and Property Law in Early Australia. In: *Law and History Review*. Spring, 2005, pp. 95-131, at p. 101)

<sup>35</sup> BANNER, S., Why Terra Nullius? Anthropology and Property Law in Early Australia. In: *Law and History Review*. Spring, 2005, pp. 93-131 a p. 102

<sup>36</sup> VATTEL de, E *The Law of Nations*. 6<sup>th</sup> American Edition: 1844, p. 100

<sup>37</sup> BANNER, S., Why Terra Nullius? Anthropology and Property Law in Early Australia. In: *Law and History Review*. Spring, 2005, pp. 95-131, at p. 96

has emigrated thither. in a body, or the different families of which it consists were previously scattered over the country, and, there uniting, formed themselves into a political society,-that country, I say, is the settlement of the nation, and it has a peculiar and exclusive right to it.”<sup>38</sup>

Second, making a distinction between agricultural peoples (who have rights in land) and nomadic savages would imply that the former would have rights under international law, i.e. quasi-state-like rights to sovereignty over ‘their land’. Vattel actually implies that in the same text under § 204 when he goes on to say:<sup>39</sup>

“§ 204. This right comprehends two things: 1. The domain, by virtue of which the nation alone. may use the country for the supply of its necessities, may dispose of it as it thinks proper, and derive from it every advantage It is capable of yielding. - 2. The empire, or the right of sovereign command, by which the nation directs and regulates at its pleasure everything that passes in the country.”

This would, however, be in sharp contrast not only to the exhaustive-list-nature of subjects of international law, but also against the very principles of international law as they are articulated even the UN Charter (sovereignty, sovereign-equality, non-intervention).

Then again, Vattel’s book the Law of Nations needs to be read in context and language of that time, namely that the term Nations means states in modern international law, i.e. the paramount subjects upon the exhaustive list of subjects of international law. Professor Okere, writing in 1979, as quoted below, provides authorities for this conclusion as well.

The concept of *terra nullius* has been discussed by the ICJ in The *Western Sahara Case* advisory opinion in 1975. In this advisory opinion (that was rendered at the end of the decolonization process) the Court arrived in relations to the nomadic tribes in Western Sahara to the conclusion that:

“whatever difference of opinion there may have been among jurists, 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*.”<sup>40</sup>

This advisory opinion, given that it was rendered at the end of the decolonization process can serve as little authority, as it was rightly criticized in leading scientific journals of the time. For instance, B.O. Okere<sup>41</sup> in the *International and Comparative Law Quarterly* in 1979 commented on the conclusions of the court as follows:

“The Court’s answer [...] reflected the multicultural composition of the Court. Whether they are “civilised” or “uncivilised” (by European standards) I no longer the criterion for determining whether a territory inhabited by native peoples is *terra nullius* but rather it is a question of whether such territories have “a social and political organization.”

This constitutes a radical departure from the doctrine widely propounded by eminent Western jurists right up to the present time and of which one still finds traces in modern European writings. Pasquale Fiore regarded as *terra nullius* territories inhabited by populations whose civilisation in the sense of the public law of Europe, was backward, and whose political organisation was not conceived according to Western norms. Francisco de Vittoria, a Spanish jurist, in the sixteenth century protested against the application to lands occupied by American Indians of this concept of *terra nullius* in order to deprive them of their lands. But W.E. Hall was still able to write in 1924 that occupation of a territory “unappropriated by a civilized or semi-civilised State” is an original mode of acquisition of territory.<sup>42</sup> Oppenheim went a stage further. He cited as a proper object of occupation such a territory as is “entirely uninhabited, for instance and island, or inhabited by *natives* whose community is not to be considered as a State.”<sup>43</sup> According to him the mere fact that “civilized individuals” (obviously Europeans) may live and have property on such a territory without forming themselves into a State proper and exercising sovereignty over such territory does not affect its susceptibility to acquisition by occupation.”<sup>44</sup> Schwarzenberger’s opinion is cloaked in the euphemism of “communities lacking international personality” and “communities outside the pale of international law”, but the message is the same.”

The ICJ’s reasoning in the *Western Sahara* case seems to not only be contrary to doctrine based on evidence of state practice as collected in the 1930s by Jessup at al. at Columbia Law School, but it seems to have overlooked another substantial point. Throughout the 20<sup>th</sup> Century, the doctrine of *terra nullius* gradually absorbed the doctrine of *territorium nullius*. As Fitzmaurice<sup>45</sup> observes:

“[w]hereas *territorium nullius* had been employed to describe territory devoid of sovereignty, but not people, *terra nullius* was employed to describe land where there was literally no one, or where a country, as Kant had said, could be said to belong to no one, since the people who lived there, such as the Inuit, counted as nothing.

[...]

<sup>38</sup> VATTEL de, E., *The Law of Nations*. 6<sup>th</sup> American Edition: 1844, p. 98.

<sup>39</sup> *Ibid.*, p. 98.

<sup>40</sup> *Western Sahara*. ICJ Advisory Opinion of 16 October 1975. 1975 ICJ Rep, p. 39, para 80.

<sup>41</sup> OKERE, B. O., The *Western Sahara Case*. In: *The International and Comparative Law Quarterly*, 1979, p. 296-312, at p. 305-306.

<sup>42</sup> Cited via B. O. Okere, fn. 27: *International Law*, 8<sup>th</sup> edn. (1924), p. 124.

<sup>43</sup> Cited via B. O. Okere, fn.28: Oppenheim, *International Law*. Vol. 1., 8<sup>th</sup> edn. (1955), p. 118.

<sup>44</sup> Cited via B. O. Okere, fn. 29: *Ibid.*, p. 888.

<sup>45</sup> FITZMAURICE, A., Discovery, Conquest, and Occupation of Territory. In: Fassbender, Bardo and Peters, Anne (Eds.) *The Oxford Handbook of The History of International Law*. Oxford, 2014, p. 859.

As it expanded in scope, *terra nullius* lost the initial focus of its meaning and rapidly assumed the signification that had also been attributed to *territorium nullius* so that the rival concept progressively disappeared from the vocabulary of international law.”

It follows from the above analysis and authority that the population in the West Bank, although permanent and settled, but unorganized into statehood, represented a mere native population that pursuant to the *territorium nullius* meaning of the doctrine of *terra nullius* did not stand in way to the legal acquisition of the territory by a subject of international law, i.e. a state.

It, therefore, follows that the 1948 occupation of the land by Trans-Jordan, although condemned at the time both by states and jurists, was, in fact, legal and the incorporation of this territory (contrary to what this author has previously observed)<sup>46</sup> was perfectly in conformity with international law of the time.

It also follows that when Israel was attacked by Jordan in 1967 and in course of this defensive warfare took possession of the territory of the West Bank, it, in fact, commenced exercising occupational administration as an occupying power over the territory that rightfully belonged to another subject of international law, namely Jordan.

However, when Jordan denounced its right to the West Bank in July 1988, the land became *territorium nullius* once again. This cannot be changed even by the existence of the PLO, its position under international law in the given time, and the material content of the customary doctrine of self-determination.

## 5. The PLO and the Nature of the Arabs in the West Bank to Self Determination

The Palestinian Liberation Organization was founded in 1964 at an Arab summit meeting in 1964 in order to bring various Palestinian groups together.<sup>47</sup> The founding document was the Palestine National Covenant (or Charter, depending upon translation), which is an ideological paper setting out the goals of the organization. This document was first adopted in 1964 and later replaced by a 1968 version after the war of 1967. It praises armed struggle (Article 9) as the only way to liberate Palestine (within the boundaries of the British Mandate - that is incl. the State of Israel) from Zionist occupation (Article 4).

There are differences between the 1964 and 1968 versions of the text that reflect the fact that the Arabs of Palestine were against the existence of Israel but they did not resist the fact that they were, in the West Bank, part of Jordan (be it *de iure* or *de facto*). This conclusion can be drawn from the following development of the respective articles of the Covenant:

Article 1 (1964)<sup>48</sup> reads: ‘Palestine is an Arab homeland bound by strong national ties to the rest of the Arab Countries and which together form the large Arab homeland.’ Whilst Article 1 (1968)<sup>49</sup> reads: ‘Palestine is the homeland of the Arab Palestinian people; it is an indivisible part of the Arab homeland, and the Palestinian people are an integral part of the Arab nation.’

Article 3 (1964) reads: ‘The Palestinian Arab people has the legitimate right to its homeland and is an inseparable part of the Arab Nation. It shares the sufferings and aspirations of the Arab Nation and its struggle for freedom, sovereignty, progress and unity.’ Whilst Article 3 (1968) reads: ‘The Palestinian Arab people possess the legal right to their homeland and have the right to determine their destiny after achieving the liberation of their country in accordance with their wishes and entirely of their own accord and will.’

Article 4 (1964) reads: ‘The people of Palestine determines its destiny when it completes the liberation of its homeland in accordance with its own wishes and free will and choice.’ Whilst Article 4 (1968) reads: ‘The Palestinian identity is a genuine, essential, and inherent characteristic; it is transmitted from parents to children. The Zionist occupation and the dispersal of the Palestinian Arab people, through the disasters which befell them, do not make them lose their Palestinian identity and their membership in the Palestinian community, nor do they negate them.’

In other words, the 1968 version shifts gradually to accenting the Palestinian Identity. The idea that there be something like a Palestinian nationality, somewhat different from being just another subset of the Arab nationality, was born.

The Palestine Liberation Organization, as an example of a newly surfacing category of *national liberation movements* during the second half of the 20<sup>th</sup> Century, acquired factual status of as non-State actor of international relations which is vested with exercising the right of self-determination of the Arab population within the territory of the former British Mandate of Palestine.<sup>50</sup> It has thus become a *sui generis* actor on the plane of international law. It was recognized by the Arab League, in 1974, at the ‘sole international representative of the Palestinian People [and] became a U.N. Observe shortly after’.<sup>51</sup>

As has been observed above, in July 1988 Jordan renounced its title to the West Bank. In November 1988 the PLO proclaimed by ‘Palestinian Declaration of Independence’ the State of Palestine as being established on the “Palestinian territory”, without explicitly specifying in what boundaries. In the State of Palestine’s application to the UN Membership in 2011, however, Mr. Abbas said the application for full membership of the UN is on the basis of the so-called 4 June 1967

<sup>46</sup> MACH, T., From the Balfour Declaration to the Creation of the State of Israel: The Issue of Legal Importance of this Declaration, Its Historical Role, and Consequences of the Arab Attack upon the Newly Proclaimed State of Israel on the Plane of Public International Law. In: *Journal on European History of Law*, Vol. 10, No. 1, 2019, p. 131.

<sup>47</sup> <https://www.britannica.com/topic/Palestine-Liberation-Organization/Intifada-and-Oslo-peace-process> (last visited 25 Oct 2020).

<sup>48</sup> <https://www.jewishvirtuallibrary.org/the-original-palestine-national-charter-1964> (last visited 25 October 2020).

<sup>49</sup> [https://avalon.law.yale.edu/20th\\_century/plocov.asp](https://avalon.law.yale.edu/20th_century/plocov.asp) (last visited 25 October 2020).

<sup>50</sup> WORSTER, T. W., Relative International Legal Personality and Non-State Actors. In: *Brooklyn Journal of International Law*, 2016, Vol. 43, No.1, p. 207-273 at p. 223.

<sup>51</sup> Ibid.

borders.<sup>52</sup> This would be in conformity with the Oslo accords where the PLO acknowledged the right of existence to Israel, although the text of the Palestine National Covenant was never altered accordingly.

It is to be noted that in November 1988 the State of Palestine was recognized quite promptly by some Arab or Muslim states and by states of the Soviet Block. Notably right on the date of its declaration, 15 November 1988, it was recognized to exist by: Algeria, Bahrain, Iraq, Kuwait, Libya, Malaysia, Mauritania, Morocco, Somalia, Tunisia, Turkey, Yemen, a day later by, *inter alia*, Afghanistan, Bangladesh, Cuba, Indonesia, Jordan, Nicaragua, Pakistan, Saudi Arabia, Yugoslavia, a few days later by Czechoslovakia, the Soviet Union and numerous countries of the third world.

The above mentioned 2011 application for UN Membership (as acceptance for membership can only take place upon the recommendation of the Security Council) was later changed to a rather informal non-member observer status. This status is not founded upon law<sup>53</sup> as there are no provisions in the UN Charter for this kind of classification. The entity called the State of Palestine shares this observer status with the Holy See, an entity in law different from the Vatican City State, but recognized under customary international law as being a subject of law parallel to the Vatican City State itself.<sup>54</sup> Given the fact that 138<sup>55</sup> of UN Member States recognize the State of Palestine, a wishful mind could be tempted to conclude, that the State of Palestine has come into existence. However, for a state to exist pursuant to international law, objective criteria of the Montevideo Convention definition of statehood, discussed above, must be positively met. Moreover, the fact that some states, like Czechoslovakia in 1988, recognized the existence of this entity<sup>56</sup> does not automatically mean that they treated this land-lacking entity as a state and did so since they would also feel compelled to treat it accordingly under international law (*opinion juris*).

The State of Palestine is currently in possession of no territory it governs, certainly not of the West Bank where the Israel Defense Force exercises belligerent occupation via the Civil Administration subordinated to the IDF. The Gaza Strip, ever since the IDF pulled out from there, could theoretically fulfill the definition of Statehood for a Palestinian state, but currently, not the State of Palestine as recognized by international community as that is not the government on the ground in Gaza at the time of writing this piece ((prior to the 2023 terror and the subsequent invasion of Gaza).

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In relation to the West Bank, the only sustainable logical conclusion under international law thus seems to be as follows:

Trans-Jordan took the West Bank as a non-member of the UN (thus not bound by the UN Charter at the time; accepted to the UN only in 1955) in 1948 by force as a *territorium nullium* and was thus entitled to incorporate it into its territory under customary international law as (i) it is hard to conclude that by 1948 an *ius cogens* prohibition of aggressive warfare existed as a customary rule of international law and (ii) the land was not taken from any subject of international law anyhow.

When Israel occupied it in the defensive war of 1967, until July 1988 it was in legal (and remains to be in factual) occupation, thus being by July 1988 obliged to follow the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention). When in July 1988 Jordan renounced its claim over the territory, it became *territorium nullius* once again and since Israel was in factual possession of the territory, she holds it in conformity with international law not only as an occupying power (and de-facto sovereign since August 1988) but also as someone who could theoretically exercise the right of 'occupatio'. The fact that three months later (November 1988) an entity that does not fulfill the criteria of statehood called the State of Palestine was declared and claimed the territory for this 'state' is fully irrelevant to this subject matter.

Nonetheless, as has been observed above, the newly invented Palestinian nation, of which the PLO has been recognized to be the international representative, enjoys the right to self-determination. It follows that the material content of this right-of self-determination also determines whether the right of Israel to exercise the right of 'occupatio' is a mere theoretical right which must not be exercised due to a conflicting right of the Palestinian people, or whether is a right that can be asserted in practice.

## 6. Self –Determination as an Institution of International Law

Self-determination as an institution of politics emerged in the times around the Great War. One of its proponents was US President Wilson with his 14 points of January 1914, the other had been Lenin.<sup>57</sup> The idea of self-determination was at the time a political, not a legal, topic; it also applied quite selectively to only some nations of former Austria-Hungary.<sup>58</sup>

The first discussion of this institution on the plane of law was in the famous *Aaland Island Case*. This case was about a Swedish speaking minority inhabiting these islands, off the coast of Sweden, yet belonging to the territory of Finland, who sought secession from Finland and aimed at joining Sweden. In the few years of pacifism that followed the Great War, this topic was dealt with by the League of Nations. The League of Nations constituted a Committee of Jurists of the League of Nations,

<sup>52</sup> <https://news.un.org/en/story/2011/09/388322-ban-sends-palestinian-application-un-membership-security-council#.VfMZaZeM-ao> (last visited 25 October 2020)

<sup>53</sup> <https://www.un.org/en/sections/member-states/about-permanent-observers/index.html>

<sup>54</sup> MACH, T., *Vademecum of International Law*. Prague, 2019, p. 31

<sup>55</sup> [https://en.wikipedia.org/wiki/International\\_recognition\\_of\\_the\\_State\\_of\\_Palestine](https://en.wikipedia.org/wiki/International_recognition_of_the_State_of_Palestine) (last visited 25 October 2020)

<sup>56</sup> It is to be noted that its successor, the Czech Republic, voted against even granting it the informal status of non-member observer status)

<sup>57</sup> CASSESE, A., *Self-Determination of Peoples: A Legal Reappraisal*. Cambridge, 1994, p. 14

<sup>58</sup> BROWN, P. M., Self-Determination in Central Europe. In: *The American Journal of International Law*, 1920, vol. 14. No. 1-2, pp. 235-239.

which was to legally look into the issue. In a Report of 5 September 1920, the Committee of Jurists concluded as follows:

“Although the principle of self-determination of peoples plays an important part in modern political thought, especially since the Great War, it must be pointed out that there is no mention of it in the Covenant of the League of Nations. The recognition of this principle in a certain number of international treaties cannot be considered as sufficient to put it upon the same footing as a positive rule of the Law of Nations. On the contrary, in the absence of express provisions in international treaties, the right of disposing of national territory is essentially an attribute of the sovereignty of every State. Positive International Law does not recognize the right of national groups, as such, to separate themselves from the State of which they form part by the simple expression of a wish, any more than it recognizes the right of other States to claim such a separation. Generally speaking, the grant or refusal of the right to a portion of its population of determining its own political fate by plebiscite or by some other method, is, exclusively, an attribute of the sovereignty of every State which is definitively constituted.”<sup>59</sup>

However, this was quite not what the politicians of the League of Nations had perhaps expected. As Cassese observed:

“Although the concept of self-determination had been promoted with zeal during the war, it could not be considered an international legal norm. Specifically, it noted that although the principle was an integral part of ‘modern political thought’, it was not mentioned in the Covenant of the League of Nations and its recognition ‘in a certain number of international treaties’ [could] not be considered as sufficient to put it upon the same footing as a positive rule of the Law of Nations.”<sup>60</sup>

Given the legally right, but politically obviously wrong answer of the Committee of Jurists, a second committee was constituted to answer the same question. In its Report, this Commission of Rapporteurs<sup>61</sup> confirmed that the principle of self-determination ‘is not, properly speaking a rule of international law[...].’<sup>62</sup> Contrary to the legal conclusions of the Committee of Jurist, however, the Commission of Rapporteurs went on to observe that ‘[i]t is a principle of justice and of liberty, expressed by a vague and general formula which has given rise to the most varied interpretations and differences of opinion’.<sup>63</sup>

In further parts of the Report, the Commission went on to distinguish between a situation when minority rights within

a given State, namely rights to cultural and linguistic self-determination, are observed by the State and in situations when they are not. The former situation of domestically allowing minorities to freely exercise their cultural and linguistic rights, including the access to education in their mother tongues and to access public authorities therein, is currently called *internal* self-determination. The contrary situation when such minority rights are not respected by the state in which such minority finds itself would, in the eyes of the Commission of Rapporteurs, open way to seeking alternative solutions, suggesting what is currently called *external* self-determination via secession and creation of a new State.<sup>64</sup>

The principle of self-determination found its way to treaties subsequent to WWII. Whilst it was not provided for in the Covenant of the League of Nations, it can be found in Art. 1(2) of the UN Charter, a document precisely 75 years old at the time of writing this piece (effective as of 24 October 1945). Amongst the authors of this document were the United Kingdom (the British Empire) and France, both of whom still had substantial colonies at the time. It is therefore hard to imagine that the authors of the treaty, apart from mere lip-services that just sounded nice, actually meant to provide for this right on the plane of international law. As Malcom Shaw observes in his leading textbook:

“It is disputed whether the reference to this principle in these very general terms was sufficient to entail its recognition as a binding right, but the majority view is against it. Not every statement of a political aim in the Charter can be regarded as automatically creative of legal obligations.”<sup>65</sup>

The current writer shares this view. However, even if this were to be meant seriously, the above-mentioned distinction between internal and external self-determination pursuant to the Commission of Rapporteurs would have been reflected, thus giving no right to secession to nations under colonial rule as long as internal self-termination would be provided for.

The principle of self-determination, however, found its way into the ‘two Covenants of 1966’ (effective of 1976), namely the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Israel is a party to both of these covenants. Both Covenants share the same Art 1(1) which reads:

“1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”<sup>66</sup>

<sup>59</sup> Report of the International Committee of Jurists Entrusted by the Council of the League of Nations, with the Task of Giving an Advisory Opinion Upon the Legal Aspects of the Aaland Islands Question. League of Nations. Official journal. Special supplement. London, 1920; Available online at: <https://www.ilsa.org/jessup/jessup10/basicmats/aaland1original.pdf> (Last access 6 August 2018)

<sup>60</sup> CASSESE, A., *Self-Determination of Peoples: A Legal Reappraisal*. Cambridge, 1995, p. 28.

<sup>61</sup> Report of the Commission of Rapporteurs of the League of Nations (B.721/68/106 (1921)). Available also online in reprint at: <https://www.ilsa.org/jessup/jessup10/basicmats/aaland2.pdf> (Last access 6 August 2018)

<sup>62</sup> Ibid.

<sup>63</sup> Ibid.

<sup>64</sup> MACH, T., *Vademecum of International Law*. Prague, 2019, p. 64.

<sup>65</sup> SHAW, M., *International Law*. 5<sup>th</sup> ed. Cambridge, 2003, p. 226.

<sup>66</sup> MACH, T., *Vademecum of International Law*. Prague, 2019, p. 67.

It follows that in course of the topic discussed in this piece one needs to be concerned with the interpretation of the provision which reads that the peoples 'have the right of self-determination [and that by virtue of that right] they freely determine their political status'.<sup>67</sup>

As well as Israel, Canada too is a party to these Covenants. The question as to whether this provision (or indeed a corresponding customary norm of international law of the right of self-determination as has been asserted -without showing evidence of *usus longaevus* and *opinio iuris* though - by the ICJ in the Western Sahara Case<sup>68</sup> advisory opinion) constitutes a right of secession was discussed by the Supreme Court of Canada in a case dealing with the question whether Quebec could unilaterally secede from Canada: *Reference Re Secession of Quebec*.<sup>69</sup> In dealing with this question the court also utilized an expert-witness report of Professor James R. Crawford, then Whewell Professor of International Law at the University of Cambridge (currently judge of the ICJ), who observed in his report<sup>70</sup> the following state practice:

"63. As this brief review demonstrates, state practice since 1945 shows very clearly the extreme reluctance of states to recognize or accept unilateral secession outside the colonial context. That practice has not changed since 1989, despite the emergence during that period of 22 new states. On the contrary, the practice has been powerfully reinforced.

64. Of the new states which have emerged since 1945 outside the context of decolonization, only one case can be classified as a successful unilateral secession in the sense described in paragraph 6 above, that is, Bangladesh - and its emergence was hardly „unilateral“. In truth, the indications are that the United Nations did not treat the emergence of Bangladesh as a case of self-determination, despite good grounds for doing so - but rather as a *fait accompli* achieved as a result of foreign military assistance in special circumstances. The violence and repression engaged in by the Pakistan military regime made reunification unthinkable, and in effect legitimized the creation of the new state. In all other cases which might otherwise be classified as unilateral secession (Senegal, Singapore, the Baltic States, and Eritrea) the consent of the relevant parties was given before independence was externally recognised as accomplished, and the process was accordingly not unilateral. The key feature in the cases of Senegal, Singapore, and Eritrea was that separation was expressly agreed to by the parties directly concerned. With the Baltic states, the essential rationale was the recovery of independence forcibly suppressed. Even so, considerable importance was attached to the indication of consent given by the State Council of the Soviet Union."

The Supreme Court of Canada then observed in its ruling that:

"126. The recognized sources of international law establish that the right to self-determination of a people is normally fulfilled through internal self-determination -- a people's pursuit of its political, economic, social and cultural development within the framework of an existing state. A right to external self-determination (which in this case potentially takes the form of the assertion of a right to unilateral secession) arises in only the most extreme of cases and, even then, under carefully defined circumstances. External self-determination can be defined as in the following statement from the Declaration on Friendly Relations as [t]he 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.

127. The international law principle of self-determination has evolved within a framework of respect for the territorial integrity of existing states. The various international documents that support the existence of a people's right to self-determination also contain parallel statements supportive of the conclusion that the exercise of such a right must be sufficiently limited to prevent threats to an existing state's territorial integrity or the stability of relations between sovereign states.

128. The Declaration on Friendly Relations, the Vienna Declaration and the Declaration on the Occasion of the Fiftieth Anniversary of the United Nations are specific. They state, immediately after affirming a people's right to determine political, economic, social and cultural issues, that such rights are not to be construed as authorizing or encouraging any action that would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction.

129. Similarly, while the concluding document of the Vienna Meeting in 1989 of the Conference on Security and Co-operation in Europe on the follow-up to the Helsinki Final Act again refers to peoples having the right to determine „their internal and external political status“ (emphasis added), that statement is immediately followed by express recognition that the participating states will at all times act, as stated in the Helsinki Final Act, „in conformity with the purposes and principles of the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of States[...]"

138. In summary, the international law right to self-determination only generates, at best, a right to external self-de-

<sup>67</sup> Joint Art. 1(1) to the two Covenants.

<sup>68</sup> *Western Sahara*. ICJ Advisory Opinion of 16 October 1975. 1975 ICJ Rep, pp. 67-68

<sup>69</sup> *Reference Re Secession of Quebec*, [1998] 2 SCR 217.

<sup>70</sup> CRAWFORD, J., *STATE PRACTICE AND INTERNATIONAL LAW IN RELATION TO UNILATERAL SECESSION*. Report. 19 February 1997. Available online: [https://is.muni.cz/el/law/jaro2006/MP803Z/um/1393966/INTERNATIONAL\\_LAW\\_AND\\_UNILATERAL\\_SECESSION.pdf](https://is.muni.cz/el/law/jaro2006/MP803Z/um/1393966/INTERNATIONAL_LAW_AND_UNILATERAL_SECESSION.pdf) (last visited 25 October 2020).

termination in situations of former colonies; where a people is oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development. In all three situations, the people in question are entitled to a right to external self-determination because they have been denied the ability to exert internally their right to self-determination.”<sup>71</sup>

In the last paragraph, the Court was probably referring to the situation in Bangladesh as described by James Crawford in his report quoted above. It is however submitted that this could well be the case in a territory under military occupation if the local residents were oppressed, i.e. denied the ‘ability to exert internally their right to self-determination’ even if that territory were not actually belonging to a particular state (i.e. constitute *territorium nullius*).

It follows from the above that the right of self-determination remains unchanged in the form as it was *de facto* founded by the Commission of Rapporteurs in the Aaland Island Case, namely divided into two categories of rights. The first is the primary right of *internal* self-determination, i.e. to freely exercise political status, social, cultural, religious, and linguistic self-determination within an existing statehood, and a second ‘last resort’ subsidiary *external* self-determination in terms of the right of seeking secession from an existing state territory (or getting rid of military occupation in a territory that would constitute *territorium nullius* – as the case would be in the West Bank) as long as internal self-determination were not to be granted. The object and purpose of the distinction between internal and external self-determination is clear, namely to prioritize stability of existing states over wild secessions causing chaos in international relations (beyond the framework of what took place in the 20<sup>th</sup> Century as the ‘decolonization movement’).

## 7. Conclusion

It follows from the aforesaid analysis that Israel, currently the occupying power to a land belonging to no subject of inter-

national law (*territorium nullium* as a subset of the *terra nullius* doctrine) can exercise original acquisition of this land via ‘occupatio’. If it decides to integrate the West Bank, including East Jerusalem, into its territory, such a move will not be contrary to international law.

The non-Israeli population of the West Bank, however, enjoys the right to self-determination, both now (under occupation) and in the event of integration of the West Bank into Israeli statehood. As long as the local population is not oppressed and is granted internal self-determination, there is no right of the PLO or the people it is deemed by actors of international relations to represent, to seek external self-determination. If it were to be oppressed (neither of the alternatives is subject to analysis in this piece) it would indeed enjoy the right to seek the creation of its own statehood.

Moreover, once Israel were to incorporate the West Bank into its territory, that state of military occupation would be over. Since the PLO is in practice recognized as a *sui generis* subject of international law with limited (relative) legal personality,<sup>72</sup> it needs to abide by the rules of international law. Unlike in 1948, by 2020 the principle of prohibition of the use of force or the threat of use of force against (inter alia) territorial integrity of a State has acquired both (formally) customary nature and also (materially) a quality of peremptory norm that is considered to create obligations *erga omnes*.<sup>73</sup> Incorporation of the West Bank into Israel *de iure* would thus preclude any invocation of armed struggle (as still included in Art. 9 as the ‘the only way to liberate Palestine’) against Israeli control of the West Bank from legality. The PLO would then be confined merely to invoking internal self-determination, as much as it is possible in the security situation of the West Bank (under the principle of proportionality as a general principle of law recognized by civilized nations). Only if internal self-determination (under the corrective of proportionality vis-à-vis serious security concerns on the ground) were not being granted, then peaceful means of seeking secession with the aim of forming an actual (not virtual, as is the case now) state of Palestine would surface as a legal right to be exercised by the PLO on behalf of the Arab population of the West Bank.

<sup>71</sup> Available online: <https://www.canlii.org/en/ca/scc/doc/1998/1998canlii793/1998canlii793.html> (last visited 25 October 2020).

<sup>72</sup> WORSTER, *op. cit.*

<sup>73</sup> KACZOROWSKA, A., *Public International Law*. 4<sup>th</sup> ed. New York, 2020, p. 48.

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